NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 32

5 JANUARY 1977

---

6 APRIL 1977

RALEIGH
1977

CITE THIS VOLUME

32 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge
WALTER E. BROCK

Judges

DAVID M. BRITT
NAOMI E. MORRIS
FRANK M. PARKER
R. A. HEDRICK
EARL W. VAUGHN
ROBERT M. MARTIN
EDWARD B. CLARK
GERALD ARNOLD

Retired Chief Judge
RAYMOND B. MALLARD

Retired Judge
HUGH B. CAMPBELL

Clerk
FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director
BERT M. MONTAGUE

Assistant Director
FRANKLIN FREEMAN, JR.

APPELLATE DIVISION REPORTER
RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER
SHERRY M. COCHRAN

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	ROBERT D. ROUSE, JR.	Farmville
4	RUSSELL J. LANIER[1]	Beulaville
5	BRADFORD TILLERY	Wilmington
	JOSHUA S. JAMES	Wilmington
6	PERRY MARTIN	Rich Square
7	GEORGE M. FOUNTAIN	Tarboro
	JOHN WEBB	Wilson
8	ALBERT W. COWPER	Kinston

Second Division

9	HAMILTON H. HOBGOOD	Louisburg
10	JAMES H. POU BAILEY	Raleigh
	A. PILSTON GODWIN, JR.	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
11	HARRY E. CANADAY	Smithfield
12	E. MAURICE BRASWELL	Fayetteville
	D. B. HERRING, JR.	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	CLARENCE W. HALL[2]	Durham
	THOMAS H. LEE	Durham
15	D. MARSH MCLELLAND	Burlington
16	HENRY A. MCKINNON, JR.	Lumberton

Third Division

17	JAMES M. LONG	Yanceyville
18	WALTER E. CRISSMAN	High Point
	CHARLES T. KIVETT	Greensboro
	W. DOUGLAS ALBRIGHT	Greensboro
19	THOMAS W. SEAY, JR.	Spencer
	HAL HAMMER WALKER	Asheboro
20	JOHN D. MCCONNELL	Southern Pines
21	WILLIAM Z. WOOD	Winston-Salem
	HARVEY A. LUPTON	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
23	JULIUS A. ROUSSEAU	North Wilkesboro

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	RONALD W. HOWELL	Marshall
25	SAM J. ERVIN III	Morganton
	FORREST A. FERRELL	Hickory
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
27	JOHN R. FRIDAY	Lincolnton
	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
28	HARRY C. MARTIN	Asheville
	ROBERT D. LEWIS	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

ROBERT R. BROWNING	Greenville
RALPH A. WALKER	Greensboro
ROBERT L. GAVIN	Pinehurst
JAMES M. BALEY, JR.	Asheville
DONALD L. SMITH	Raleigh
RONALD BARBEE	Greensboro
WILLIAM THOMAS GRAHAM	Winston-Salem
DAVID I. SMITH	Burlington

EMERGENCY JUDGES

WALTER W. COHOON	Elizabeth City
W. E. ANGLIN	Burnsville

[1] Resigned 1 June 1977.
[2] Retired 31 July 1977.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	CHARLES H. WHEDBEE (Chief)	Greenville
	HERBERT O. PHILLIPS III	Morehead City
	ROBERT D. WHEELER	Grifton
	E. BURT AYCOCK, JR.	Greenville
	NORRIS C. REED, JR.	New Bern
4	KENNETH W. TURNER (Chief)	Rose Hill
	HARVEY BONEY[1]	Jacksonville
	WALTER P. HENDERSON	Trenton
	STEPHEN W. WILLIAMSON	Kenansville
5	GILBERT H. BURNETT (Chief)	Wilmington
	N. B. BAREFOOT	Wilmington
	JOHN M. WALKER	Wilmington
6	JOSEPH D. BLYTHE (Chief)	Harrellsville
	NICHOLAS LONG	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	JOHN PATRICK EXUM (Chief)	Kinston
	W. MILTON NOWELL	Goldsboro
	HERBERT W. HARDY	Maury
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	LINWOOD T. PEOPLES	Henderson
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford

DISTRICT	JUDGES	ADDRESS
10	GEORGE F. BASON (Chief)	Raleigh
	S. PRETLOW WINBORNE	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER	Raleigh
11	ROBERT B. MORGAN, SR. (Chief)	Lillington
	W. POPE LYON	Smithfield
	WOODROW HILL	Dunn
	ELTON C. PRIDGEN	Smithfield
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	COY E. BREWER, JR.	Fayetteville
	GEORGE STUHL	Fayetteville
	CHARLES LEE GUY	Fayetteville
13	FRANK T. GRADY (Chief)	Elizabethtown
	J. WILTON HUNT, SR.	Whiteville
	WILLIAM E. WOOD	Whiteville
14	E. LAWSON MOORE (Chief)	Durham
	J. MILTON READ, JR.	Durham
	SAMUEL F. GANTT	Durham
15	JASPER B. ALLEN, JR. (Chief)	Burlington
	STANLEY PEELE	Chapel Hill
	DONALD LEE PASCHAL	Siler City
	THOMAS D. COOPER, JR.	Burlington
16	SAMUEL E. BRITT (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. McLEAN	Lumberton
	B. CRAIG ELLIS	Laurinburg
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	GEORGE M. HARRIS	Yanceyville
	FRANK FREEMAN	Dobson
18	EDWARD K. WASHINGTON (Chief)	Jamestown
	BYRON HAWORTH[2]	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	JAMES SAMUEL PFAFF	Greensboro

DISTRICT	JUDGES	ADDRESS
	JOHN B. HATFIELD, JR.	Greensboro
	JOHN F. YEATTES	Greensboro
	ROBERT L. CECIL	High Point
19	ROBERT L. WARREN (Chief)	Concord
	L. T. HAMMOND, JR.	Asheboro
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	L. FRANK FAGGART	Kannapolis
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	DONALD R. HUFFMAN	Wadesboro
21	ABNER ALEXANDER (Chief)	Winston-Salem
	GARY B. TASH	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	HUBERT E. OLIVE, JR.	Lexington
	PRESTON CORNELIUS	Troutman
	ROBERT W. JOHNSON	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
24	J. RAY BRASWELL (Chief)	Newland
	ROBERT HOWARD LACEY	Newland
25	LIVINGSTON VERNON (Chief)	Morganton
	JOSEPH P. EDENS, JR.	Hickory
	BILL J. MARTIN	Hickory
	SAMUEL McD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
26	CLIFTON E. JOHNSON (Chief)	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	L. STANLEY BROWN	Charlotte
	LARRY THOMAS BLACK	Charlotte
	DAVID B. SENTELLE	Matthews
	JAMES E. LANNING	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	WILLIAM G. JONES	Charlotte

DISTRICT	JUDGES	ADDRESS
27	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	ARNOLD MAX HARRIS	Ellenboro
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
28	CARY WALTER ALLEN (Chief)	Asheville
	JAMES O. ISRAEL, JR.	Candler
	WILLIAM MARION STYLES	Black Mountain
	GARY A. SLUDER	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	HOLLIS M. OWENS, JR.	Rutherfordton
	ZORO J. GUICE, JR.	Hendersonville
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES McDARRIS	Waynesville
	JOHN J. SNOW, JR.	Murphy

[1] Retired 31 July 1977. Succeeded by E. Alex Erwin III, Jacksonville, 12 August 1977.
[2] Resigned 30 June 1977. Succeeded by Joseph Andrew Williams, Greensboro, 18 July 1977.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

HOWARD A. KRAMER

Special Assistant to the Attorney General

JOHN A. ELMORE

Senior Deputy Attorneys General

JAMES F. BULLOCK
ANDREW A. VANORE, JR.
ROBERT BRUCE WHITE, JR.

Deputy Attorneys General

JEAN A. BENOY
MILLARD R. RICH, JR.
WILLIAM W. MELVIN

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
EUGENE A. SMITH
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED
ROBERT P. GRUBER
GEORGE J. POE, JR.

Assistant Attorneys General

CLAUDE W. HARRIS
WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
JAMES L. BLACKBURN
RICHARD N. LEAGUE
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
H. AL COLE, JR.
Guy A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
CHARLES J. MURRAY
WILLIAM W. WEBB
I. B. HUDSON, JR.
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
JAMES M. WALLACE, JR.
ARCHIE W. ANDERS
JESSE C. BRAKE
DAVID S. CRUMP
DANIEL C. OAKLEY
GEORGE J. OLIVER
ELIZABETH C. BUNTING
HARRY E. BUNTING
ALAN S. HIRSH
SANDRA KING

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3	ELI BLOOM	Greenville
4	WILLIAM H. ANDREWS	Jacksonville
5	WILLIAM ALLEN COBB	Wilmington
6	W. H. S. BURGWYN, JR.	Woodland
7	FRANKLIN R. BROWN	Tarboro
8	DONALD JACOBS	Goldsboro
9	CHARLES M. WHITE III	Warrenton
10	BURLEY B. MITCHELL, JR.	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	LEE J. GREER	Whiteville
14	ANTHONY BRANNON	Durham
15A	HERBERT F. PIERCE	Graham
15B	WADE BARBER, JR.	Pittsboro
16	JOE FREEMAN BRITT	Lumberton
17	ALLEN D. IVIE, JR.	Eden
18	E. RAYMOND ALEXANDER, JR.	Greensboro
19	JAMES E. ROBERTS	Kannapolis
20	CARROLL R. LOWDER	Monroe
21	DONALD K. TISDALE	Clemmons
22	H. W. ZIMMERMAN, JR.	Lexington
23	MICHAEL A. ASHBURN	Wilkesboro
24	CLYDE M. ROBERTS	Marshall
25	DONALD E. GREENE	Hickory
26	PETER S. GILCHRIST	Charlotte
27A	JOSEPH G. BROWN	Gastonia
27B	W. HAMPTON CHILDS, JR.	Lincolnton
28	ROBERT W. FISHER	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Case	*Reported*	*Disposition in Supreme Court*
Acceptance Corp. v. David	32 N.C. App. 559	Denied, 292 N.C. 640
Armento v. City of Fayetteville	32 N.C. App. 256	Denied, 292 N.C. 466
Ayers v. Rowland	32 N.C. App. 599	Denied, 292 N.C. 640
Bank v. Moss	32 N.C. App. 499	Denied, 292 N.C. 728
Batiste v. Home Products Corp.	32 N.C. App. 1	Denied, 292 N.C. 466
Bell v. Wallace	32 N.C. App. 370	Denied, 292 N.C. 466
Blanton v. Maness	32 N.C. App. 577	Denied, 292 N.C. 728
Booker v. Medical Center	32 N.C. App. 185	Allowed, 292 N.C. 466
Business Funds Corp. v. Development Corp.	32 N.C. App. 362	Denied, 292 N.C. 728 Appeal Dismissed
Caldwell v. Realty Co.	32 N.C. App. 676	Denied, 292 N.C. 728
Carding Specialists v. Gunter & Cooke	32 N.C. App. 485	Denied, 292 N.C. 640
Cockrell v. Transport Co.	32 N.C. App. 172	Allowed, 292 N.C. 466
Construction Co. (James R. Edwards) v. Holloman	32 N.C. App. 234	Denied, 292 N.C. 467
Employment Security Comm. v. Young Men's Shop	32 N.C. App. 23	Denied, 292 N.C. 264
Gambill v. Bare	32 N.C. App. 597	Denied, 292 N.C. 640
Gibbs v. Duke	32 N.C. App. 439	Denied, 292 N.C. 640
In re Cox	32 N.C. App. 765	Denied, 292 N.C. 729
In re Johnson	32 N.C. App. 704	Denied, 292 N.C. 729
In re Taylor	32 N.C. App. 742	Allowed, 292 N.C. 641
Insurance Co. v. Ingram, Comm. of Insurance	32 N.C. App. 552	Denied, 292 N.C. 729
Investors, Inc. v. Berry	32 N.C. App. 642	Allowed, 292 N.C. 729
Lambert v. Power Co.	32 N.C. App. 169	Denied, 292 N.C. 265
Latney v. Revier	32 N.C. App. 234	Denied, 292 N.C. 467
Lewis Clarke Associates v. Tobler	32 N.C. App. 435	Denied, 292 N.C. 641

Case	*Reported*	*Disposition in Supreme Court*
Loughlin v. Board of Registration	32 N.C. App. 351	Denied, 292 N.C. 467 Appeal Dismissed
McRorie v. Query	32 N.C. App. 311	Denied, 292 N.C. 641
Miller v. Houpe	32 N.C. App. 103	Denied, 292 N.C. 266 Appeal Dismissed
Nelson v. Harris	32 N.C. App. 375	Denied, 292 N.C. 641
Newlin v. Gill, State Treasurer	32 N.C. App. 392	Allowed, 292 N.C. 468
Parker v. Bennett	32 N.C. App. 46	Denied, 292 N.C. 266
Ports Authority v. Roofing Co.	32 N.C. App. 400	Allowed, 292 N.C. 730
Prentice v. Roberts	32 N.C. App. 379	Denied, 292 N.C. 730
Schofield v. Tea Co.	32 N.C. App. 508	Denied, 292 N.C. 641
Snider v. Dickens	32 N.C. App. 388	Allowed, 292 N.C. 642
State v. Blakney	32 N.C. App. 399	Denied, 292 N.C. 731
State v. Brown	32 N.C. App. 234	Denied, 292 N.C. 468
State v. Buff	32 N.C. App. 395	Denied, 292 N.C. 468
State v. Campbell	32 N.C. App. 398	Denied, 292 N.C. 468
State v. Carson	32 N.C. App. 234	Denied, 292 N.C. 267
State v. Chapman	32 N.C. App. 398	Denied, 292 N.C. 731
State v. Chapman	32 N.C. App. 599	Allowed, 293 N.C. 161
State v. Craft	32 N.C. App. 357	Denied, 292 N.C. 642
State v. Crosby	32 N.C. App. 786	Denied, 292 N.C. 731
State v. Cumber	32 N.C. App. 329	Denied, 292 N.C. 642
State v. Dangerfield	32 N.C. App. 608	Denied, 292 N.C. 642
State v. Deese	32 N.C. App. 786	Denied, 292 N.C. 732 Appeal Dismissed
State v. Gainey	32 N.C. App. 682	Denied, 292 N.C. 732
State v. Gregory	32 N.C. App. 762	Denied, 292 N.C. 732
State v. Hagler	32 N.C. App. 444	Denied, 292 N.C. 642
State v. Hales	32 N.C. App. 729	Denied, 292 N.C. 732
State v. Harris	32 N.C. App. 599	Denied, 292 N.C. 469
State v. Hyatt	32 N.C. App. 623	Denied, 292 N.C. 733
State v. Jeeter	32 N.C. App. 131	Denied, 292 N.C. 268
State v. Jones	32 N.C. App. 408	Denied, 292 N.C. 643 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
State v. Kennedy	32 N.C. App. 234	Denied, 292 N.C. 268
State v. Kraus	32 N.C. App. 144	Denied, 292 N.C. 469
State v. Lewis	32 N.C. App. 471	Denied, 292 N.C. 643
State v. Lilly	32 N.C. App. 467	Denied, 292 N.C. 643
State v. McDonald	32 N.C. App. 457	Denied, 292 N.C. 469
State v. Miller	32 N.C. App. 770	Denied, 292 N.C. 733 Appeal Dismissed
State v. Page	32 N.C. App. 478	Denied, 292 N.C. 643
State v. Palmer	32 N.C. App. 166	Allowed, 292 N.C. 469
State v. Sarvis	32 N.C. App. 234	Denied, 292 N.C. 469
State v. Smith	32 N.C. App. 786	Denied, 292 N.C. 734
State v. Stewardson	32 N.C. App. 344	Denied, 292 N.C. 643
State v. Watson	32 N.C. App. 399	Denied, 292 N.C. 470
State v. Watts	32 N.C. App. 753	Denied, 292 N.C. 734
State v. Whitley	32 N.C. App. 234	Denied, 292 N.C. 269
State v. Wike	32 N.C. App. 475	Denied, 292 N.C. 734
State v. Williams	32 N.C. App. 204	Appeal Dismissed 292 N.C. 470
State v. Wills	32 N.C. App. 787	Allowed, 292 N.C. 734
Strickland v. King and Sellers v. King	32 N.C. App. 222	Allowed, 292 N.C. 470
Trust Co. v. Broadcasting Corp.	32 N.C. App. 655	Denied, 292 N.C. 734
Turner v. Investment Co.	32 N.C. App. 565	Denied, 292 N.C. 735
Utilities Comm. v. Edmisten, Atty. General	32 N.C. App. 787	Allowed, 292 N.C. 735
Utilities Comm. v. Simpson	32 N.C. App. 543	Allowed, 292 N.C. 735
Waters v. Personnel, Inc.	32 N.C. App. 548	Allowed, 292 N.C. 735
Waters v. Phosphate Corp.	32 N.C. App. 305	Denied, 292 N.C. 470
Williams v. Insurance Repair Specialists	32 N.C. App. 235	Denied, 292 N.C. 735

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Electric Service, Inc. v. Sherrod	32 N.C. App. 338	Pending
Pendergrast v. Aiken	32 N.C. App. 89	293 N.C. .....
Sales Co. v. Board of Transportation	32 N.C. App. 97	Pending
State v. Best	31 N.C. App. 250	292 N.C. 294
State v. West	31 N.C. App. 431	293 N.C. 18

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ALICE M. BATISTE v. AMERICAN HOME PRODUCTS CORPORATION, A DELAWARE CORPORATION; WYETH LABORATORIES, INC., A NEW YORK CORPORATION; DR. HENRY J. RITCHIE; AND PIKE'S DRUG STORE, INC., A NORTH CAROLINA CORPORATION

No. 7619SC438

(Filed 5 January 1977)

1. **Physicians, Surgeons and Allied Professions § 11; Uniform Commercial Code § 15— issuance of prescription for drug — inapplicability of warranties of fitness and merchantability**

A physician's issuance of a prescription for an oral contraceptive drug did not constitute a "sale" of the drug within the meaning of sections of the Uniform Commercial Code applicable to implied warranties of fitness and merchantability, and the physician is not liable to the patient for adverse reactions caused by the drug in the absence of negligence or intentional misconduct. G.S. 25-2-314; G.S. 25-2-315.

2. **Sales § 22— druggist's sale of prescription drug — insufficient allegations of negligence**

Plaintiff's complaint failed to state a claim for relief against defendant drug store based on negligence in the sale of an oral contraceptive drug to plaintiff where plaintiff alleged that she obtained a prescription for the drug from a physician and that defendant filled the prescription as directed by selling her a quantity of the drug in the sealed package as prepared by the manufacturer, and there was no allegation that the druggist did any compounding or added to or took from the product as contained in the sealed container, that the druggist did anything to change the prescription given him, or that the drug delivered to plaintiff was in any way different than the drug prescribed by plaintiff's physician or that it contained any foreign material.

3. Sales § 22— druggist's sale of prescription drug — inapplicability of strict liability

The doctrine of strict liability without fault does not apply in an action against a retail druggist to recover for injuries resulting from the use of a drug compounded or sold in compliance with a physician's order.

4. Sales § 22; Uniform Commercial Code § 15— druggist's sale of prescription drug — warranties of merchantability and fitness

Implied warranties of merchantability and fitness did not apply to a druggist's sale to plaintiff of an oral contraceptive drug prescribed by plaintiff's physician where plaintiff did not allege any deleterious, poisonous or harmful ingredient in the drug which constituted a breach of an implied warranty of fitness, and where plaintiff's allegations did not sustain the position that she relied "on the seller's skill or judgment to select or furnish suitable goods." G.S. 25-2-314; G.S. 25-2-315.

APPEAL by plaintiff from *Lupton, Judge.* Judgment entered 3 February 1976, in Superior Court, CABARRUS County. Heard in the Court of Appeals 12 October 1976.

By this action, instituted on 30 September 1975, plaintiff seeks to recover damages for a severe stroke allegedly suffered as the result of taking Ovral, an oral contraceptive drug.

Briefly summarized, her complaint alleges that on 2 October 1972, she consulted defendant, Dr. Henry J. Ritchie " . . . in his professional capacity as said practicing physician, for the purpose of securing medical services and advice with respect to the prevention of pregnancy and the use of birth control devices," and that the relationship of physician and patient existed between Dr. Ritchie and plaintiff. "On October 2, 1972, the defendant, Dr. Henry J. Ritchie, in his professional capacity as said practicing physician, undertook to render medical services and advice to the plaintiff with respect to the prevention of pregnancy and the use of birth control devices and in the course thereof said defendant issued and delivered to the plaintiff a written prescription for the purchase, use and consumption by the plaintiff of said oral contraceptive drug commonly known and sold under the trademark or tradename of 'Ovral'." Plaintiff took the prescription to the defendant Pike's Drug Store, Inc., where she was sold a certain quantity of Ovral " . . . in the sealed package or container and in the same condition and composition as originally manufactured, designed, prepared, packaged, promoted, marketed, distributed,

sold and delivered to the defendant, Pike's Drug Store, Inc., by the defendants, American Home Products Corporation and Wyeth Laboratories, Inc." Ovral was a " . . . combined drug preparation containing 0.05 mg. of esthinyl estradiol, an estrogen ingredient or compound, which caused numerous harmful side effects and dangerous adverse reactions, including clotting of the blood and severe strokes, in the ultimate users and consumers of said oral contraceptive drug . . . " and, by reason thereof, the drug was " . . . defective, unreasonably and inherently dangerous, unsafe and unfit for human use, and consumption for its intended purpose and use by the ultimate users . . . including the plaintiff herein." The defendants, and each of them, knew that the drug would be prescribed, sold, purchased, used and consumed without inspection by sellers or prescribers for defects. Plaintiff took the prescribed Ovral from 2 October 1972, through 18 November 1972, and on 19 November 1972, she suffered a severe stroke.

The complaint alleges several claims for relief against each of the defendants. The first nine claims for relief are directed to defendants American Home Products Corporation and Wyeth Laboratories, Inc. The tenth claim for relief is grounded on Dr. Ritchie's alleged negligence in treating plaintiff in prescribing the drug in twelve particulars. The eleventh claim for relief is grounded upon Dr. Ritchie's breach of an implied warranty of fitness. The twelfth claim for relief is grounded upon Dr. Ritchie's breach of an implied warranty of merchantability. The thirteenth, fourteenth, fifteenth and sixteenth claims for relief are directed to defendant Pike's Drug Store and are grounded on theories of negligence, strict liability in tort, implied warranty of fitness, and implied warranty of merchantability.

Defendant Dr. Ritchie moved in writing that all claims for relief against him be dismissed for that each claim for relief failed to state a cause of action against him. The court allowed the motion as to the eleventh and twelfth claims only, finding as a fact in the order that " . . . there is no just reason for delay in the entry of said Order [of dismissal] and that said Order constitutes a final adjudication and decision of the rights and liabilities . . . " between plaintiff and Dr. Ritchie upon those two claims for relief.

Defendant Pike's Drug Store, Inc., also moved under the provisions of Rule 12(b) (6) to dismiss the cause of action as

to it for failure of the complaint to state a claim upon which relief can be granted. This motion was allowed, and the order entered also complied with the provisions of Rule 54.

Plaintiff appeals from the entry of each of the orders.

Mraz, Aycock, Casstevens & Davis, by Gary A. Davis and Hunter Meacham, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and C. Byron Holden, for Dr. Henry J. Ritchie, defendant appellee.

Hartsell, Hartsell & Mills, P.A., by William L. Mills, Jr. for Pike's Drug Store, Inc., defendant appellee.

MORRIS, Judge.

Plaintiff notes in her brief that the claims against defendant Ritchie which were dismissed are interrelated and, therefore, she discusses them together in her brief. We agree that they are sufficiently interrelated to allow single discussion and, accordingly, will follow plaintiff's format.

[1] Plaintiff first argues that the issuance of a prescription for Ovral by defendant Ritchie to plaintiff constituted a transaction covered by those sections of the Uniform Commercial Code applicable to implied warranties of fitness and merchantability. G.S. 25-2-314 provides:

> "(1) Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 25-2-316) other implied warranties may arise from course of dealing or usage of trade."

G.S. 25-2-315 provides:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 25-2-316] an implied warranty that the goods shall be fit for such purpose."

The Uniform Commercial Code defines "merchant" as ". . . a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . ." G.S. 25-2-104(1). A "sale" is defined as a transaction consisting ". . . in the passing of title from the seller to the buyer for a price." G.S. 25-2-106(a).

Plaintiff earnestly contends that the physician who issues a prescription for an oral contraceptive drug is a "seller" within the meaning of the statute and that the issuance of the prescription constitutes passing title. She argues that the physician's role in the chain of distribution of drugs is admittedly unique but is a vital link in the chain. Because the physician is the only person vested with legal authority to place the drug manufacturer's product in the hands of the consumer, and unless the physician issues a prescription for the manufacturer's product, the manufacturer cannot long exist in the industry. Therefore, the plaintiff argues, the manufacturer is willing to and does expend large sums of money and a great amount of the time of its salesmen to place in the hands of physicians literature with respect to the particular drugs manufactured by it and samples

of the drugs. All this is done to encourage the physician to prescribe the drug manufactured by it—to "sell" the particular drug, as plaintiff would have it. While plaintiff's argument may be ingenuous, it is not, in our opinion, either factually or legally sound. The Uniform Commercial Code was designed to apply to transactions between a seller and a purchaser. Inherent in the legislation is the recognition that the essence of the transaction between the retail seller and the consumer relates to the article sold, and that the seller is in the business of supplying the product to the consumer. It is the product and that alone for which he is paid. The physician offers his professional services and skill. It is his professional services and his skill for which he is paid, and they are the essence of the relationship between him and his patient. To say that the issuance of a prescription for drugs, which prescription is to be filled by a pharmacist should the patient desire to follow the physician's suggestion, constitutes the transfer of title to the drugs in the formula in the prescription, is simply too unrealistic for serious consideration.

The fact remains that one does not normally go to a physician to purchase medicines or drugs or bandages or other items incidental to medical treatment. Plaintiff alleged in her complaint that she "employed and consulted with" defendant in his professional capacity *"for the purpose of securing medical services and advice."* A case strikingly similar to the one now before us is *Carmichael v. Reitz,* 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971). There plaintiff sought to recover damages from the defendant physician for pulmonary embolisms and thrombophlebitis allegedly caused by defendant's having prescribed Enovid in treating plaintiff for endometriosis. The Court first held that there was insufficient evidence of negligence to allow the case to go to the jury. It then considered and rejected plaintiff's contention that she should have been permitted to go to the jury on the theory that the defendant was, in a sense, a retailer of Enovid and that, therefore, strict liability in tort imposed on retailers of products should have been applied. The Court recognized that the doctrine of strict liability is no longer restricted to sales transactions, but also recognized that ". . . the distinction between a transaction where the primary objective is the acquisition of ownership or use of a product and one where the dominant purpose is to obtain services has not been obliterated. Where the services sought are

professional in character, the distinction applies *a fortiori.*" *Id.* at 978, 95 Cal. Rptr. at 392. Further, the Court said that,

> ". . . there is a difference in status or classification between those upon whom the courts have heretofore imposed the doctrine of strict liability and a physician who prescribes an ethical drug to achieve a cure of the disorders for which the patient has sought his professional services. The former acts basically as mere conduits to the distribution of the product to the consumer; the latter sells or furnishes his services as a healer of illnesses. The physician's services depend upon his skill and judgment derived from his specialized training, knowledge, experience, and skill. The physician prescribes the medicine in the course of chemotherapy only as a chemical aid or instrument to achieve a cure. A doctor diagnosing and treating a patient normally is not selling either a product or insurance." *Id.* at 979, 95 Cal. Rptr. at 393.

See also *Magrine v. Krasnica,* 94 N.J. Super. 228, 227 A. 2d 539 (1967), *aff'd.,* 100 N.J. Super. 223, 241 A. 2d 637 (1968); *Cheshire v. Southampton Hospital Association,* 53 Misc. 2d 355, 278 N.Y.S. 2d 531 (1967); *Foster v. Memorial Hospital Association of Charleston,* ____ W.Va. ____, 219 S.E. 2d 916 (1975).

We adhere to the general and majority rule that those who, for a fee, furnish their professional medical services for the guidance and assistance of others are not liable in the absence of negligence or intentional misconduct. We, therefore, hold that the court committed no error in dismissing the eleventh and twelfth claims for relief.

As to Pike's Drug Store, Inc.

[2] Plaintiff's thirteenth claim for relief is grounded on negligence and seeks recovery against Pike's Drug Store, Inc., for its failure to warn plaintiff of ". . . the numerous risks, hazards, contraindications, harmful side effects and dangerous adverse reactions, including clotting of the blood, and severe strokes, inherent in the human use and consumption of said oral contraceptive drug of which said defendant knew or in the exercise of reasonable care should have known." The complaint also alleges that defendant Pike's Drug Store, Inc., failed adequately to warn plaintiff that human consumption of the drug could cause clotting of the blood and severe strokes and

that defendant sold the drug to plaintiff for her use when defendant knew or should have known that it was ". . . unreasonably and inherently dangerous, unsafe, unfit and defective for human use and consumption as a contraceptive drug . . ." and would likely cause harmful side effects including clotting of the blood and severe strokes.

Plaintiff cites authority for the proposition that a druggist has a duty to act with due, ordinary, care and diligence in compounding and selling drugs. We certainly do not disagree with this principle. Plaintiff also calls our attention to *Spry v. Kiser,* 179 N.C. 417, 102 S.E. 708 (1920), and *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822 (1951). In *Spry,* the druggist had sold a bottle of rancid cottonseed oil for consumption by a baby rather than the sweet oil requested. The Court, in reversing a nonsuit, said:

> " 'The public safety and security against the fatal consequences of negligence in keeping, handling, and disposing of dangerous drugs and medicines is a consideration to which no druggist can safely close his eyes. An imperative social duty requires of him such precautions as are liable to prevent death or serious injury to those who may, in the ordinary course of events, be exposed to the dangers incident to the traffic in which he is engaged, and it is therefore incumbent upon him to understand his business, to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty so to qualify himself, or to employ those who are so qualified, to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that, when a prescription is presented to be made up, the proper medicines, and none others, be used in mixing and compounding it. . . . A person engaged in the business of pharmacy holds himself out to the public as one having the peculiar learning and skill necessary to a safe and proper conducting of the business, while the general customer is not supposed to be skilled in the matter, and frequently does not know one drug from another, but relies on the druggist to furnish the article called for. . . . He must use due care to see that he does not sell to a purchaser or send to a patient a poison in place of a harmless drug, or even one innocent drug, calculate to produce a certain effect, in place of another sent for and designed to produce

> a different effect, and it is well settled that he will be liable for any injury proximately resulting from his negligence. Where death is caused by the negligence of a druggist the recovery of damages is governed by the usual rules relating to actions for wrongful death generally.' " 179 N.C. at 421-22, 102 S.E. at 710.

In *Davis,* plaintiff had brought an action against a retail druggist for damages for breach of implied warranty of wholesomeness in the sale to his intestate of an article for human consumption known as "Westal." Plaintiff alleged the product contained poisonous ingredients which caused intestate's death. The druggist joined his supplier, who demurred to the cross-complaint. The demurrer was overruled and the supplier appealed. The Court held that the druggist could join his supplier and file a cross-action against the supplier on the ground that the supplier had impliedly warranted to the druggist that the article was fit for human consumption, and the supplier was primarily liable for injuries resulting from that breach of warranty.

We fail to see the applicability of either case. Here plaintiff alleges that she had consulted a physician, obtained a prescription and carried it to defendant Pike's Drug Store, Inc., to be filled. The prescription was filled as directed. There is no allegation that the product was other than it was supposed to be. There is no allegation that the druggist did any compounding or added to or took from the product as prepared and contained in the sealed container, or that the druggist did anything to change the prescription given him, or that the drug delivered to plaintiff was in any way different than the drug prescribed by plaintiff's physician, or contained any foreign material. Certainly defendant is not qualified or licensed to advise plaintiff with respect to the best oral contraceptive for *her* to use to prevent pregnancy. Defendant is not a physician. Perhaps had a druggist employed by defendant undertaken to *prescribe* the oral contraceptive she took or to advise her concerning it, the result might be different. That question is not before us. We are of the opinion that the trial court properly dismissed plaintiff's thirteenth claim for relief.

[3] Plaintiff's fourteenth claim for relief is grounded on the legal theory of strict liability in tort. Plaintiff concedes that North Carolina has not adopted this theory as applied to re-

tailers, but argues that the situation of a drug store selling packaged drugs is analagous to situations in which North Carolina has placed liability on a defendant regardless of fault. She gives as examples blasting operations, private nuisance, defamation, and vicarious liability. She argues further that the Twentieth Century has been a changing era and that technological changes and scientific advances have produced a multitude of new products available to the consuming public. Of course, the medical profession and pharmaceutical industry have participated in this, and the result is a drug-conscious society. Nevertheless, we do not think all of this, true though it may be, requires that we hold a retail druggist liable without fault because of injuries and damage resulting from the use of a drug compounded or sold in strict compliance with the physician's order, in the absence of any knowledge which would constitute negligence.

In *McLeod v. W. S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965), the plaintiff sought to recover damage for injuries suffered as the result of ingesting a drug known as "Mer/29" which she had purchased in a sealed container from a druggist in compliance with a physician's prescription given for the purpose of controlling body cholesterol. The count in the complaint against the druggist was based on breach of implied warranty. The Court, however, noted that in effect the plaintiff was asking the court to impose upon retail prescription druggists an absolute, strict liability without fault in an action in tort in reliance upon the rapidly evolving concept of strict liability without fault. The Florida Court was unwilling to do so. The Court said:

> "The concept of strict liability without fault should not be applied to the prescription druggists in the instant situation. Rather, it appears to us, that the rights of the consumer can be preserved, and the responsibilities of the retail prescription druggist can be imposed, under the concept that a druggist who sells a prescription warrants that (1) he will compound the drug prescribed; (2) that he has used due and proper care in filling the prescription (failure of which might also give rise to an action in negligence); (3) the proper methods were used in the compounding process, (4) the drug has not been infected with some adulterating foreign substance." (Citations omitted.) *Id.* at 739.

While it is true that The American Law Institute in its restatement of the law provides for strict liability of the seller of a product, Restatement (Second) of Torts, § 402A (1965), it is interesting to note that, by comment k to § 402A, retail prescription druggists are excepted. The comment noted that, as an example, the vaccine for the Pasteur treatment of rabies frequently leads to serious consequences to the person injected with it. Nevertheless, the disease itself invariably leads to a terrible death, and the marketing and use of the drug is fully justified.

> " . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."

See also *Coffer v. Standard Brands,* 30 N.C. App. 134, 226 S.E. 2d 534 (1976).

The trial court properly dismissed plaintiff's fourteenth claim.

[4] Plaintiff's fifteenth and sixteenth claims for relief are grounded on implied warranties of fitness and merchantability. While we recognize that there are differences in the warranties, we do not think either lies in this situation, and we, therefore, combine the two claims for relief for discussion. Plaintiff calls attention to N.C.G.S. 25-2-314 which provides for an implied warranty of merchantability that the goods sold ". . . are fit for the ordinary purposes for which such goods are used . . ." and also that they ". . . conform to the promises or affirma-

tions of fact made on the container or label, if any"; and N.C.G.S. 25-2-315, which provides that "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 25-2-316] an implied warranty that the goods shall be fit for such purpose." Assuming *arguendo* that the implied warranties are applicable, plaintiff does not allege what deleterious or poisonous or harmful ingredient the Ovral purchased on her doctor's prescription contained which constituted a breach of an implied warranty of fitness, nor do her allegations sustain the position that she relied "on the seller's skill or judgment to select or furnish suitable goods." She alleged that she obtained a prescription from her physician and that defendant druggist filled that prescription. There is no allegation that defendant druggist added anything thereto or selected anything for plaintiff to take. Nor is this a situation where plaintiff made her choice from items selected and displayed by the druggist for sale to the general public. See generally *Adams v. Tea Co.*, 251 N.C. 565, 112 S.E. 2d 92 (1960); *Spry v. Kiser, supra,* and *Coffer v. Standard Brands, supra.* Here the drug purchased by plaintiff was not available to the general public in the sense that it was available for purchase by any customer who came in the drug store, selected it from the shelf, and paid the price therefor. It was available only to those who had previously seen their physician and obtained from the physician a prescription directing the druggist to supply the drug. Obviously the plaintiff patient did not rely on the druggist's skill or judgment in assuming that the drug would be fit for its intended purpose. This reliance had been properly placed with her physician. We are not willing to extend the applicability of implied warranties of fitness and merchantability to this situation and agree with the trial court in dismissing these two claims for relief.

For the reasons stated herein the order of the trial court is

Affirmed.

Judges HEDRICK and ARNOLD concur.

WILSON COUNTY BOARD OF EDUCATION v. WILSON COUNTY BOARD OF COMMISSIONERS

No. 767SC393

(Filed 5 January 1977)

1. **Schools § 5— superintendent's local salary supplement — disapproval by county commissioners — authority of commissioners**

Contention of petitioner Board of Education that since it is empowered by G.S. 115-39 to elect a superintendent and to enter into a written contract with him stating the terms and conditions of employment and since the local salary supplement provided in the contract is not unreasonable, the respondent County Commissioners should not be permitted to impair the obligation of that contract by refusing to agree to the payment of the full amount of the supplement which petitioner has contracted to pay is without merit, since the power granted petitioner by G.S. 115-39 does not go so far as to permit it to bind the respondents, who alone have the tax levying authority as far as local funds are concerned; therefore, insofar as the contract between the petitioner and its superintendent calls for payment from local funds, such contractual provisions are necessarily contingent upon the approval of the respondent.

2. **Schools § 5— "necessary" expense — construction of statute**

The trial court's definition of "necessary expense" as used in G.S. 115-87 and G.S. 115-88 to mean "that which is indispensable" to maintain schools "and not that which is reasonable, useful, and proper or conducive to the end sought" amounts to too narrow a construction of those statutes.

3. **Schools § 5— superintendent's salary supplement — no "necessary" expense**

Evidence was insufficient to support a finding that the payment of the entire amount of a local salary supplement provided in petitioner's budget for the superintendent of schools was "necessary" or "needed to maintain the schools" under any reasonable construction of G.S. 115-87 and G.S. 115-88.

APPEAL by petitioner from *Tillery, Judge.* Judgment entered 27 January 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 21 September 1976.

This case arose because of a disagreement between the petitioner, the Wilson County Board of Education, and the respondent, the Wilson County Board of Commissioners, concerning petitioner's current expense fund budget for the 1974-75 fiscal year. At issue is only one item in the budget, being the item for supplement to the Superintendent's salary. Petitioner wished

to pay its Superintendent a locally funded salary supplement of $6,984.00. Respondent approved a locally funded salary supplement of $5250.00. The amount in dispute is the difference between those figures, $1734.00, out of the total current expense fund budget of $806,542.00.

This is the second time this case has been appealed to this Court. For a narration of the proceedings leading to the first appeal, reference is made to the opinion of this Court reported in *Board of Education v. Board of Commissioners,* 26 N.C. App. 114, 215 S.E. 2d 412 (1975). In summary, those proceedings were as follows:

In April 1973, after observing its new Superintendent perform his duties for approximately a year and finding his performance to be excellent, the petitioner entered into a new contract with its Superintendent calling for the payment to him of an annual salary supplement to be paid from local funds in the amount of $6500.00 "plus cost of living increases." For fiscal 1973-1974 petitioner submitted a budget which included $6500.00 for the salary supplement. Respondent approved only $5000.00 for that purpose. Because a gift from an anonymous donor made possible the payment of the full supplement provided in the contract, petitioner did not contest the reduction made by respondent in the 1973-1974 salary supplement item. For fiscal 1974-1975 petitioner submitted its budget which included $6984.00 for the Superintendent's local salary supplement, being the $6500.00 called for in the contract plus 7½% as a cost of living increase. Respondent approved $5250.00, being an increase of 5% over the amount which it had approved for the previous year. A joint meeting between petitioner and respondent and arbitration provided for by G.S. 115-87 failed to produce an agreement, and petitioner appealed to the superior court. After the first hearing in the superior court, the court entered judgment finding that the supplement which petitioner requested and which it contracted to pay its Superintendent was "not unreasonable." On the first appeal this Court, although not in disagreement with the finding made by the superior court, held that such a finding was not dispositive of the questions presented. Accordingly, we remanded the case for further proceedings.

Upon remand to the superior court after the first appeal, the case was heard by the court without a jury. Both parties presented evidence.

The pleadings and the evidence presented by the Wilson County Board of Education show the following:

On 18 May 1972 Dr. Henry Cole, the previous Superintendent of the Wilson County Schools, resigned effective 30 June 1972, one year before his contract would have normally expired. On receiving this resignation, the County Board of Education took immediate steps to secure a new Superintendent. Within a two-week period approximately twenty-two applications for the position of Superintendent were received by the County Board of Education, and the Chairman of the Board personally interviewed fourteen or fifteen of the applicants. Among the applicants was Mr. Earl Funderburk, whose background was far superior to that of the other applicants. At a special meeting on 1 June 1972 the County Board of Education elected Mr. Funderburk as Superintendent for the one year unexpired term of the previous Superintendent. The new Superintendent went to work immediately, and through his energetic leadership many improvements were effected in the Wilson County schools. In April 1973, the County Board of Education, acting pursuant to G.S. 115-39, negotiated a new contract with Mr. Funderburk and re-elected him as Superintendent for a term of four years. This election was certified to the State Superintendent of Public Instruction. In negotiating the new contract, dated 9 April 1973, the County Board of Education felt that a raise in the amount of the local supplement to the Superintendent's salary was justified because of the Superintendent's fine record and experience. Accordingly, the new contract contained the following provision:

> "In addition to the salary paid the Superintendent from State funds, the Superintendent shall receive annually from local funds as a supplement thereto the amount of $6500.00 plus cost of living increases annually."

A copy of the contract was filed with the State Superintendent of Public Instruction as required by G.S. 115-39.

In June 1973 the Wilson County Board of Education included an item of $6500.00 for the local supplement to the Superintendent's salary in the current expense budget which it submitted to the Wilson County Board of Commissioners for the fiscal year 1973-1974. The Board of Commissioners approved the overall amount in the budget requested by the Board of Education, but it reduced the line item for the Superintendent's salary supplement from $6500.00 to $5000.00 and directed

the County Board of Education to reallocate the $1,500.00 reduction in that item to other school purposes. This was done, $1,000.00 being put in the Superintendent's travel allowance and $500.00 being allocated for supplies. The County Board of Education did not at that time challenge the action of the Board of County Commissioners because an anonymous donor donated to the County Schools an amount equal to the reduction, thereby making it possible for the County Board of Education to honor its contract with the Superintendent for the fiscal year 1973-1974.

In May 1974 the County Board of Education submitted its budget request for the fiscal year 1974-1975 to the County Board of Commissioners. As first submitted this budget included an item of $7,500.00 for the local supplement to the Superintendent's salary. This item was subsequently reduced by the County Board of Education to $6,984.00, this figure being arrived at by applying a 7.5% factor as a cost of living increase to the $6,500.00 local supplement called for in the contract between the County Board of Education and the Superintendent. The revised item of $6,984.00 was included in the total current expense fund budget request of $806,542.00 as finally submitted by the County Board of Education to the County Board of Commissioners for the fiscal year 1974-1975. The County Commissioners approved the overall current expense fund budget of $806,542.00, making no reduction in that amount. However, the Commissioners refused to approve the line item of $6,984.00 for the Superintendent's local salary supplement and instead approved only $5,250.00 for that item. The Commissioners requested the County Board of Education to indicate to which line item or items the remaining $1,734.00 should be applied. The Board of Education refused to accede to this request, and this litigation ultimately resulted.

The Chairman and the two members of the Wilson County Board of Education who testified at the hearing in the superior court, each testified as to the excellent manner in which Mr. Funderburk has performed his duties as Superintendent and as to the many improvements which have been effected in the Wilson County Schools under his leadership. Each also testified that in his opinion the contract dated 9 April 1973 between the County Board of Education and the Superintendent and the payment of the supplement provided for therein is necessary for the maintenance of the Wilson County Schools.

The respondent, the Wilson County Board of Commissioners, presented exhibits and evidence to show that of the 100 county school systems in North Carolina there were sixteen, including the Wilson County school system, which in 1973 had an average daily membership in the range from 4000 to 5000. The local salary supplements paid to the Superintendents in these sixteen systems ranged from a low of $2,246.00 to a high of $6,600.00, and the total County-State salaries (including the local supplements) ranged from a low of $20,280.00 to a high of $24,792.00. The average daily membership of the Wilson County Schools was 4,670, the local supplement was $5,000.00, and the total County-State salary (including the local supplement) paid the Superintendent was $23,552.00.

The Chairman of the Wilson County Board of Commissioners, called as a witness by the petitioner, testified that in 1973-1974 and 1974-1975 there were three separate school systems in Wilson County, being the Wilson City, the Elm City, and the Wilson County school systems. Prior to 1973-1974 the Wilson City and Elm City school districts each had a supplementary tax. The Wilson County schools had none. Beginning with the 1973-1974 fiscal year the supplementary tax for the Wilson City and Elm City schools was abolished, and the County Commissioners adopted a single countywide tax rate. This resulted in an increase in the tax rate to residents outside the Wilson City and Elm City school districts. At the same time the Wilson County school budget was increased about 127% over the budget for the previous year.

The Chairman of the Wilson County Board of Commissioners further testified:

> "The County Commissioners have a responsibility to provide the tax dollars for education and when it comes to supplements, it is my understanding of a supplement that it is something that somebody may give to someone in order to entice him to come to a community or perhaps do a little better than your next community. We went and got the ranges of the supplements around us trying to be fair about this thing and trying to compare it to longevity of service here in the county to the educational standing for degrees or whatever you might have as an individual, primarily trying to compete with your neighbors and I guess that is the way we made our judgment.

* * *

In approving the current expense fund for the fiscal year 1974-1975 for the County Board of Education, the sum of $806,542.00, we looked at every line item and approved it except I think there was a question on the Superintendent's supplement.

I think that was the year we had a policy to limit supplements to a 5% increase. That was the sole reason for rejecting the remainder of the supplement request plus the fact that we had determined that $5,000.00 would be a legitimate and rightful supplement for him the two years previous.

For the fiscal year 1974-1975 we approved a Superintendent's supplement of $5,250.00.

When the County Board of Education asked for a supplement far greater than what it had been, in trying to arrive at a fair way of arriving at this supplement to pay the Superintendent, the Commissioners took the measure of school attendance and every measure that we could to try to see if we were being fair."

At the conclusion of the hearing the court entered judgment making findings of fact, conclusions of law, and adjudging that the Superintendent's salary supplement for the fiscal year beginning 1 July 1974 "stand as made and that payment over and above the budgeted amount is prohibited." The court further ordered that "[t]he sum of $1,734.00 in the petitioner's current expense fund representing the difference between the proposed supplement of $6,984.00 and the supplement approved by the respondents in the amount of $5,250.00 shall remain an unencumbered balance to be credited to the petitioner's current expense funds in the subsequent fiscal year in accordance with the express provisions of North Carolina General Statutes 115-86."

From this judgment the petitioner, the Wilson County Board of Education, appealed.

Connor, Lee, Connor, Reece & Bunn by David M. Connor, Attorney for Wilson County Board of Education, appellant.

Carr, Gibbons and Cozart by F. L. Carr, Attorney for Wilson County Board of Commissioners, appellee.

PARKER, Judge.

This case arose because of a disagreement as to one item in petitioner's current expense budget for the fiscal year which began 1 July 1974. By Ch. 437 of the 1975 Session Laws, the pertinent statutes in effect when this controversy arose were repealed effective 1 July 1976 and were replaced by "The School Budget and Fiscal Control Act," which is now codified as Art. 10A of G.S. Ch. 115. In this opinion reference will be made to the applicable statutes in effect when this case arose without further mentioning that they have now been replaced.

In this case there has been no disagreement between the petitioner, the Wilson County Board of Education, and the respondent tax-levying authority, the Wilson County Board of Commissioners, as to the *amount* of the petitioner's current expense fund for the 1974-1975 fiscal year. On competent evidence the trial court found as a fact that "[t]he Board of Commissioners budgeted a current expense fund in the total sum of $806,542.00, the said sum representing that portion of the county-wide current expense funds apportioned to the Wilson County Administrative School Unit on a per capita enrollment basis as required by North Carolina General Statutes 115-86." That finding is not questioned on this appeal. Furthermore, the petitioner County Board of Education has never contended that the amount of the current expense fund, $806,542.00, provided by the respondent County Commissioners was inadequate or that a larger sum was needed to maintain the schools in the administrative unit for which petitioner is responsible. The only controversy between the parties involves the question how $1734.00 out of the total $806,542.00 should be spent. Thus, this case involves a single item which is approximately two-tenths of one percent of the total current expense budget, the amount of which has never been in controversy.

[1] Petitioner contends that since it was empowered by G.S. 115-39 to elect a Superintendent and to enter into a written contract with him stating the term and conditions of employment and since the local salary supplement provided in the contract was not unreasonable, the respondent County Commissioners should not be permitted to impair the obligation of that contract by refusing to agree to the payment of the full amount of the supplement which petitioner contracted to pay. We do not agree. The power granted petitioner by G.S. 115-39 did not

go so far as to permit it to bind the respondent County Commissioners, who alone have the tax-levying authority as far as local funds are concerned. Therefore, insofar as the contract between the petitioner and its Superintendent called for payment from local funds, such contractual provisions were necessarily contingent upon the approval of the County Commissioners. In the opinion on the former appeal of this case, we said:

> "The board of commissioners are the representatives of the taxpayers in levying the tax, collecting the revenue therefrom, and spending it—all in the manner which will best suit the needs and interests of all the taxpayers. One of their duties is to provide the funds *necessary* to operate the public schools for nine months, but only *such funds as are needed for the economical administration of the schools.* They can only fulfill their duty to the taxpayers by considering closely all budgets presented to them as requests for funds. The statute requires the itemization of the budget requests and we think the General Assembly intended that each item be considered by the county commissioners, regardless of whether additional tax levy is necessary." *Board of Education v. Board of Commissioners,* 26 N.C. App. 114, 130, 215 S.E. 2d 412, 422-3 (1975).

We hold that the petitioner had no power, either by virtue of G.S. 115-39 or by any other statute of which we are aware, by contracting with a third party to foreclose the respondent County Commissioners from independently exercising the duty and responsibility which the law imposed upon them.

[2] In the judgment appealed from the court, after making findings of fact, concluded as a matter of law "that the services performed by the superintendent and his qualifications while highly desirable do not meet the test of a necessary expense within the meaning of General Statutes, Chapter 115-87, -88 where it refers to 'amount needed to maintain the schools.' " In its judgment the court then went on to state:

> "For the purpose of this hearing, the Court treats the word 'necessary' to mean 'that which is indispensable' and not 'that which is reasonable, useful and proper or conducive to the end sought.' To rule otherwise would put the respondent in a position of being unable to deny any request for County funds for educational purposes so long

> as that request was for a worthwhile objective, as the objectives of the petitioner most assuredly were."

We do not approve the statement contained in this conclusion of law. In our opinion G.S. 115-87 and G.S. 115-88 should not be so narrowly construed. The applicable statutes relating to the preparation and adoption of local school budgets clearly contemplate that the budget as finally adopted should be the result of the concurrence of two boards, one being the Board of Education for the particular school administrative unit involved and the other being the Board of County Commissioners, which alone is the tax-levying authority. The statutes clearly contemplate that each of these boards should exercise its own independent judgment. For example, G.S. 115-80 contains the following:

> "Notwithstanding any other provisions of this Chapter, when necessity is shown by county and city boards of education, or peculiar local conditions demand, for adding or supplementing items of expenditure in the current expense fund, including additional personnel and/or supplements to the salaries of personnel, the board of county commissioners *may approve or disapprove, in part or in whole* any such proposed and requested expenditure." (Emphasis added.)

[3] Although we do not approve the narrow construction contained in the above conclusion of law, this does not impair the validity of the judgment. Without attempting to define more precisely what tests should be applied in general in determining what amount should properly be considered as being "necessary" or "needed to maintain the schools," as those words are used in G.S. 115-87 and 115-88, under no view of the evidence in the present case could the court have legitimately found that the disputed $1,734.00 here involved was "necessary" or "needed to maintain the schools." The additional $1,734.00, if paid to the Superintendent, would have increased his total annual compenpensation by approximately 7.5%. Whether his compensation should be so increased is clearly a matter as to which reasonable men could reasonably differ. We hold only that the evidence in this case would not support a finding that payment of the additional compensation was "necessary" or "needed to maintain the schools" under any reasonable construction of that statutory language. Although all of the evidence shows that the Superintendent performed his duties in a superior manner and that his leadership was responsible for effecting substantial improve-

ments in the Wilson County schools, there was no evidence that he would not continue to perform in the same exemplary fashion even though his compensation should not be increased by the disputed amount, nor was there evidence that no other competent person could be obtained to serve as Superintendent for the compensation approved by the respondent.

Evidence in this case reveals a situation in which the members of the Wilson County Board of Education, charged with the duty of maintaining the public schools in one of the three school systems in Wilson County, conscientiously felt that the schools for which they were responsible had been so improved by the services of their Superintendent that, in fairness to him and for the continuing benefit of the schools, his services should be more substantially rewarded. At the same time, the members of the Wilson County Board of Commissioners, charged with a responsibility to all of the residents and taxpayers of the County, including those residing in the two other school districts, and viewing the matter from a slightly different perspective, arrived at a different conclusion. The parties being unable to reach agreement by a joint meeting and consultation, the matter was referred to the courts under the statutes for that purpose then in effect. Our holding is only the narrow one that the evidence in this case would not support a finding that the payment of the disputed amount was "necessary" or "needed to maintain the schools" within the meaning of the applicable statutes.

Accordingly, the judgment appealed from is

Affirmed.

Judges BRITT and CLARK concur.

IN THE MATTER OF: STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. PAUL'S YOUNG MEN'S SHOP, INC. (EMPLOYER No. 56-67-043); PAUL C. CAPPS, TRADING AS RICKY'S (EMPLOYER No. 57-67-040); DIAMOND OUTLET, INC. (EMPLOYER No. 59-67-058); SHRUNKEN HEAD, INC. (EMPLOYER No. 56-67-039); GEMS, INC. (EMPLOYER No. 59-67-057); COOPERATIVE SERVICE, INC. (EMPLOYER No. 73-67-012)

No. 764SC382

(Filed 5 January 1977)

1. Master and Servant § 111— unemployment compensation — appeals from Employment Security Commission — authority of reviewing court

In appeals from the Employment Security Commission the reviewing court may determine upon proper exceptions whether the facts found by the Commission are supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but the reviewing court may not consider the evidence for the purpose of finding the facts for itself.

2. Master and Servant § 111— unemployment compensation — appeals — remand for findings of fact

If the findings of fact of the Employment Security Commission are insufficient to enable the reviewing court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings.

3. Master and Servant § 107— unemployment compensation — independent finding by reviewing court — harmless error

Where all parties recognized that for many years the several defendants followed an erroneous method of reporting and paying contributions to the State Unemployment Insurance Fund, and the essential problem presented by the case concerned what measures could be lawfully applied to correct the error, language in the judgment of the reviewing court that the method used was established with the advice of Employment Security Commission employees and was not disapproved in Commission audits, if viewed as constituting an independent factual finding which the court had no authority to make, was at most harmless error since it was not necessary to determine the source of the original error.

4. Master and Servant § 107— Unemployment Insurance Fund — contributions of corporations erroneously paid through proprietorship — correction by Employment Security Commission

Where the contributions of three corporations to the Unemployment Insurance Fund were erroneously paid for a number of years through the account of a sole proprietorship, the Employment Security Commission had authority to set up accounts retroactively in the name of each of the three corporations, to allocate to each account the con-

tributions previously paid through the sole proprietorship's account on the wages of employees of each particular corporation, to make charges against each account for all amounts which would properly have been chargeable thereto had the account been in existence from the time when each corporation became subject, as a separate employing unit, to the provisions of the Employment Security Law, and then to compute the appropriate rate at which each of the three corporations should have paid contributions, year by year, and thus arrive at the total amount now properly payable by each.

APPEAL by plaintiff from *Lanier, Judge.* Judgment entered 17 February 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 September 1976.

This is a proceeding under the Employment Security Law, G.S. Ch. 96, to determine the liability of the several defendants under G.S. 96-9 to make payment of contributions to the State Unemployment Insurance Fund. After an investigation by one of its field representatives, the Employment Security Commission in 1972 made an administrative determination that three of the defendant corporations, Paul's Young Men's Shop, Inc., Diamond Outlet, Inc., and Gems, Inc., were liable for unpaid contributions. Timely protests were filed, and the matter was set for an evidentiary hearing before a hearing officer of the Commission. At this hearing, which was held 1 November 1972, evidence was presented to show the following:

Paul C. Capps is the president and he and his wife and children are the stockholders of each of the three corporations. For many years Paul C. Capps has conducted a business as a sole proprietor under the trade name of "Ricky's." Extending back to about 1956, Capps, trading as Ricky's, has been assigned an employer account number by the Commission through which he has reported and paid all contributions due on account of wages paid to all employees of Ricky's. At some time prior to 1961 Capps formed Paul's Young Men's Shop, Inc., and Gems, Inc., to engage in separate retail businesses. At least since 1961, Capps reported the employees of these businesses and paid contributions on their wages through the account number of Ricky's. In 1963 Capps opened Diamond Outlet, Inc., which he at first operated as a separate employment unit with its own employer account number assigned to it by the Commission. In 1964 Capps filed with the Commission a request for transfer, in which he indicated that as of 1 April 1964 he, trading as Ricky's, had acquired all of the business and assets of Diamond Outlet, Inc.

On the basis of this request, the Commission approved the transfer of the experience rating account theretofore assigned to Diamond Outlet, Inc., to Capps, trading as Ricky's. Thereafter, however, Diamond Outlet, Inc., continued to conduct business and to have persons in its employment, such employees being reported to the Commission under the employer account number assigned to Capps, trading as Ricky's. Effective 11 February 1971 Diamond Outlet, Inc., acquired the total business and assets of Gems, Inc.

During each of the years 1967 through 1972, Paul's Young Men's Shop, Inc., had four or more persons in its employment for twenty or more weeks. In 1967 and 1968 Diamond Outlet, Inc., and Gems, Inc., were operating as separate businesses, but neither had four or more employees for twenty or more weeks in either of those two years. During each of the years 1969 through 1972, Diamond Outlet, Inc., did have four or more persons in its employment for twenty or more weeks. In 1969 and 1970 Gems, Inc., had four or more persons in employment for twenty or more weeks. Gems, Inc., ceased to do business after the first quarter of 1971 when Diamond Outlet, Inc., acquired all of its business and assets. The wages paid to the employees of Diamond Outlet, Inc., and the wages paid to employees of Gems, Inc., during the years 1967 and 1968 were reported through Ricky's account number and contributions were paid on those wages, although neither corporation was liable for those years since neither had in its employment four or more persons for twenty or more weeks during either of those years.

The net effect of reporting all employees of the three corporations and paying contributions on their wages through Ricky's account number was to build up the reserves in the account of the proprietorship, Ricky's, and to allow the three corporations to have the advantage of Ricky's lower rate of contribution. For the years 1967 through 1971, the rates of contribution assigned to Ricky's account ranged from a high of 2.3% to a low of .5%. If the corporations had reported their employees and paid contributions on their wages through separate accounts, each would have been required to pay at the standard rate of 2.7% until their separate credit reserve ratios met statutory requirements so as to entitle them to reduced rates.

According to the Commission's records, an audit of Ricky's, covering the years 1961-63, was conducted in 1965. Although

during this period at least two of the above named corporations were reporting and paying through Ricky's account, no discrepancies were found in the account or in the method of reporting. Helen Capps, the wife of Paul C. Capps, kept the books for the proprietorship and all three corporations and furnished these records to the Commission's field representatives when they came to examine them. She testified that the Employment Security Commission people came in "roughly annually" to examine the books; that each time one came, she would give him the Ricky's folder; and that this folder contained the employment sheets for all employees, information on each of the three corporations, and personal information on the employees of each corporation naming which corporation they worked for. The investigation in 1972 was the first time this method of reporting was questioned.

After completion of the evidentiary hearing held 1 November 1972, this matter was heard on 29 January 1973 by the Chairman of the Employment Security Commission. On 26 July 1973 the Chairman issued his order, making findings of fact and setting forth his opinion, in which the Chairman stated the questions presented to be as follows:

> "Briefly recapitulating what has transpired, Paul C. Capps, Trading as Ricky's has been a liable and covered employer throughout the entire period in question and has paid the contributions due on its employees. Additionally, Paul C. Capps, trading as Ricky's, has reported as its own employees persons performing services for Gems, Inc., Diamond Outlet, Inc., and Paul's Young Men's Shop, Inc.
>
> The questions raised are, in essence: (1) What will happen to the moneys paid in by Paul C. Capps, trading as Ricky's, which was based upon the earnings of persons not in its employ? and (2) What options are available, if any, to the several employing units who have been determined liable in their own right, but whose employees were reported under Paul C. Capps, trading as Ricky's?"

After considering applicable statutes, the Chairman ruled that "it is necessary that the following take place:

> (a) All contributions erroneously paid by Paul C. Capps, trading as Ricky's, from 1967 through the present will have to be refunded to Ricky's.

(b) Beginning January 1, 1969, Diamond Outlet, Inc., will have to report the wages paid to its employees and pay contributions on those wages at the rate of 2.7 percent.

(c) Gems, Inc., will have to make reports and pay contributions on the wages paid to its employees at the rate of 2.7 percent from the period beginning January 1, 1969, through February 11, 1971. Subsequent to February 11, 1971, Diamond Outlet, Inc., as successor, will have to report as its own any employees acquired when it succeeded Gems, Inc.

(d) Paul's Young Men's Shop, Inc., will have to make reports and pay contributions on the wages paid to its employees at the rate of 2.7 percent from the period beginning January 1, 1967, through 1972 and thereafter."

This matter was heard before the Full Commission on 11 December 1973, and on 20 December 1973 the Full Commission issued its order in which it overruled the exceptions filed to the Chairman's opinion, affirmed the opinion of the Chairman in its entirety, and adopted that opinion as its own. To this order the defendant employing units filed exceptions and appealed to the Superior Court.

The matter was heard in the Superior Court at the February 1976, civil session held in Onslow County. On 17 February 1976 the court entered judgment in which it concluded that "there is nothing in the Statutes to prohibit the Commission from going back and making a proper allocation of the contributions erroneously paid by taxpayer to the proper employing units." Accordingly, the court remanded the case to the Commission

> "with the specific direction that the Commission give the taxpayer credit for contributions erroneously made under the method of reporting, for the period beginning January 1, 1964, through December 31, 1972.
>
> In making the proper allocations and computations to give the taxpayer credit for the contributions he has made through the entity of Ricky's, the Commission shall treat each of the employing units, i.e., Diamond Outlet, Inc., Gems, Inc., Paul's Young Men's Shop, and Ricky's as if

each of them were a separate and qualified entity liable since January 1, 1964, as set forth in taxpayer's Exhibit 2.

For the period beginning January 1, 1973 to the present, each employing entity set out above shall be assigned a proper experience rate based upon the computation of its reserves as of December 31, 1972, after the Commission has given the credits to the employing entities as set out above.

This 17 day of February, 1976.

s/ RUSSELL J. LANIER
Judge Presiding"

From this judgment, the Commission appealed.

Howard G. Doyle, H. D. Harrison, Jr., Garland D. Crenshaw, and Thomas S. Whitaker for Employment Security Commission of North Carolina, appellant.

Akins, Harrell, Mann & Pike, by Bernard A. Harrell for defendant appellees.

PARKER, Judge.

Appellant's first assignment of error is directed to following language in the judgment of the Superior Court from which this appeal has been taken:

"While the Court is aware that it is bound by such findings of fact of the Commission as are supported by competent evidence (G.S. Sec. 96-4(m)), and while the Court makes no additional findings of fact, it is observed that, according to the evidence, the method of reporting the employee contributions of the three employing units involved was originally established with the advice of the Commission employees. Further, it appears from the evidence that the taxpayer, while paying and reporting under an erroneous method, nevertheless paid the taxes due on all employees. Regular review and audits by the Commission did not disapprove the method of paying all employees through Ricky's."

Appellant contends that by including this language in its judgment the Superior Court, despite its disclaimer, made an in-

dependent finding of fact which it had no power to do and that it thereby committed reversible error. We do not agree.

The Employment Security Commission has been vested by statute with "the power and authority to determine any and all questions and issues of fact" arising under the Employment Security Law. G.S. 96-4(m). The same statute provides that on appeal to the Superior Court from a decision of the Commission in a matter over which it has jurisdiction, the decision or determination of the Commission "shall be conclusive and binding as to all questions of fact supported by any competent evidence."

[1, 2] Interpreting similar provisions in our Workmen's Compensation Act, our Supreme Court has held that in appeals from the Industrial Commission the reviewing court may determine upon proper exceptions whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969); *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963); *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958). "If the findings of fact of the Commission are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings." *Pardue v. Tire Co., supra*, p. 416. The same principles govern the scope of judicial review on appeal from decisions of the Employment Security Commission. *See, Employment Security Com. v. Kermon*, 232 N.C. 342, 60 S.E. 2d 580 (1950).

[3] Applying these principles in the present case, we find that, although there was uncontradicted evidence from which the Employment Security Commission could have found as a fact that "the method of reporting the employee contributions of the three employing units involved was originally established with the advice of the Commission employees," and that "[r]egular review and audits by the Commission did not disapprove the method of paying all employees through Ricky's," the Commission made no such findings. Indeed, the Commission made no findings, one way or the other, with regard to these matters. If findings as to these matters were necessary for a proper determination of this case, the case should have been remanded to the

Commission to the end that the Commission make proper findings. In our opinion, however, factual findings with respect to the matters referred to in that portion of the Superior Court's judgment to which appellants' first assignment of error is directed are not necessary for a proper determination of this case. All parties recognize that for many years an erroneous method of reporting and paying contributions was followed by the several defendants. The essential problem presented by this case concerns what measures may now be lawfully applied to correct the error, now that it has been recognized. To solve that problem it is not necessary that the source of the original error be determined. Therefore, the language in the Court's judgment which is the subject of appellant's first assignment of error may be treated as surplusage. The inclusion of this language in the judgment, even if it be viewed as constituting an independent factual finding which the Court had no authority to make, was at most harmless error. Accordingly, appellant's first assignment of error is overruled.

Although, as above noted, it is not necessary to determine the source of the erroneous method of reporting and paying contributions, which was for so many years followed by the defendants in this case and was for an equally long time accepted without question by the plaintiff, we do feel it pertinent to observe that there was no finding by the Commission, nor was there any evidence to support a finding, that defendants ever acted in bad faith. Indeed, the evidence is quite to the contrary, for it shows without question, and the Commission found as a fact, that two of the defendants, Diamond Outlet, Inc., and Gems, Inc., reported wages paid to their employees and contributions on account of such wages were paid to the Commission through the medium of Ricky's account number for the years 1967 and 1968, even though neither of those corporations had a sufficient number of employees for the requisite number of weeks to be liable for payment of contributions during those years. All of the defendants here were owned and controlled by the same interest, Mr. Paul C. Capps and the members of his family. Under the Unemployment Compensation Law as originally enacted, all of the defendants collectively would have constituted but one "employing unit." Sec. 19(f)(4), Ch. 1, Extra Session, 1936. Thus, the method of reporting and paying contributions which was for so many years followed by the defendants in this case would not only have been proper, but would have been required, by the law as previously written. *Unemploy-*

ment Compensation Com. v. Coal Co., 216 N.C. 6, 3 S.E. 2d 290 (1939). The statute was later changed, but suffice it to say that nothing in this record even suggests any improper motives on the part of the defendants in failing to comply with the changes made.

[4] This brings us to the essential question presented by this appeal, which is: What steps may now be taken to correct the error in reporting and paying contributions which all parties now recognize occurred? The Commission in its order and through its attorneys on this appeal has taken the position that the only thing which it has legal authority to do under the controlling statutes is to deal with the several defendants, Paul C. Capps, trading as Ricky's, Paul's Young Men's Shop, Inc., Diamond Outlet, Inc., and Gems, Inc., each as a completely separate and unrelated entity; to recognize that Mr. Capps, trading as Ricky's, has erroneously reported wages paid to persons who were not his employees and that he is entitled to a refund of the erroneously paid contributions, going back, however for a period of only five years; and then to deal with each of the three corporate defendants as though each was a delinquent employing unit which had never reported any wages paid to any of its employees and had never paid any contributions to the Commission on account of such wages. In taking this position as to the three corporations, the Commission is deliberately ignoring, as being without legal significance, the fact that every penny of taxable wages paid to every employee of each of the corporations was actually fully reported to the Commission and contributions were paid to the Commission on account of such wages, though the reporting and payment was, by error, made under the account number of Ricky's. We find nothing in the governing statutes which requires such a harsh result. In *Unemployment Compensation Comm. v. Nissen*, 227 N.C. 216, 41 S.E. 2d 734 (1947), our Supreme Court, in reversing a judgment of the Superior Court which had affirmed an order of the Commission, found nothing in the Statutes to prevent the Commission from transferring a reserve account which was incorrectly standing in the name of a mortgagee, when it was later determined that the account should have been in the name of and the contributions should have been paid on the account of the mortgagor, for whom the mortgagee was acting simply as an agent in managing the mortgaged property. Accordingly, the Supreme Court held in that case that the reserve which had been created and credited to the mortgagee, the Metropolitan Life Insurance Com-

pany, by the Unemployment Compensation Commission (now the Employment Security Commission), by reason of contributions made by the Metropolitan on wages of employees employed at the Nissen Building in Winston-Salem should be transferred to the credit of Mrs. Nissen. Although the factual situation presented by that case is somewhat different from that presented in the present case, it did involve a situation where a reserve account had been mistakenly built up in the name of one employing unit, which had erroneously reported as its own employees persons who in reality were employees of another and had mistakenly paid to the Commission contributions on account of wages paid to such persons. Our Supreme Court found nothing in the statutes to prohibit correction of the error and ordered transfer of the reserve account. Similarly, in the present case we agree with the conclusion reached by Judge Lanier that "there is nothing in the Statutes to prohibit the Commission from going back and making a proper allocation of the contributions erroneously paid." Moreover, we find nothing in the statutes which prevents the Commission, under the circumstances of this case, from going back and setting up accounts retroactively in the names of each of the three corporations, allocating to each account the contributions heretofore paid (erroneously through the medium of Ricky's) on account of wages of employees of each particular corporation, and making charges against each account of all amounts which would properly have been chargeable thereto had the account been in existence from the time when each corporation became subject, as a separate employing unit, to the provisions of the Employment Security Law. This accomplished, the Commission should then compute the appropriate rate at which each of the three corporate defendants should have paid contributions, year by year, and thus arrive at the total amount properly payable by each, after each is given credit for the contributions heretofore paid on the taxable wages of its employees through the medium of Ricky's. This, essentially, is what Judge Lanier's order directed. There are, however, certain ambiguities in that order to which the appellant's brief directs attention. For example, the order appealed from directs the Commission to make the proper allocations and computations "as set forth in taxpayers Exhibit 2." The exhibit referred to was a computation prepared by a certified public accountant employed by the defendants. In its brief the appellant points out that the accountant, in preparing the exhibit, did not have access to the amounts of the administrative

costs or of benefits charged, both of which would be needed to make proper allocations and computations as to each account. However, the Commission itself does have access to those figures, and it can now make the proper retroactive allocations and computations. We hold that the statutes do not prohibit, and justice requires, that it should.

Accordingly, the judgment of the Superior Court should be modified to direct the Commission retroactively to set up the separate accounts, to make proper allocations of contributions and charges to each, and to compute the correct rates of contribution which should have been paid by each separate employing unit. As so modified, the judgment of the Superior Court is affirmed.

This cause is remanded to the Superior Court for judgment in accord with this opinion.

Modified and remanded.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. STEVEN L. PERIMAN

No. 7612SC356

(Filed 5 January 1977)

1. **Homicide § 15; Infants § 11— homicide of three year old child — battered child syndrome — admissibility of evidence**

In a prosecution for second degree murder of a three year old child, the trial court did not err in allowing two medical experts to use the term "battered child syndrome" and in allowing them to define what they meant when they used it, since the witnesses were not attempting to say that the victim's wounds were inflicted by defendant, but were instead properly testifying that the group of signs or symptoms they observed upon examination of the victim's body precluded the notion that the injuries were self-inflicted or were inflicted in a manner other than by the intentional violence of another.

2. **Homicide § 21— death of three year old child — sufficiency of evidence of homicide**

Evidence was sufficient to be submitted to the jury in a prosecution for homicide of a three year old child where it tended to show that defendant beat the child on numerous occasions; defendant had stated before that he was the only one who could discipline the child

properly; the child was left in defendant's care on the day that she died; when the child was left with defendant, she had only two slight bruises on her body; the child died as a result of two fatal blows to the brain; and when the child's body was examined after her death, she was found to suffer from the "battered child syndrome."

3. Homicide § 27— voluntary manslaughter — instructions proper

In a prosecution for second degree murder the trial court's instructions on voluntary manslaughter were proper where the jury was required to find that defendant intentionally assaulted the victim with his hands or fist and that death did directly result therefrom, and the jury had previously been told that an assault must be intentionally and unlawfully done with intent to do some harm or injury without any legal justification or excuse.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 9 December 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 14 September 1976.

Defendant was charged with the second degree murder of Jacqueline (Jackie) Cliburn.

Evidence for the State tends to show the following:

On 11 October 1974, when she was killed, Jackie was three years old. She was small for her age and had blue eyes and blond hair. She was living in a housetrailer with her female parent, who, at that time, was calling herself Linda Periman. Linda had not been divorced from Jackie's father, Robert Cliburn. Steve Periman, the man with whom Linda most recently lived, was also staying in the trailer.

Defendant Periman beat Jackie on numerous occasions. Several times he took her into a bedroom and the beatings and child's screams could be heard for from five to ten minutes. After these beatings, bruises could be seen on Jackie's buttocks, legs and face. He had been heard to say that he was the only one who could discipline the child properly. On other occasions when others would comment on bruises they saw on the child, Periman's explanations would be that she fell from a table, knocked over a bookcase or was involved in a minor automobile accident.

On 10 October 1974, Linda spent most of the day in the presence of the child. About 4:40 p.m., she went to work, leaving Jackie in the trailer with Periman. At that time she saw no bruises or injuries on the child. She had last seen the child's entire body when she bathed her the day before. At that time

the child had only a slight bruise on her chest and another on her back.

Periman was in the trailer with the child from the time Linda left until she returned, at about 1:00 a.m., and found him asleep on the couch. Linda went in the room where the child ordinarily slept on a set of springs and mattress on the floor. Although she could see well enough to keep from falling over the furniture, the room was not well lighted. Jackie was lying on the mattress and was covered by a sleeping bag. Linda rubbed the top of the child's head and patted her. She did not observe any injuries. She could see that the child was breathing. She then awakened Periman. The pair then entered their bedroom and went to bed. About 6:00 a.m. Periman got up and went in Jackie's room. He returned and told Linda that Jackie was dead. When Linda looked at Jackie's body she saw that there was blood on the side of her mouth, her lips and eyelids were blue and that the body was cold and turning stiff. Periman and Linda then took Jackie's body to a hospital where it was examined by Dr. Azzoli. He observed the following:

> "Upon my examination I found that the child was very cool; she was motionless, not breathing; upon examination of her heart, there were no heart sounds; there was no blood pressure recordable; there was no pulse; we checked her pupils and they did not respond to any reflex or stimuli. Upon further examination, it was noted that she had some blood left in her left nostril which was dried. She has an area in the back of her head which was about 3½ inches in diameter, roundish, turned soft, with a soft layer. This was on the lower back portion of the head. She had bruises on her body; she had several small bruises on her forehead; some on her cheek, several on her chest, on her thighs; there were two bite marks on her forearms, both forearms, one on each side. There were areas of bruising on her back also and it was noted that some of these bruises appeared to be older than others. I did not count the exact number of bruises I observed but I would estimate them to be at least eight to ten."

In Dr. Azzoli's opinion the child had been dead for several hours before it was seen by him.

The chief pathologist at the hospital performed an autopsy at about 10:00 a.m. on that morning and later, on 18 October

1974, the Assistant Chief Medical Examiner in Chapel Hill performed another one. Both of these doctors testified in detail as to their findings. The doctor with the Medical Examiner's office was allowed to use photographic slides to illustrate his testimony. Their testimony, in general, tended to show the following:

The body was covered with between 25 to 30 bruises on the face, scalp, chest, stomach, back, buttocks and extremities. There was a laceration in the region of the right eyelid extending into the white of the eye. There was evidence of an old unexplained fracture of one of the legs. Some of the blows causing the bruises (particularly to the lower body) may have been inflicted several days before death. Others were inflicted from one to six or eight hours before death. The internal autopsies exposed five bruises on the reflected scalp. The cause of death was a swelling of the brain caused by trauma of blunt force to the head. The bruises on the brain were distributed on the left back and the right middle portions of the brain on almost opposite sides of the skull. At least two separate and apparently fatal blows were necessary to create those bruises. The fatal wounds were not caused by a fall. The child had apparently bitten herself on each arm just below the elbow.

After defendant was arrested he made a statement in which he said that Linda went to work, he fed Jackie and then went to sleep on the couch. Later, he said, Jackie awakened him and complained of a headache. He said he put the child to bed and then went back to sleep. He did not awaken until Linda came home about 1:00 a.m. About 6:00 a.m. he went to awaken Jackie and found her lying partly on the mattress and partly on the floor. He saw blood on the mattress cover and felt Jackie's cold body. She was not breathing and her heart was not beating. He then dressed and, along with Linda, took the child to a hospital.

The State also offered evidence tending to show that defendant tried to persuade Linda not to talk with an investigator about the child's death. Linda had also been charged with second degree murder in connection with the child's death but that charge was apparently dropped when she pleaded guilty to bigamy and child abuse and agreed to testify for the State.

Defendant offered no evidence.

The jury returned a verdict of guilty of voluntary manslaughter. Judgment imposing a prison sentence was entered.

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

Faircloth, Fleishman & Beaver, by H. Gerald Beaver, for defendant appellant.

VAUGHN, Judge.

[1] In his first assignment of error defendant contends that it was error to allow two of the doctors' testimony concerning "their respective diagnosis of and understanding of 'the battered child syndrome.' "

Dr. Beddow had just testified as to his findings as a result of the autopsy. The following then took place:

> "From my examination of the bruises on the body itself, I have an opinion that, as related to the time of death of the patient, the bruises occurred at varying stages in time prior to death. We can determine this by the coloration which there is characteristic changes that occur in a bruise or a contusion by time interval, and judging from this, they were of varying ages, probably none older than three days, some more recent.
>
> Q. And, Doctor Beddow, based upon the cause of death which you formed your opinion to, as well as the entire gross autopsy that you made, did you make a diagnosis based on what you found?
>
> MR. BEAVER: Objection.
>
> COURT: Objection overruled.
>
> A. As I have mentioned, the cause of death was blunt head trauma dealt from at least two different directions. It falls into my concept of what is called in medical terminology a battered child syndrome.
>
> MR. BEAVER: Objection; move to strike.
>
> COURT: Motion denied.
>
> EXCEPTION No. 1.
>
> Q. What was that word; I did not hear you?
>
> A. A battered child syndrome.

Q. Now what exactly is your understanding, Doctor Beddow, of the battered child syndrome?

MR. BEAVER: Objection.

COURT: Objection overruled.

A. My concept of this, and this is an entity that is a little difficult to define—people do use it differently—my concept of it is a child which is not necessarily malnourished or not taken care of but has evidence of trauma or blunt blows at varying intervals and time periods they are usually young children and often have a history of injuries sometimes leading to death.

EXCEPTION No. 2.

MR. BEAVER: Motion to strike, your Honor.

COURT: Motion denied.

EXCEPTION No. 3.

Q. How recent a medical concept is this, Dr. Beddow?

A. My first encounter with this particular syndrome as it's used today or as I use it was approximately four to five years ago.

Q. Are there any other parts or building blocks which make up the battered child syndrome which you found present in the body of Jacqueline Cliburn?

MR. BEAVER: Objection.

COURT: Overruled.

A. In this particular case there was evidence of multiple injuries of various kinds and subsequently a traumatic death.

EXCEPTION No. 4."

Dr. Anderson also testified as to the result of the autopsy performed by him. He described in detail the nature of the wounds and was of the opinion that death was caused by two or more blows to the brain. Defendant excepted, as indicated, to the following:

"Q. Doctor Anderson, based on the autopsy which you performed, and based on your expertise in the field of

Forensic Pathology, did you make a diagnosis based upon what you had observed on Jacqueline Mari Cliburn on the 18th day of October, 1974?

MR. BEAVER: Objection.

COURT: Overruled.

A. Yes, I did.

Q. What was your diagnosis?

MR. BEAVER: Objection.

A. The general pattern of the various ages of bruises distributed over the area of the back, the buttocks, the head, and coupled with the findings of an older injury to the leg, indicate to me that this is a syndrome known recently in medical circles as the battered child syndrome.

MR. BEAVER: Move to strike.

COURT: Motion denied.

EXCEPTION No. 7.

Q. Now what, Doctor Anderson, do you understand generally to be the battered child syndrome?

MR. BEAVER: Objection.

COURT: Overruled.

EXCEPTION No. 8.

A. The battered child syndrome is a situation where injuries are inflicted upon a child by a parent, guardian, baby-sitter, someone in charge at the time of discipline of the child. The injuries are effected or applied in such a manner as to be of a severity more than what is usually given in a disciplinary measure.

Q. Without referring to the person, can you describe for us about the battered child syndrome?

MR. BEAVER: Objection.

COURT: Overruled.

EXCEPTION No. 9.

A. All right, they are inflicted generally in a disciplinary or punishment situation.

MR. BEAVER: Objection; move to strike.

COURT: Objection overruled.

EXCEPTION NO. 10.

A. The force that is applied is excessive—

MR. BEAVER: Motion to strike.

COURT: Motion allowed; do not consider that statement, members of the jury.

A. All right, the force that is applied is more than what is usually applied in a disciplinary action of a guardian or parent to a child.

MR. BEAVER: Objection; move to strike.

COURT: Motion denied.

EXCEPTION NO. 11.

A. The injuries, therefore, inflicted are more severe than injuries, if any injuries are sustained, during a disciplinary action.

MR. BEAVER: Motion to strike.

COURT: Motion denied.

EXCEPTION NO. 12."

We find no error in allowing the medical experts to use the term "battered child syndrome" and in allowing them to define what they meant when they used it. The term was used with tacit approval in *State v. Fredell,* 17 N.C. App. 205, 193 S.E. 2d 587, and on appeal, though the precise questions were not before the Supreme Court, that Court said, without further comment: "The condition of the child was diagnosed as that of a 'battered child,' a term meaning the most extreme form of child abuse, characterized by multiple injuries in different stages of healing." *State v. Fredell,* 283 N.C. 242, 195 S.E. 2d 300. In the case before us, the doctors were not attempting to say that the wounds were inflicted by defendant. The doctors were saying, as we believe they were properly allowed to do, that the group of signs or symptoms they observed precludes the notion that the injuries were self-inflicted or inflicted by other than the intentional violence of another.

"In other words, the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly 'caring' for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months." *People v. Jackson,* 18 Cal. App. 3d 504, 95 Cal. Rpts. 919, at p. 921.

Defendant's first assignment of error is, therefore, overruled.

Defendant has expressly abandoned his second assignment of error.

[2] In his third assignment of error defendant contends the court erred in denying his motion for nonsuit made at the close of the State's evidence. The sole basis of the argument is that there is no evidence tending to show that defendant was the one who inflicted the blows resulting in the child's death. We have set out the evidence in considerable detail. When the well-established rules that determine how the evidence must be considered on a motion for nonsuit are applied to that evidence, it seems clear that the judge properly denied the motion. *State v. Ledbetter,* 4 N.C. App. 303, 167 S.E. 2d 68; *State v. Sallie,* 13 N.C. App. 499, 186 S.E. 2d 667. *See also State v. Loss,* 295 Minn. 271, 204 N.W. 2d 404. Moreover, the evidence would have permitted the jury to have found defendant guilty of murder as charged in the bill of indictment.

[3] The question posed by defendant in his fourth assignment of error is as follows: "Did the trial court commit reversible error in charging the jury as to the law of voluntary manslaughter?"

The court instructed the jury it could return one of four verdicts: (1) guilty of second-degree murder; (2) guilty of voluntary manslaughter; (3) guilty of involuntary manslaughter; or (4) not guilty and then proceeded to define the three degrees of homicide he was allowing them to consider. There are no exceptions to the submission of these possible verdicts.

The exceptions that are the basis of the assignment of error are Nos. 14 and 17, found on pages 73 and 84 of the record.

Exception No. 14 is to the part in parenthesis of the following:

> "If the defendant intentionally assaulted Jacqueline Cliburn with his hands or fists and used such force that under the circumstances that force was likely to cause death and that death directly resulted from the use of that force, he would be guilty of second degree murder.
>
> Or if the defendant carelessly applied force to the person of Jacqueline Mari Cliburn under such circumstances that danger to life clearly appeared from the application of that force, and he did so recklessly or wantonly so as to show an utter disregard for human life, and that death directly resulted from the use of that force, he would be guilty of second degree murder.
>
> As I've said, members of the jury, voluntary manslaughter is the intentional, unlawful killing of a human being without malice and without premeditation.
>
> (Again it is not necessary that there be a specific intent to kill, but there must be an intent to do an unlawful act which directly and naturally causes the death of another person, and it must be such an act that is reasonable to foresee that death was likely to result from such conduct. So if the defendant intentionally assaulted Jasqueline Mari Cliburn with his hands or fists but you do not find beyond a reasonable doubt that the force he used was such that it was likely to cause death under the circumstances but death did, however, directly result from the use of that force, then under those circumstances he would be guilty of voluntary manslaughter. Voluntary manslaughter requires an intentional act that directly results in death but not such an act that under the circumstances appeared likely to cause a death.)
>
> EXCEPTION No. 14."

Exception No. 17 is to the following part of the final mandate as it relates to voluntary manslaughter:

> "[I]f you are satisfied from the evidence that the defendant intentionally assaulted Jacqueline Mari Cliburn with

his hands or fists but you do not find that the force used under the circumstances was likely to cause death, although death did directly result from the use of that force, if you find those to be the facts beyond a reasonable doubt, the defendant would be guilty of voluntary manslaughter.

EXCEPTION NO. 17."

Defendant's fifth assignment of error is based on Exception Nos. 15, 16 and 18 and is directed to the following part of the charge (in parenthesis) as it related to involuntary manslaughter:

"Turning to involuntary manslaughter, members of the jury, (if the defendant undertook to act in the place of a parent to the child and in doing so was so grossly careless and negligent in his treatment of the child as to show a wanton and reckless behavior and a total disregard for her rights and safety, although his conduct was not such as to show an utter disregard for human life, and if death directly resulted from that conduct, then he would be guilty of involuntary manslaughter.)

EXCEPTION NO. 15.

Mere carelessness or negligence is not enough to carry criminal responsibility, but if carelessness or negligence is accompanied by wanton or reckless behavior, showing a total disregard for the rights and safety of others, it is culpable negligence for which one may be criminally responsible.

(The intentional violation of a statute designed for the protection of life or limb is culpable negligence, and if death directly results from the intentional violation of such a statute, that is involuntary manslaughter. We have a statute which provides that if a person providing care for a child under sixteen years of age inflicts physical injury on such a child by other than accidental means, he is guilty of the misdemeanor of child abuse. So if the defendant was providing care for Jacqueline Mari Cliburn and in doing so, he intentionally inflicted injury upon her and she was a child under sixteen years of age, and if her death directly resulted from that injury, he would be guilty under those circumstances of involuntary manslaughter.)

EXCEPTION NO. 16."

Exception No. 18 was to substantially the same instruction when it was repeated in the judge's final mandate.

We have set out all of the charge to which defendant excepted. In other parts of the charge the judge instructed the jury on all elements of the possible verdicts. He instructed them as to how to arrive at a decision on defendant's intent. He instructed them on what they might consider in determining whether defendant acted with malice, and among other things, he told them:

> "I've said that the killing must be intentionally done, members of the jury. That does not mean that a specific intent to kill is necessary in the mind of the person. If an act is intentionally done which directly and naturally results in death and there is no legal provocation or excuse, the law implies malice. So a specific intent to kill is not necessary, but the act which causes death must be intentionally done, and it must be such an act that danger to life therefrom is a likely and foreseeable result."

He also told them:

> "If an assault is committed with hands or fists on an infant of tender years, using such force as is likely to cause death, that would be an assault with a deadly weapon, and if death actually resulted, the law implies malice, and that would be second degree murder."

We hold that, when the entire charge is considered, the judge properly declared and explained the law arising on the evidence as given in the case *then being tried.*

Murder in the second degree is the unlawful killing of a human being *with malice* but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being *without* malice and without premeditation and deliberation. Only the element of malice, therefore, separates these two degrees of homicide. It was for the jury to determine the presence or absence of malice on the part of the defendant.

The charge was abundantly fair to this defendant. Malice may be implied from circumstances other than the use of a deadly weapon. Here, however, in order to find the malice necessary to support second degree murder the judge, in effect, required the jury to find that defendant intentionally used his

hand or fist as a deadly weapon. In order to find that the hand or fist was used as a deadly weapon the jurors were required to find that the hand or fist was, as used under the circumstances, likely to cause death. "A deadly weapon is not one that must kill. It is an instrument which is likely to produce death or great bodily harm, under the circumstances of its use." *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915. They were further required to find that the death "directly resulted" from the use of that weapon. The jury failed to find that the hand or fist was used as a deadly weapon and, under the charge of the court, thus failed to find malice that would support a verdict of guilty of second degree murder.

The jury then, as instructed, proceeded to consider voluntary manslaughter. Having failed to find the killing was by the use of a deadly weapon, they were, in order to convict of voluntary manslaughter, required to find that defendant "intentionally assaulted . . . [Jackie] with his hands or fist" and that "death did directly result" therefrom. The jury had theretofore been told that an assault must be "intentionally and unlawfully done with intent to do some harm or injury without any legal justification or excuse. . . ."

The jury then found that defendant intentionally and unlawfully, with intent to cause injury and without any legal excuse, struck the deceased a blow or blows that directly caused her death. That verdict was supported by the evidence which the jury considered on proper instructions from the able trial judge.

We have also considered defendant's exceptions with reference to the instructions on involuntary manslaughter and conclude that they cannot be sustained.

Defendant has had a fair trial that was free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

WILLIAM LEE PARKER AND WIFE, MAE ELLEN KENNEDY PARKER v. PAUL A. BENNETT AND WIFE, ZEPHYA P. BENNETT

No. 7623SC336

(Filed 5 January 1977)

1. **Evidence § 32; Fraud § 11— action for fraud — inapplicability of parol evidence rule**

In an action for fraud in the sale of a farm, evidence of misrepresentations by defendants that the farm contained 125 acres when it actually contained only 95 acres was not inadmissible under the parol evidence rule because of statements in the contract of purchase that no representations were made as to "precise lot dimensions," the parol evidence rule being inapplicable since the evidence of fraud did not challenge the accuracy of the terms of the writing but the validity of the writing itself.

2. **Fraud § 12— misrepresentation of acreage — summary judgment**

The trial court erred in granting summary judgment for defendants in an action to recover damages or to rescind a sale of land on the ground of alleged fraudulent misrepresentations by defendants as to the acreage of the land since it was for the jury to determine whether defendants fraudulently misrepresented the acreage and whether plaintiffs relied on such misrepresentation.

APPEAL by plaintiffs from *Graham, Judge.* Judgment entered 5 February 1976 in Superior Court, YADKIN County. Heard in the Court of Appeals 1 September 1976.

This is a civil action wherein plaintiffs allege in their complaint that on 30 July 1974 they purchased from defendants a tract of land known as Green Acre Farm in reliance upon defendants' oral and written misrepresentations that the farm contained 125 acres when in actuality and to the defendants' knowledge the farm contained approximately 95 acres. Plaintiffs contend they are entitled to $30,000 damages or, in the alternative, reduction of the purchase price or rescission of the contract. Defendants answered, denying the allegations of fraud and asserting as a defense the execution of two purchase contracts by plaintiffs and defendants on 20 June 1974 and 5 July 1974, each stating that there had been no representations or warranties made by Paul A. Bennett Realty Company, Inc. or its agents concerning "precise lot dimensions," and the execution of a deed from defendants to plaintiffs, which contains no representations as to precise lot dimensions.

Defendants moved for summary judgment and filed transcripts of the depositions of defendant Paul Bennett and plain-

tiff William Parker's secretary, Mrs. Windsor. The depositions reveal that Paul Bennett never told plaintiffs the tract contained 125 acres without stating that such figure was his guess, could not be proved, and was subject to survey; that the property had never been completely surveyed because one boundary line was a meandering creek which was difficult to survey; that three boundaries of the land were surveyed in 1968 by Mr. Goldsmith who told defendant Paul Bennett over the phone that the tract contained between 115 and 150 acres; that Goldsmith also wrote defendant Paul Bennett a letter in February 1968 stating the acreage to be "over 100 acres"; that Paul Bennett prepared a map from aerial photographs and wrote on it "one hundred twenty-five acres, more or less, as per survey by Woodrow Goldsmith"; that Paul Bennett gave this map to plaintiffs prior to the sale and also walked the boundaries of the land with plaintiff William Parker prior to the sale; that plaintiff William Parker's secretary called Paul Bennett prior to the sale and asked for a "rundown" on the purchase price ($190,000) of the farm and Paul Bennett told her the value of the property based upon 125 acres but instructed her to indicate that the number of acres was subject to survey; that plaintiff William Parker's secretary typed up the figures but failed to include the "subject to survey" language because she was in a hurry; that Paul Bennett signed the "appraisal" thus prepared by plaintiff William Parker's secretary after the closing as a favor to plaintiffs to help them get a loan on the property; and that defendant Paul Bennett had not noticed the sentence in his own deed to the property which read "containing 95.5 acres, more or less, as per survey in plat by Jessie Lee Mackie, Registered Surveyor, March 5, 1968" and does not believe Mackie ever made a survey of the property.

Plaintiffs filed affidavits of Woodrow Goldsmith stating that he had never told defendants that the property contained 125 acres or any amount of acreage except that set out in his letter, and of plaintiff William Parker's father and three brothers stating that they had accompanied plaintiff William Parker when he walked the boundary lines with defendant Paul Bennett and had heard him state that the property contained 125 acres.

The court granted defendants' motion for summary judgment, and plaintiffs appealed.

White and Crumpler, by Harrell Powell, Jr., Carl F. Parrish, and William G. Ijames, Jr., for the plaintiffs.

Peebles and McConnell, by Joel C. McConnell, Jr., for defendants.

MARTIN, Judge.

The sole question presented by this appeal is whether the court erred in allowing defendants' motion for summary judgment. Plaintiffs' action is based on fraud. In their complaint, plaintiffs allege:

> "6. That prior to and at the time of the transfer of the title of the above-described property by the defendants to the plaintiffs, the defendants represented to the plaintiffs that the property consisted of 125 acres. That in addition, the defendants furnished to plaintiffs maps representing the property as containing '125 acres, more or less, as per survey by Woodrow Goldsmith, Survey Engineer 9/3/68.' That the defendants on numerous occasions stated that the property contained 125 acres.
>
> "7. That the aforesaid representations of the defendants were not true in fact but were false, and were known by the defendants to be false at the time they were made; that in fact, the tract of land consisted of approximately 95 acres. That these false representations were made by the defendants with the intent to deceive the plaintiffs and to induce the plaintiffs to purchase the said property, and that they did, in fact, deceive the plaintiffs, and in reliance upon them, the plaintiffs purchased the said property from the defendants.
>
> "7. That the plaintiffs would not have entered into the contract except for the trust and confidence they had in the representations of the defendants as to the quantity of the land. That the actual quantity of the land and the falsity of the defendants' representations were not apparent or ascertainable to the plaintiffs upon their inspection of the land. That the plaintiffs reasonably relied on the fraudulent representations as to the amount of acreage, both from the aforementioned maps and oral representations. That because of the material and fraudulent inducements of the defendants, the plaintiffs entered into this contract to their detriment."

The written instruments, in their chronological order, leading up to the deed of conveyance by Paul A. Bennett and wife to William C. Parker and wife, are as follows:

20 June 1974 — Exhibit A (original) entitled "Offer To Purchase Real Estate" and signed by William C. Parker and Ellen K. Parker

20 June 1974 — Acceptance of offer to purchase signed by Paul A. Bennett and Zephya P. Bennett

1 July 1974 — Plaintiffs' Exhibit No. 3 Appraisal of Green Acre Farm by Paul A. Bennett s/ (illegible) C.R.E.A.

5 July 1974 — Offer to purchase Green Acre Farm signed by William L. Parker, Purchaser, Ellen Kennedy Parker, Purchaser, Paul A. Bennett, Seller, Zephya P. Bennett, Seller

30 July 1974 — Deed from Paul A. Bennett and wife, Zephya P. Bennett, Sellers, to William Lee Parker and wife, Ellen Kennedy Parker

Those instruments designated signed 20 June 1974, one of which is exhibit A and the other plaintiffs' exhibit 6, which are essentially the same, contain the following words:

"It is expressly understood and agreed:

"1. That no representation other than those expressed herein, either oral or written, have been made by Paul A. Bennett Realty Co., Inc., and more specifically, no representations or waranties have been made by Paul A. Bennett Realty Co., Inc., agent, concerning:"

* * *

"(c) Precise lot dimensions."

* * *

"3. Paul A. Bennett Realty Co., Inc. is not bound by or responsible for any agreement between any of the parties herein unless said agreement is in writing and is signed by an authorized representative of said Paul A. Bennett Realty Co., Inc."

[1] Defendants contend that summary judgment was properly granted because plaintiffs' evidence of fraud is inadmissible under the parol evidence rule which states that:

> "When a contract is reduced to writing, parol evidence cannot be admitted, to vary, add to, or contradict the same. But when a part of the contract is in parol and part in writing, the parol part can be proven if it does not contradict or change that which is written." (Citation omitted.) *Stern v. Benbow,* 151 N.C. 460, 462, 66 S.E. 445, 446 (1909).

Consequently, defendants contend that evidence of oral guarantees on the part of defendants was inadmissible due to the specific statements in both purchase contracts that no representations were made as to "precise lot dimensions." We disagree.

The North Carolina Supreme Court has held 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." (Citations omitted.) *Neal v. Marrone,* 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953) (emphasis added).

Moreover, it has been stated that

> "[A]n action for fraud inducing the execution of a contract is not on the contract but in tort, and the rule that prior negotiations are merged in the writing does not apply." 4 Strong, N. C. Index 2d, *Fraud,* § 11 (1968).

Therefore, we feel that allegations and evidence as to prior negotiations are competent when relevant to the question of fraudulent intent or deception. See *Fox v. Southern Appliances,* 264 N.C. 267, 141 S.E. 2d 522 (1965).

In *Fox v. Southern Appliances,* Justice Moore stated:

> "No verbal agreement between parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provision. (Citation omitted.) It will be presumed that the writing merged therein all prior and contemporaneous negotiations. (Citation omitted.) *But parol evidence is admissible to show that a written contract was procured by fraud,*

for the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms—the instrument itself, on the issue of fraud, is the subject of dispute. (Citations omitted.) Fraud alleged as a defense to the enforcement of a written contract is not an attempt to vary or contradict the terms of the contract, for if the fraud be proven it nullifies the contract. (Citations omitted.) 'It is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable—that is, the representations are usually not regarded as merged in the contract. . . . '" *Fox v. Southern Appliances, supra* at 270, 141 S.E. 2d at 525 (emphasis added).

In *Hardware Co. v. Kinion,* 191 N.C. 218, 219, 131 S.E. 579, 580 (1926), Chief Justice Stacy, speaking for the Court, stated the same principle as that expressed in *Fox v. Southern Appliances* when he commented that:

"Most of the evidence offered by the defendant to show his defense and counterclaim was excluded on the hearing for the reason, we apprehend, that it was in conflict with the written instrument, and therefore thought to be incompetent, resting as it does in parol. (Citations omitted.) The rule that no verbal agreement between the parties to a written contract, made before or at the time of the execution of said contract, is admissible to vary its terms or to contradict its provisions (citation omitted), well established and controlling in proper cases (citation omitted), has no application where the validity of the written instrument, as here, is challenged on the ground of fraud. (Citation omitted.) The instrument itself is the subject of dispute."

The North Carolina Supreme Court has also had an opportunity to comment on clauses in contracts that preclude a party from setting up representations made before the contract was executed. In one such case, the Court stated:

" 'Where the execution of the contract is produced by fraud, a party is not bound by any clause precluding him from setting up false and fraudulent representations within a proper and reasonable time.' " *Wolf Co. v. Mercantile Co.,* 189 N.C. 322, 325, 127 S.E. 208, 209 (1925). See also 17 C.J.S., *Contracts,* § 165(a) (1963) and 17 Am. Jur. 2d, *Contracts,* § 191 (1964).

In that same case, the Court also said that:

"The conduct of the parties, their words and deeds throughout the entire treaty may be shown to the jury upon the issue of fraud." (Citation omitted.) *Wolf Co. v. Mercantile Co., supra.*

In *Fox v. Southern Appliances, supra,* like the case at bar, the plaintiffs stood on the proposition that "where the written instrument itself precludes the representation relied upon, an action on such alleged representations cannot be maintained" and cited 2 Strong, N. C. Index, *Fraud,* § 10 (now 4 Strong, N. C. Index 2d, *Fraud,* § 11) which was footnoted with the case of *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118 (1953). *Wilkins* can be distinguished, however, from the case at bar because in *Wilkins* it is clear that the plaintiffs' pleadings did not allege that the execution of the documents was procured by fraud.

In an earlier case involving this same argument, the North Carolina Supreme Court stated:

" . . . the defense of fraudulent representations, whereby one is induced to enter into a contract, is not founded on the contract, but, when established, vitiates and destroys it, and the restrictive stipulations contained in the contract fall with it." *Machine Co. v. McKay,* 161 N.C. 584, 586, 77 S.E. 848, 849 (1913).

The plaintiffs allege in their complaint "that prior to and at the time of the transfer of the title of the above-described property by the defendants to the plaintiffs, the defendants represented to the plaintiffs that the property consisted of 125 acres . . . that in fact, the tract of land consisted of approximately 95 acres." It is a well established rule that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon. *Keith v. Wilder,* 241 N.C. 672, 86 S.E. 2d 444 (1955).

" . . . [T]he law is settled in this State by *Griffin v. Lumber Co.,* 140 N.C. 514, where it is held, approving what is said in Pollock on Torts, 293: 'It seems plausible, at first sight, to contend that a man who does not use obvious means of verifying the representations made to him does not

> deserve to be compensated for any loss he may incur by relying on them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied on them. He must show that his representation was not in fact relied upon. . . . In short, nothing will excuse a culpable misrepresentation, short of proof that it was not relied on, either because the other party knew the truth or because he relied wholly on his own investigation or because the alleged facts did not influence his action at all. And the burden of proof is on the person who has been proven guilty of material misrepresentation.' And in *Hill v. Brewer,* 76 N.C., 124, Justice Bynum said that 'The maxim of *caveat emptor* does not apply in cases where there is actual fraud.' " *Machine Co. v. Bullock,* 161 N.C. 1, 10, 76 S.E. 634, 637 (1912).

Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that any party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c), *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

[2] Our inquiry, therefore, is whether the defendants were entitled to summary judgment. 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."

Even so, defendants, the movants in this case, still have the burden of showing that there is no triable issue of fact and that they are entitled to judgment as a matter of law. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972). Therefore, plaintiffs here may succeed in defending against the motion for summary judgment if the evidence produced by the movants and considered by the court is insufficient to satisfy this burden. *Page v. Sloan, supra.* Moreover, " 'Where by the nature

of things, the moving papers themselves demonstrate that there is inherent in the problem a factual controversy then, while it is certainly the part of prudence for the advocate to file one, a categorical counter-affidavit [by the plaintiff in this case] is not essential.'" (Citation omitted.) *Page v. Sloan, supra* at 705, 190 S.E. 2d at 194.

On the motion for summary judgment, if the material offered by defendants in support of their motion fails to affirmatively negate any one or more of the essential elements of fraud they have failed to bear the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court."

We have carefully considered defendants' supporting documents and materials and conclude that the granting of summary judgment by the trial court was erroneous. We hold that defendants have failed to carry the burden of proof needed for the granting of their motion.

Whether defendants perpetrated the fraud which plaintiffs have alleged, and whether plaintiffs reasonably relied upon defendants' representations as to acreage, are questions for the jury.

> "The courts have been careful to define the rights of parties to a fraudulent transaction. The purchaser has the right at his election to rescind or to keep the property and recover the difference between its actual value and its value as represented. (Citation omitted.) 'The great weight of authority sustains the general rule that a person acquiring property by virtue of a commercial transaction, who has been defrauded by false representations . . . may recover as damages in a tort action the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representation had been true.'" (Citations omitted.) *Horne v. Cloninger,* 256 N.C. 102, 104, 123 S.E. 2d 112, 113 (1961).

Thus, in our opinion, and we so hold, that in actions such as the case at bar, where motives, intent, subjective feelings and reactions, consciousness and conscience, are to be searched, the issues may not be disposed of on summary judgment.

The judgment is reversed and the case is remanded for further and not inconsistent proceedings.

Reversed and remanded.

Chief Judge BROCK and Judge VAUGHN concur.

DELMAS DURHAM AND WIFE, IRENE W. DURHAM v. MARGIE M. CREECH (WIDOW); HAROLD L. CREECH, ADMINISTRATOR OF THE ESTATE OF JESSE S. CREECH; AND WILLIE FLOYD SMITH AND WIFE, MILDRED PARRISH SMITH

No. 7611SC605

(Filed 5 January 1977)

1. **Reformation of Instruments § 7— ineffectiveness of deed to reserve life estate — mutual mistake — sufficiency of evidence**

In an action for reformation of a deed on the ground of mutual mistake, evidence was sufficient to be submitted to the jury where it tended to show that plaintiffs intended to retain a life estate in their house and an acre of land surrounding it; plaintiffs would sell their property only on the condition that their life estate was perfected; the purchasers of the property agreed that plaintiffs should retain a life estate; and the deed from plaintiffs to defendant purchasers and the contemporaneously executed instrument providing for the life estate failed to express accurately the agreement of the parties as alleged in the complaint.

2. **Reformation of Instruments § 9— land sold to third parties — no innocent purchasers — reformation not barred**

In an action for reformation of a deed on the ground of mutual mistake, reformation was not barred because the purchasers conveyed the land to third parties, since the evidence was sufficient to show that the third parties were not innocent purchasers, but instead had actual knowledge of plaintiffs' claim to a life estate.

3. **Reformation of Instruments § 3— wife as grantee of deed — husband as negotiator — husband's knowledge and intentions imputed to wife — reformation proper**

In an action for reformation of a deed on the ground of mutual mistake, reformation would not be barred by the fact that the wife was the sole grantee in the deed while the husband alone conducted the negotiations resulting in execution of the deed, since the intentions and knowledge of the husband would be imputed to the wife if the jury found that the husband was the wife's agent.

Durham v. Creech

APPEAL by plaintiffs from *Hobgood, Judge.* Judgment entered 10 March 1976 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 December 1976.

Delmas and Irene Durham (sometimes hereinafter the Durhams) reside in the home they have occupied since long before the events which led to this action occurred. In 1969, the Durhams filed a complaint seeking to reform a deed, executed by them 29 April 1961, on the alternative grounds of fraud or mutual mistake. In 1976, after numerous delays, trial was held, and at the close of all the evidence, the court directed a verdict for the defendants.

Only the Durhams presented evidence at the trial. Prior to 29 April 1961, the Durhams lived in a house located on approximately twenty acres of land in Johnston County. Both were in their early fifties, and Delmas Durham feared he was losing his health. They decided to sell the land they owned, reserving for themselves a life estate by the entireties in their home and the surrounding one acre of land. Apparently, the Durhams had some trouble finding a buyer for their property. However, they eventually spoke to Jesse Creech (now deceased and represented by his son and administrator, Harold Creech), and he agreed to buy the land, reserving to the Durhams a life estate in their house and the surrounding acre. Four witnesses, the Durhams, Harold Creech and Raymond Atkinson, testified about this agreement. They concurred in saying the Durhams were to retain a life estate in their home.

On 29 April 1961, the Durhams met Jesse Creech and Harold Creech in the office of an attorney who was selected by Jesse Creech, and who served as attorney for all parties. Margie Creech, Jesse's wife, said both that she was present and that she was not; her son Harold and Irene Durham said she was not. At this meeting, Jesse Creech and the Durhams explained their agreement to the attorney. Thereafter, he prepared a deed conveying the Durhams' property to Margie Creech in fee simple absolute. He gave this deed to Irene Durham, who refused to sign it, saying that it did not reserve to her and her husband the agreed upon life estate. The attorney then said he would correct this, and he dictated the following document:

> "I, Jesse S. Creech, husband of Margie M. Creech, do hereby agree that Delmas Durham and wife, Irene Durham,

> will be entitled to a right to live in the house located on the property this day purchased by Margie M. Creech from the said Delmas Durham and wife, Irene Durham, and also one acre of land for gardening purposes, so long as said property is owned by the said Margie M. Creech. However, the said Delmas Durham and wife, Irene Durham, shall be responsible for the upkeep of the house."

Irene Durham read this document. When she read that the property would be hers and her husband's only "so long as said property is owned by the said Margie M. Creech," she protested that the document failed to reserve to them a "lifetime right" in the property. In response to her objections, the attorney added this sentence to the document:

> "This will be a lifetime right in the house and one acre of land for the life of Delmas Durham and wife, Irene Durham."

The attorney then told the Durhams that the papers reserved to them a "lifetime right" which would stand up in any court. Satisfied, they signed the deed and Jesse Creech signed the "lifetime right" document.

The Durhams received $6,000 for their property. At the time of the sale, Margie Creech did not know that the property was to be put in her name, but she testified that her husband "had authority from me to act in my behalf in regards to the Durham property." The Creeches recorded the deed. The Durhams retained the document quoted above without recording it, and they remained in their house.

Sometime in November 1962, Willie Floyd Smith and his wife (the Smiths) became interested in purchasing the property in question. The Durhams were then, as always, in possession of the house. Floyd Smith knew of their so-called lifetime right. Harold Creech told him; Albert Holland told him; and, according to Harold and his mother, Jesse Creech also told him. Smith, however, took an option on the property, which he recorded. Thereafter, the Durhams also told Smith about their interest in the land, and they showed him the document purportedly acknowledging their right. Smith expressed his opinion that the paper was useless, and that the Durhams had no interest in the land. Only then did the Durhams record their document.

Months passed, and the Smith option lapsed. The Durhams remained in their home. On 22 February 1963, Jesse and Margie Creech conveyed her property to the Smiths.

The Durhams brought this action against Margie Creech, Harold Creech, in his capacity as administrator of his father's estate, and the Smiths. They allege that their life estate was omitted from the deed in question because of the mutual mistake of the parties and their draftsman or, in the alternative, because of the fraud of Jesse Creech and the attorney. The defendants demurred to the complaint, saying it failed to allege fraud. The action was dormant until November 1972 when all parties took a voluntary and indefinite continuance. In January 1974, the defendants withdrew their demurrers, and on 28 February 1974, they filed an answer and a counterclaim for ejectment and to quiet title. After other procedural delays, and a premature interlocutory appeal, this case finally came to be heard in March 1976. At this time, only the plaintiffs' complaint was before the court; the defendants had taken a voluntary dismissal without prejudice as to their counterclaim.

At the close of plaintiffs' evidence, defendants moved for a directed verdict. This motion was denied. Defendants then rested without offering evidence and renewed their motion for a directed verdict. The motion was granted and plaintiffs appeal.

L. Austin Stevens and E. V. Wilkins for plaintiff appellants.

James A. Wellons, Jr., and William R. Britt, for Willie Floyd Smith and Mildred Parrish Smith, defendant appellees.

ARNOLD, Judge.

Plaintiffs assign error to the directed verdict in favor of defendants. Defendants' motion for directed verdict measures the sufficiency of the evidence according to this test: is the evidence, when considered in the light most favorable to plaintiffs, sufficient as a matter of law to support a jury verdict in plaintiffs' favor. If it is, the jury must be given the evidence for its consideration and decision. If it is not, the court must enter a directed verdict. *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973); *American Personnel, Inc. v. Harbolick,* 16 N.C. App. 107, 191 S.E. 2d 412 (1972).

Where a deed fails to express the true intention of the parties, and that failure is due to the mutual mistake of the parties,

or to the mistake of one party induced by fraud of the other, or to the mistake of the draftsman, the deed may be reformed to express the parties' true intent. *Parker v. Pittman,* 18 N.C. App. 500, 197 S.E. 2d 570 (1973). According to plaintiffs, it was the true intent of the parties here to reserve a life estate to plaintiffs.

Defendants correctly assert that there is no evidence of fraud in this case. It does not appear that Jesse or Margie Creech made a statement which he or she knew to be false or which was in reckless disregard for the truth. No purpose is served by a discussion of the elements of fraud in this opinion. However, see, *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131 (1953).

When, due to the mutual mistake of the parties, or perhaps a mistake by their draftsman, the agreement expressed in a written instrument differs from the agreement actually made by the parties, the equitable remedy of reformation is available. However, reformation on grounds of mutual mistake is available only where the evidence is clear, cogent and convincing. *Parker v. Pittman, supra.* Whether the evidence is clear, cogent and convincing is for the jury. *Insurance Co. v. Hylton,* 7 N.C. App. 244, 172 S.E. 2d 226 (1970).

Executed contemporaneously with the deed which plaintiffs seek to reform was a written instrument purporting to reserve a life estate to plaintiffs. Defendants argue that there has been no judicial determination as to whether this instrument created a life estate, and that the plaintiffs have not shown any evidence of mutual mistake because the instrument was drafted and then changed at plaintiffs' request. We hold as a matter of law that this instrument referred to did not reserve or create a life estate in plaintiffs. (No opinion is expressed with respect to whether it constitutes color of title.)

[1] In order to reform the deed to the true intent of the parties plaintiff has the burden of showing that the deed fails to express the actual agreement because of the mutual mistake of the parties, or the mistake of their draftsman. There is evidence that the failure to reserve plaintiffs' life estate resulted from the draftsman's mistake. Testimony by the Durhams, Harold Creech and Raymond Atkins indicates that plaintiffs and Jesse Creech agreed that the plaintiffs were to retain a life estate to their house and an acre of land surrounding it. Testimony

by plaintiffs and Harold Creech, as well as the instrument which purports to reserve a life estate, show that the Durhams would sell their property only on the condition that their life estates was prefected. The jury could conclude that there was clear, cogent and convincing evidence of a mistake by the draftsman. The deed and the contemporaneously executed instrument fail to express accurately the agreement of the parties as alleged in the complaint.

It is immaterial whether the mistake arose out of the attorney's ignorance. This is not a case where reformation is sought of a bare mistake of law. A bare mistake of law generally affords no grounds for reformation. *Trust Company v. Braznell,* 227 N.C. 211, 41 S.E. 2d 744 (1947). There is evidence that the parties agreed and intended to reserve a life estate. The instrument purporting to reserve the life estate, executed along with the deed, was ineffectual, which may be a mistake of law as to the legal efficacy of the transaction. However, the failure to accomplish the intention of the parties, to reserve a life estate, was a mistake of fact which will afford reformation. See, *Trust Company v. Braznell, supra.*

Evidence which tends to show the draftsman's error also tends to show that the parties were mistaken in their beliefs. The evidence would support a finding of mutual mistake by the parties.

[2] Reformation is not barred because Margie Creech conveyed the land to third parties, the Smiths. In *Archer v. McClure,* 166 N.C. 140, 144, 81 S.E. 1081 (1914), our Supreme Court said:

> " . . . where because of mistake an instrument does not express the real intention of the parties, equity will correct the mistake unless the rights of third parties, having prior and better equities, have intervened."

A third party's equities are not great enough unless he is a bona fide purchaser, i.e., one who purchases without notice, actual or constructive, and who pays valuable consideration. *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174 (1964); *Crews v. Crews,* 210 N.C. 217, 186 S.E. 156 (1936); Dobbs, Remedies, § 11.6 (1973). There is evidence that the Smiths were not bona fide purchasers. Plaintiffs, Harold Creech, Margie Creech, and Albert Holland all testified concerning the Smiths'

actual knowledge of plaintiffs' claim to a life estate. Willie F. Smith was actually shown the instrument purporting to preserve the plaintiffs' life estate. There is ample service that the Smiths were not innocent purchasers of the property in question.

[3] Margie Creech, not Jesse Creech, was the sole grantee in the deed from the Durhams. This fact does not bar reformation because there is also evidence that Jesse Creech was acting as agent for Margie Creech. He conducted the negotiations, and, in his own name, purported to reserve the plaintiffs' life estate. Margie Creech's own testimony presents evidence that he was her agent. She said, "On this occasion in [the attorney's] office, my husband had authority from me to act in my behalf in regards to the Durham property, to act as he saw fit." If the jury finds that Jesse Creech was Margie Creech's agent, then his intentions and knowledge are imputed to her.

There is evidence of a mutual mistake by the parties and their draftsman. The record reflects nothing which bars reformation as a matter of law. Directed verdict was improper.

Reversed and remanded.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. MALCOM REX McKAY

No. 7610SC610

(Filed 5 January 1977)

1. **Searches and Seizures § 1— warrantless search of vehicle — probable cause to search**

In a prosecution for breaking and entering motor vehicles with intent to commit larceny therein, the trial court did not err in denying defendant's motion to suppress C.B. radios and other evidence seized from defendant's vehicle without a warrant where the evidence tended to show that an officer observed defendant speeding 80 mph in a 55 mph zone; the officer stopped the car and directed defendant who was driving to exit the car and display his driver's license; defendant did not comply; the officer approached the car, opened the door, and again directed defendant to get out; the officer detected the odor of marijuana and saw marijuana seeds on the floor; as defendant got

out of the car, the officer saw several knives on his belt; the officer arrested defendant for speeding; and the officer then searched the car without defendant's consent.

2. **Burglary and Unlawful Breakings § 5— breaking into vehicles — possession of recently stolen property — sufficiency of evidence**

In a prosecution for breaking and entering motor vehicles with intent to commit larceny therein, evidence was sufficient to be submitted to the jury where it tended to show that C.B. radios had been stolen from various motor vehicles; defendant was in control of the automobile in which they were found two days after they were stolen; defendant admitted the vehicle belonged to him and he was driving it; and defendant admitted knowledge that two of the radios were there, but denied that they were stolen.

3. **Burglary and Unlawful Breakings § 6— breaking into vehicles — burden of proof — jury instructions proper**

In a prosecution for breaking and entering motor vehicles with intent to commit larceny therein, the trial court properly instructed the jury that defendant was presumed innocent and that the State had the burden of proving his guilt beyond a reasonable doubt.

4. **Criminal Law § 114— jury instructions — contentions of parties — no expression of opinion**

The trial court in a prosecution for breaking and entering motor vehicles with intent to commit larceny therein did not overemphasize and repeat the contentions of the State or fail to give equal stress to the contentions and evidence of defendant, thereby violating G.S. 1-180.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 26 February 1976, Superior Court, WAKE County. Heard in the Court of Appeals 9 December 1976.

Defendant was charged in bill of indictment No. 75CR71133 with eight separate counts of breaking and entering motor vehicles with intent to commit larceny therein and in indictment No. 75CR7286 with four counts of breaking and entering motor vehicles with intent to commit larceny therein. At the close of State's evidence, all counts having been consolidated for trial, five counts were dismissed for insufficient evidence. The jury returned a verdict of guilty as to each of the remaining seven counts, and defendant appeals from the judgment entered on the verdicts.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Garland B. Daniel for defendant appellant.

MORRIS, Judge.

[1] On 15 January 1976, defendant, through his court-appointed counsel, moved in writing to suppress certain specified evidence expected to be offered by the State upon trial of the charges. The motion was concerned primarily with listed C.B. radios but also included hunting equipment, a Remington shotgun, and a .22 calibre pistol. On the day of and prior to the beginning of the trial of the charges on 24 February 1976, the court heard the motion to suppress. The court found facts and ruled that the evidence was competent and admissible. The ruling of the court overruling defendant's motion constitutes defendant's first assignment of error.

State's evidence on the motion to suppress is summarized as follows: On 14 November 1975, Georgia State Highway Trooper Coward was assisting in running the radar on Interstate 95. A 1966 Plymouth came through the radar at a speed of 80 miles per hour, the speed limit being 55 miles per hour. Trooper Coward pursued the automobile, turned on his blue light, and the driver of the Plymouth pulled to the right side of the road. Trooper Coward got out of his car and asked the driver of the Plymouth to get out and come to the rear of his car, so that the trooper could inspect his driver's license. For some reason, the driver failed to do so, so Trooper Coward walked to the car, opened the door, and again asked that the driver step to the rear of the car. When he opened the door, he detected the odor of marijuana and saw marijuana seeds on the floor. As the driver got out of the car, Trooper Coward saw " . . . several knives on the belt on the small of his back." These were concealed when he stood up or was sitting down, but were seen by Trooper Coward when the man turned his body to get out of the car. He directed the driver to go to the rear of the car and there told him he was under arrest for speeding. He also advised him that he had seen marijuana seeds and smelled marijuana which was sufficient probable cause to search the car. He walked back to the car and directed the beam of his flashlight into the interior of the car. He saw a bag of marijuana halfway hidden, stuck down in the crack of the seat. He removed that and went back and advised the driver that he was under arrest for possession of marijuana. He read him his "Miranda rights," searched him, took the knives from his body, handcuffed him, and called for a back-up unit. He returned to the Plymouth and discovered another white male under a blanket

asleep in the back seat. He got him out and arrested him for possession of marijuana. This passenger also had some knives on his person. When Trooper Coward looked in the car as the result of smelling marijuana and seeing marijuana seeds, he also saw a brand new C.B. radio just wired under the dash and installed very shoddily. Also in the front on the floorboard and in the back seat were several C.B. radios. A registration check of serial numbers disclosed they had been stolen in Raleigh and Garner. A search of the trunk revealed a suitcase filled with C.B. radios and a tool box containing C.B. radios. Additional radios were under a blanket. Both men were read their rights. Neither wanted to talk without the privilege of the presence of an attorney. The car was impounded and searched again. A total of 21 C.B. radios was found. Trooper Coward identified the driver of the vehicle as McKay and the passenger as George Lewis Davis. McKay did not give Trooper Coward permission to search the vehicle, and he did not have a search warrant. The search revealed roach holders, alligator clips, slang roaches, and butts of marijuana cigarettes all in the floor of the car. The majority of the radios were inside the car. There were several lying in plain view on the floor and on the seat, and there were several boxes inside the car. McKay and Lewis were taken in separate cars to the jail by the trooper and a deputy sheriff, and a wrecker was called to pick up the Plymouth. The inventory of the radios did not show whether a specific radio was found in the inside of the car or in the trunk of the car.

Defendant testified that he was speeding, saw the trooper come out behind him, and when he saw the blue light, he immediately pulled over to the side of the road. McKay got out of his car and met the trooper. The trooper noticed that he had at least one knife on his belt and asked him to remove it. McKay complied. The trooper walked to McKay's car, opened the door, and started to search it. He knelt down and came up with a bag of marijuana, carried it back to where McKay was, and informed McKay that he was under arrest for "possession of susjected narcotics. The trooper handcuffed McKay and called for assistance. A county sheriff came and put McKay in his vehicle, got Davis out of the car and handcuffed him and arrested him for possession of marijuana and placed him in the back of the same vehicle. The officers then proceeded to search the car, taking two radios from the car—one that was hooked up and one that was under the seat. He also removed a .22 caliber pistol

from the glove compartment. He then took the key from the ignition and tried to open the trunk but could not. He did, however, get in the trunk and searched there, finding some more radios. The marijuana was not in plain view. McKay's permission to search the car was not obtained and no search warrant was shown him. McKay did not know the car contained stolen merchandise. Davis said he put the radios in there. The radio connected and the one under the seat were not stolen but purchased by McKay from a friend. McKay did not know there was marijuana in the car and does not use it himself. He had two radios because he normally had two cars.

Davis testified to substantially the same effect as McKay. He said the marijuana was his and he had stolen all the radios except the Cobra which was "hooked up," and that was McKay's. McKay didn't have anything to do with stealing them. He had asked McKay to take him to Florida. The trunk was not locked but was tied down.

The court found the facts to be as testified to by Trooper Coward and concluded that under these circumstances Trooper Coward had probable cause to conduct a search of the passenger compartment of the vehicle.

> " . . . [I]n the carrying out of that search, he found at least five or six C.B. radios in the passenger compartment of the vehicle. Upon these findings and upon finding the passenger, Davis, in the back seat of the vehicle, the Court is of the opinion that Mr. Coward had the right and the responsibility to take the defendant and Davis into custody and thereafter to take the vehicle into custody pending the disposition of charges against them. At this point the officer caused the trunk of the vehicle, which was secured by being tied rather than locked, to be opened and searched, and found therein in boxes, in suitcase and in a tool box a number of other citizens band radios."

We are of the opinion that the court properly concluded that the officers were within their rights and not in violation of any constitutional rights of defendant in the search of the vehicle, in its impoundment, and in the seizure of the C.B. radios found.

Defendant argues that Trooper Coward's intitial intrusion into the vehicle by opening the door and directing defendant to

exit the vehicle was not justified and was, therefore, unreasonable and illegal. If the initial intrusion is justified, there is little difference between a search on the open highway and a later search at the station. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419, *reh. den.*, 400 U.S. 856, 27 L.Ed. 2d 94, 91 S.Ct. 23 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443, n. 20, 91 S.Ct. 2022, 29 L.Ed. 2d 564, *reh. den.*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120 (1971).

Clearly the initial intrusion here was justified. The officer had observed defendant speeding 80 miles per hour in an area where the speed limit was 55 miles per hour. He had stopped the car and directed the defendant to exit the car and display his driver's license. The defendant did not comply. The officer had every right to approach the car, open the door and again direct defendant to get out. This is the initial intrusion which defendant urges was unjustified and which disclosed marijuana in plain view. To hold that the officer was not justified in opening the door to the vehicle under the circumstances would simply defy reason and practicality. This we are not willing to do. This assignment of error is overruled.

[2] Defendant by his next assignment of error contends that the court erred in overruling his motion to dismiss all counts in the bills of indictment and in overruling his "motion for a directed verdict of not guilty" at the close of all the evidence. He argues that the motions should have been allowed because the State failed to offer evidence of either element of the offenses; i.e., (1) breaking or entering a motor vehicle, (2) with intent to commit larceny therein.

At the trial, the State introduced the same evidence presented on the motion to suppress. In addition, Trooper Coward read into the record the serial numbers and brand names of the C.B. radios confiscated on 14 November 1975. Witnesses testified that on the 12th and 13th of November 1975, C.B. radios had been stolen from vehicles owned by them or under their control and they identified the stolen units by serial number or other identifying mark placed thereon by them.

Defendant correctly contends that the State must rely on the doctrine of possession of recently stolen goods. The doctrine of inference of guilt derived from the possession of recently stolen goods " ' . . . applies only when the possession is of a kind which manifests that the stolen goods came to the possessor

by his own act or with his undoubted concurrence' *(S. v. Smith,* 24 N.C. 406), and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. (Citations omitted.)" *State v. Weinstein,* 224 N.C. 645, 650, 31 S.E. 2d 920, 924 (1944), *cert. den.,* 324 U.S. 849, 89 L.Ed. 1410, 65 S.Ct. 689 (1945). Nor does possession have to be such that the goods are actually in the hands or on the person of the accused. It is sufficient if the property was under his exclusive personal control. *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966). " 'It may be of things elsewhere deposited, but under the control of a party. It may be in a store-room or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence.' *S. v. Johnson,* 60 N.C. 237." *Id.,* at 487, 151 S.E. 2d at 67.

Nor does it apply unless there is proof that the property had been stolen. Here, there is clear proof that the radios had been stolen. Defendant was in control of the automobile in which they were found, admitted the vehicle belonged to him, and was driving it at the time. He admitted knowledge that two of the radios were there, but denied they were stolen. There is sufficient evidence of possession and control to raise the presumption. The court properly submitted the case to the jury.

[3] With one exception, defendant's remaining assignments of error are to the court's instructions to the jury. He first contends that the court failed to remind the jury at proper points in the charge that the burden of proof remained with the State. The court clearly instructed the jury that the defendant was presumed innocent and that the State had the burden of proving his guilt beyond a reasonable doubt. Additionally, he clearly instructed them that in order for them to find defendant guilty the State had to prove all elements of the offense beyond a reasonable doubt, and throughout the charge referred to proof by the State beyond a reasonable doubt. The court is not required to do more—certainly, in the absence of any request for special instructions because of the circumstances of the case. Defendant asked for no special instructions nor were any necessary.

[4] Next defendant urges that the court violated G.S. 1-180 by overemphasizing and repeating the contentions of the State and

in failing to give equal stress to the contentions and evidence of the defendant and by tending to ridicule and discredit the defendant and his evidence. A careful reading of those portions of the charge to which defendant excepts reveals when the court gave the contentions of the State, he clearly so labelled them and gave them dispassionately and accurately. The same treatment was given defendant's contentions and evidence. We find no misstatement of evidence, no undue emphasis to State's contentions, nor any partisan conduct by the court. Defendant also contends that the court failed to instruct the jury properly on possession of or constructive possession of recently stolen property and what evidence, direct or circumstantial, is necessary to prove possession. On the contrary, we find the charge of the court to be a correct statement of the law in this respect.

The only remaining assignment of error is to the court's failure to allow defendant's motion to set aside the verdict and for a new trial. These are purely formal and we see no need to reiterate what has already been said. Suffice it to say, in our opinion defendant, represented by able counsel at trial and on appeal, received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge BRITT concur.

COMMUNITY BANK OF CAROLINA, PLAINTIFF v. EMILY E. McKENZIE, DEFENDANT v. ROBERT C. EMANUEL, JR., DEFENDANT AND THIRD PARTY PLAINTIFF v. LIFE ASSURANCE COMPANY OF CAROLINA, THIRD PARTY DEFENDANT

No. 7618DC598

(Filed 5 January 1977)

1. **Insurance § 44— credit disability insurance — real party in interest — accommodation maker of note**

An accommodation maker of a note which included the premium for a credit disability policy providing for payment of installments of the note if the accommodated comaker became disabled was a real party in interest who could maintain an action on the disability policy.

2. **Insurance § 44— credit disability insurance — sufficiency of findings**

The trial court did not err in allowing the third party plaintiff to recover on a credit disability insurance policy issued to the maker

of a promissory note to a bank without making specific findings as to the terms of the contract of insurance where the evidence was sufficient to support the court's findings that the insurer became obligated under the policy to make monthly payments of $113.64 on the note when the maker became disabled in a certain month and to continue making those payments during her disability, that when those payments were not made the bank declared the unpaid balance of $2,727.36 immediately due and payable, and that by virtue of the policy and the insured's continued disability, the insurer became obligated to pay the amount of $2,727.36, and where there was never any dispute or question with respect to the terms of the policy.

APPEAL by Third Party Defendant, Life Assurance Company of Carolina, from *Fowler, Judge.* Judgment entered 27 April 1976, District Court, Greensboro Division, GUILFORD County. Heard in the Court of Appeals 8 December 1976.

Plaintiff brought this action against Emily E. McKenzie and Robert C. Emanuel, Jr., alleging that the defendants executed and issued to plaintiff their promissory note payable to plaintiff in the amount of $4,091.04 payable in 36 consecutive monthly installments of $113.64 each. Plaintiff further alleged that the note expressly provided that in the event any installment be not paid when due, the entire balance shall become due and payable at the option of the holder; that defendants are at least five payments behind, and plaintiff has elected to declare the unpaid balance due; that demand has been made, but defendants have refused to pay. Plaintiff seeks to recover $2,727.36 plus interest and attorney's fees.

Emily McKenzie failed to answer the complaint, and a default judgment was entered against her for the full amount of the claim, including interest and attorney's fee of $409.10.

Defendant Emanuel filed answer, cross-claim, and third party complaint. In his answer he admitted the execution of the note but denied that the "unpaid balance for which defendants are indebted to the plaintiff is $2726.36," and denied that plaintiff was entitled to attorney fees. As a second defense, he averred that at the time the loan was made, the plaintiff, acting as agent for Life Assurance Company of Carolina, required defendants to purchase disability insurance; that insurance, insuring the paying of the installments to plaintiff in event Emily McKenzie became disabled, was purchased by defendants at a cost of more than $100; that subsequently, and during the life of the loan, Emily McKenzie did become disabled; that defend-

ant Emanuel advised plaintiff of her disability and that under the contract of insurance defendants were entitled to have payments on the loan made by the Life Assurance Company of Carolina; that, though so advised, plaintiff refused to process a claim under the policy, even though plaintiff had sold the coverage as agent for the insuring company; that plaintiff's failure to notify the insurance company constitutes a breach of duty and plaintiff must first recover the payments from the insurer prior to looking to defendants for payment.

As a third defense, defendants averred that in seeking to recover the entire balance due, plaintiff had failed to credit defendants with unearned interest, and if plaintiff is allowed to recover the amount prayed for, plaintiff would have earned usurious interest.

As a fourth defense and cross-action, defendant Emanuel averred that he signed the note as an accommodation maker but that Emily McKenzie received all proceeds of the loan; that he made payments on the loan from 3 April 1973, through 21 January 1974, for a total of $1,142.76 when defendant McKenzie defaulted; that he is entitled to recover that amount from defendant McKenzie together with such other amounts as he may be obligated to pay to plaintiff under the note.

By his third party complaint, Emanuel, as third party plaintiff alleged the execution of the note; the requirement of plaintiff bank that insurance be obtained; that insurance was obtained from third party defendant, Life Assurance Company of Carolina, which agreed to make payments in the event of the disability of Emily McKenzie; that defendants Emanuel and McKenzie paid the premium for such insurance; that plaintiff, at all times, was acting as agent of third party defendant; that subsequently Emily McKenzie became disabled and, by reason of her disability, third party defendant became obligated to make payments on the note while she was disabled; that it had failed to do so, although its agent, plaintiff herein, had been repeatedly advised of the disability; that third party plaintiff had paid some $1,142.76 on the note after Emily McKenzie became disabled and is being requested by plaintiff to pay an additional $2,727.36 plus interest; that third party plaintiff is entitled to recover from third party defendant the sum of $1,142.76 plus such other sums as he may be adjudged to owe plaintiff on the note.

McKenzie did not answer the cross-claim. The third party defendant filed an answer in which it admitted only that it had issued its single premium credit life and accident and health insurance policy #234-12241 insuring Emily McKenzie in connection with a loan by plaintiff on or about 5 May 1972. By additional defenses, it averred that third party plaintiff is not the real party in interest; that no notice had been given or proof of loss filed in compliance with the policy requirements; denied that Emily McKenzie suffered total disability or any disability as a result of injury or sickness contracted after the issuance of the policy.

Prior to trial, the parties stipulated the execution of the note, the provisions thereof; that the makers are in default; that demand for payment of the entire balance has been made with refusal to pay; that plaintiff has exercised its option of declaring the entire unpaid balance due and payable, and that defendants have failed to pay the balance due.

At trial, plaintiff bank put on evidence as did defendant Emanuel. Third party defendant offered as its evidence its Exhibit 1, the form insurance policy.

The trial court made extensive findings of fact and upon the facts found made appropriate conclusions of law. He entered judgment ordering that plaintiff have and recover of Emanuel the sum of $2,727.36 with interest from the date of the judgment; that Emanuel have and recover of McKenzie the sum of $1,142.76 together with interest from the date of the judgment, and that Emanuel have and recover of the third party defendant Life Assurance Company of Carolina the sum of $2,727.36, with interest from the date of this judgment.

Third party defendant appeals from the judgment assigning error to certain findings of fact and conclusions of law.

Brooks, Pierce, McLendon, Humphrey and Leonard, by Edgar B. Fisher, Jr., for third party plaintiff appellee.

Morgan, Byerly, Post, Herring and Keziah, by Steven E. Byerly, for third party defendant appellant.

MORRIS, Judge.

Although appellant excepted to several of the findings of fact and conclusions of law, it brings forward only two. Those

not brought forward and argued in appellant's brief are deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

[1] Appellant first contends that the trial court committed reversible error in " . . . concluding as a matter of law that defendant Emanuel was a real party in interest to the insurance contract alleged in this matter and allowing recovery by Emanual on the contract."

The conclusion of law to which defendant excepts and which it assigns as error is numbered 5 and is as follows:

> "The said Single Premium Credit Life and Accident and Health Insurance Policy was written to protect the plaintiff in the repayment of its loan in the event of the disability of McKenzie, and also said policy was written to protect McKenzie and also Emanuel from suffering loss in the event that McKenzie became disabled and unable to be gainfully employed. Said policy, therefore, was written for the protection not only of the plaintiff, but also for the protection of the two defendants herein who were obligated under said promissory note. In addition, the premium for said policy was included in the promissory note, and the obligation to pay the premium thereof became the obligation of both McKenzie and Emanuel. The insurance in question, therefore, was written for the benefit of the creditor and also for the benefit of each of the two debtors in connection with said loan. The defendant Emanuel, therefore, is a real party in interest and has the legal right to assert a claim against the third-party defendant in connection with benefits to be paid under said insurance policy."

Appellant correctly contends that G.S. 1-57 requires that every action be prosecuted in the name of the real party in interest. It argues that Emanuel cannot be classified as the real party in interest because he does not fit the definition of having an interest in the subject matter of the litigation and not merely an interest in the action, *Rental Co. v. Justice,* 211 N.C. 54, 188 S.E. 609 (1936), and because a payment to him would not protect defendant from the claims of third parties. *Home Indemnity Co. v. State Bank,* 233 Iowa 103, 8 N.W. 2d 757 (1943). It argues that, assuming it is obligated under the policy, it would not only be obligated to third party plaintiff

Emanuel, it would also be subject to suit by the bank should Emanuel avoid execution on the judgment against him.

We think appellant's arguments are effectively answered by *Newsom v. Insurance Co.*, 4 N.C. App. 161, 166 S.E. 2d 487 (1969). There, the plaintiff administratrix sought to recover from defendant insurance company the amount due on a conditional sales contract executed by her husband for the purchase of an automobile from S & E Motors. The conditional sales contract provided that the time balance included the amount of the premium for creditor life insurance on the life of the purchaser. The purchaser, plaintiff's husband, died while the creditor life insurance was still in full force and effect. Defendant insurance company was notified of his death but refused to pay the balance owing on the conditional sales contract. Subsequently GMAC repossessed the automobile because of failure to pay the amount due. Defendant demurred on the ground that GMAC and not plaintiff was the real party in interest. The trial court sustained the demurrer. We reversed. Judge Parker, in an opinion in which Mallard, C.J., and Brock, J., (now C.J.), concurred, said:

> "The fact that the insured's estate, plaintiff herein, is not named directly as beneficiary in the insurance policy issued by the defendant company, is no bar to plaintiff's right to maintain this suit. North Carolina has long recognized the right of one for whose benefit a contract has been made to sue to enforce its terms, even though he is not directly a party to the contract. *Lammonds v. Manufacturing Co.*, 243 N.C. 749, 92 S.E. 2d 143. Here the creditor life insurance was clearly for the benefit of the insured's estate in that the proceeds of the policy were, by contractual and statutory provision, to be applied to discharge an indebtedness of the estate. If defendant insurance company fears it might incur double liability, both to the named beneficiary and to the insured's estate, it can protect itself by way of interpleader. G.S. 1-73; 1 McIntosh, N. C. Practice and Procedure, § 728." *Id.* at 168-69, 166 S.E. 2d at 492.

Here the third party plaintiff obligated himself to pay the premium. Indeed he paid a portion of the premium in the installments which he paid when Emily McKenzie defaulted, the premium having been added to the loan. The protection he seeks is that for which he paid, and it is the risk which the

third party defendant insurer agreed to assume. This assignment of error is overruled.

[2] By assignment of error No. 3, based on exceptions 4, 6 and 8, appellant takes the position that the court erred in allowing Emanuel to recover against the third party defendant without finding facts as to the terms of the alleged contract of insurance. While it is true that third party plaintiff did not offer into evidence the contract of insurance issued, nevertheless, there is sufficient evidence in the record to support the finding of fact to which appellant excepts. The court found that under the policy, the insurance company became obligated to make monthly payments of $113.64 on the note in question in February 1974, under McKenzie's disability, and to continue making those payments during her disability. When those payments were not made, the bank, as it had a right to do, declared the unpaid balance of $2,727.36 immediately due and payable. The court further found that by virtue of the policy and McKenzie's disability, the insurance company became obligated to pay the amount of $2,727.36.

By its answer to the third party complaint, third party defendant, appellant, admitted that on or about 5 May 1972, it issued its single premium credit life and accident and health insurance policy #234-12241, insuring Emily McKenzie in connection with an indebtedness to plaintiff. Exhibit No. 1 of defendant (third party plaintiff) is the agent's (bank) copy of "Certificate of Policy Issue—Life Assurance Company of Carolina" certifying that Policy Number 234-12241 had been issued to insured, Emily E. McKenzie, 108 Orville Drive, High Point; that insured's age was 33; that the date of the loan was 5/5/72 for a term of 36 months and in the amount of $4,091.04; that the name of the creditor was Community Bank of Carolina; that the single premium for "life" was $122.73 and for "accident and health" $155.46; that the minimum disability period was "14 Day Retro" and the "Commencement Date" was "1 day." The certificate further stated that a policy bearing the identical number and containing the identical information shown in the "above Schedule" had been issued to "the above named Debtor." The witness for the bank identified third party defendant's Exhibit as a copy of an insurance policy which was the same form used at the time the loan was made. He further testified, and it is obvious from the exhibits, that third party defendant's Exhibit No. 1 (the form policy) and the Certificate of Policy Issue bear

the same form number, which is Form 322-165.1. The third party defendant's Exhibit No. 1 was stated by appellant in the record to be " . . . *the* form insurance policy . . . " . That exhibit bears the identical format and schedule at the top of the policy as does the "Certificate of Policy Issue." That form policy requires the company, upon proof of disability of insured debtor to pay " . . . indemnity for the period of such disability that falls within the Term, beginning with the day of such disability designated in the Schedule as 'Commencement Date', at a monthly rate not to exceed $150, determined by dividing the Amount of Loan by the number of months in the Term . . . " . Witness for the bank testified that the "pay-off" on the policy the bank usually wrote for third party defendant was the amount of the monthly payment. Indeed by the terms of G.S. 58-254.8 " . . . [t]he amount of credit accident and health insurance written shall not exceed the installment payment." The amount of the remaining installments is the amount for which the court held third party defendant liable. The evidence was plenary to support the court's finding that Emily McKenzie had been disabled from February 1974 to the time of the trial of the action. The terms of the policy with respect to notice of claim and time of filing claim are set out in third party defendant's answer. It does not except to any finding as to notice. We think the court had before it sufficient evidence to support its finding of fact No. 5 and the finding supports the conclusion of law based thereon. Defendant cannot now be heard to complain that the terms of the policy were not introduced by third party plaintiff. It is obvious there was never any dispute or question with respect to the policy terms. This assignment of error is without merit.

The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

DONALD F. GOODSON, JR. v. PAULETTE GOODSON (AISTROP)

No. 7619DC524

(Filed 5 January 1977)

1. Divorce and Alimony § 24; Infants § 9— modification of child custody decree

The modification of a child custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change in circumstances which has affected the welfare of the child.

2. Witnesses § 8; Rules of Civil Procedure § 43; Appeal and Error § 42— hostile witness — leading questions — placing excluded testimony in record

In a hearing in which plaintiff father sought to gain custody of his child from the mother based in part on allegations of physical abuse of the child by the mother's present husband, the court erred in ruling that the mother's present husband was not a hostile witness and in denying plaintiff his right under G.S. 1A-1, Rule 43(b), to ask a hostile witness leading questions, and in refusing to permit counsel to insert in the record the answers to the questions to which objections were sustained; however, such errors were not prejudicial to plaintiff where the trial judge investigated the allegation of physical abuse by questioning the child in chambers and found that there had been no substantial change in circumstances to warrant a change in custody.

3. Divorce and Alimony § 24— failure to return child to legal custodian — contempt — insufficiency of evidence

The evidence was insufficient to support the court's finding that plaintiff had refused to return the child to its mother, who had been given legal custody, and the court erred in holding defendant in contempt for refusing to return the child to its mother.

4. Divorce and Alimony § 23— failure to pay child support — wilfulness

The evidence was sufficient to support a finding that plaintiff's failure to pay child support in accordance with a court decree was wilful where there was evidence that plaintiff was regularly employed during the entire period of delinquency and was presently able to comply with the order of the court.

5. Divorce and Alimony § 23; Parent and Child § 7— child support decree — credit for voluntary expenditures

A parent is entitled to credit toward the amount of child support ordered by a court decree for expenditures incurred in behalf of the child only when equitable considerations exist which would create an injustice if such credit were not allowed.

6. Divorce and Alimony § 23; Parent and Child § 7— child support decree — credit for voluntary expenditures

A parent delinquent in child support payments is not entitled to credit for obligations incurred prior to the entry of the support order and is not entitled as a matter of law to a deduction proportionate to the amount of time spent with the child or to a credit for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods; however, credit is more likely to be appropriate for expenses incurred with the consent or at the request of the parent with custody and for payments made under compulsion of circumstances.

7. Attorney and Client § 7; Divorce and Alimony § 22— child custody and support — attorney's fees — findings of fact

Findings of fact were not required to support an award of attorney's fees in an action for child custody and support. G.S. 50-13.6.

8. Appeal and Error § 7— mother held in contempt — appeal by son

Plaintiff was not aggrieved by an order holding his mother in contempt for failing to return his child to defendant and had no standing to appeal in her behalf. G.S. 1-271.

APPEAL by plaintiff from *Faggart, Judge.* Order entered 31 March 1976 in District Court, CABARRUS County. Heard in the Court of Appeals 17 November 1976.

Plaintiff and defendant were divorced in December 1972. In March 1973 defendant-former wife was awarded custody of the only child of the marriage, Scott Goodson. Plaintiff-former husband was given visitation rights and was ordered to pay $30.00 per week to support the child. Instead, since that time he has paid $30.00 every other week.

On 21 March 1976, the child was visiting his paternal grandmother, Mrs. Dorothy Goodson, and his paternal great-grandmother, Mrs. Nan Queen. When defendant and her current husband came to get the child, Mrs. Goodson refused to let them have him. After consulting her attorney, the defendant phoned Mrs. Goodson and was again told that Scott would not be returned to her.

On 22 March, the defendant filed a motion in which she recited the above-related events and requested that the plaintiff, Mrs. Goodson, and Mrs. Queen be held in contempt of court for refusing to return the child and that the plaintiff also be held in contempt for failure to pay support each week as ordered. The arrearage at that time amounted to $1320.00. That same day the district court ordered the child returned to the defend-

ant and ordered plaintiff, Mrs. Goodson, and Mrs. Queen to show cause why they should not be held in contempt.

On 26 March, plaintiff filed a response and a counterclaim. With respect to the arrearage, he alleged that he was entitled to credit for additional sums he had provided for food, clothing and medical care. He also asked for custody of the child, alleging that the defendant was "neither a fit nor suitable person" and that her continued custody "would endanger the life and well-being" of the child. Among the grounds for this claim was that on several occasions the plaintiff had seen bruises and contusions on the child which were believed to have been caused by the actions of defendant's current husband, Michael Aistrop.

Pertinent testimony taken at the hearing will be related in the body of the opinion. The judge dismissed the contempt citation against Mrs. Queen and found Mrs. Goodson in contempt but did not punish her. Plaintiff was found in contempt on both counts, but judgment was continued on the condition that he make up the arrearage in periodic payments and that he pay part of defendant's attorney's fees. Custody remained with the defendant.

Plaintiff appeals from this order.

Fletcher L. Hartsell, Jr., for plaintiff appellant.

Davis, Koontz & Horton by James C. Davis for defendant appellee.

CLARK, Judge.

Plaintiff first assigns error to that part of the order awarding custody to the defendant, contending that he was prevented from establishing a substantial change in circumstances. Plaintiff contends that the judge erred in ruling that the current husband of the defendant, Michael Aistrop, was not a hostile witness, in sustaining objections to material leading questions asked of Aistrop, and in refusing to allow answers to those questions to be entered in the record. Although we agree that the trial judge erred in these rulings and we do not condone his conduct, we find that plaintiff was not harmed by the errors.

[1] The courts of this State have long held that in cases involving the custody of children, the trial judge is vested with broad discretion since he is in a position to see and hear the

parties and witnesses. *Tucker v. Tucker,* 288 N.C. 81, 216 S.E. 2d 1 (1975). The welfare of the child is the paramount consideration that must guide the court in exercising this discretion. *Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974). The modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change in circumstances which has affected the welfare of the child. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357 (1968).

The plaintiff's claim for custody was based in part upon allegations that his child, Scott, had been physically abused by Aistrop. Plaintiff's leading questions of Aistrop, to which objections were sustained, were designed to elicit information on the frequency and severity of corporal punishment administered to Scott by Aistrop.

[2] In the context of leading questions, a hostile witness is one whose sympathies lie with the opponent's cause. 3 Wigmore, Evidence § 774 (Chadbourn Rev. 1970). Aistrop was the husband of the woman whose interests were at issue in the action. His conduct formed a material part of the opposing party's claim. He testified that he "want(ed) her to keep custody of Scott." In these circumstances the trial court erred in ruling that Aistrop was not a hostile witness and in denying plaintiff his right under G.S. 1A-1, Rule 43(b) to ask a hostile witness leading questions. 1 Stansbury, N. C. Evidence § 31, p. 85 (Brandis Rev. 1973). The trial court further erred in refusing to permit counsel to insert in the record the answers to the questions to which objections had been sustained. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970).

However, we find that the plaintiff was not prejudiced by these errors. The trial court found as a fact that there had been no substantial change in circumstances to warrant a change in custody. The order discloses

> "That at the request of the plaintiff, and without objection by the defendant, the Court took the minor child into chambers and talked to him for some period of time in regard to the allegations of the plaintiff that the defendant's present husband, Michael Aistrop, had beaten the child."

The content of the examination in chambers does not appear in the record. However, it does appear that the subject was the

allegation that Aistrop had beaten the child. This was also the subject of those questions about which the trial court committed error.

Where there is evidence which does not appear in the record on appeal, it will be presumed that the evidence supports the trial court's findings of fact. *Carter v. Carter,* 232 N.C. 614, 61 S.E. 2d 711 (1950); *Cobb v. Cobb,* 10 N.C. App. 739, 179 S.E. 2d 870 (1971). The trial judge investigated the allegation of physical abuse in ascertaining whether there had been a substantial change in circumstances which affected the welfare of the child. We find no merit in this initial assignment of error.

[3] Plaintiff next assigns error to the findings of fact that he had custody of the child after the defendant came to get him on 21 March 1976, and when the police picked the child up on 22 March 1976, and to the conclusion of law that he was in contempt for refusing to return the child to the defendant. Defendant's testimony was that the grandmother refused to return the child, and that defendant did not see the child until she picked him up at the police station. No evidence in the record identifies the person from whom the police got the child, nor establishes that plaintiff had custody of Scott during this period. The question of the sufficiency of the evidence to support the trial court's findings of fact may be raised on appeal. *Little v. Little,* 9 N.C. App. 361, 176 S.E. 2d 521 (1970). A finding by the court which is not supported by the evidence is not binding on appeal. *Schloss v. Hallman,* 255 N.C. 686, 122 S.E. 2d 513 (1961). Where there are insufficient findings to support an order, the cause must be remanded. *Bank v. Insurance Co.,* 265 N.C. 86, 143 S.E. 2d 270 (1965); *Smith v. Smith,* 248 N.C. 194, 102 S.E. 2d 868 (1958); *Boswell v. Boswell,* 241 N.C. 515, 85 S.E. 2d 899 (1955); *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971).

[4] Plaintiff next assigns error to that part of the order finding him in contempt for failure to pay child support. In order to hold a parent in contempt for failure to pay child support in accordance with a decree, the failure must be wilful. In order to find the failure wilful, there must be particular findings of the ability to pay during the period of delinquency. *Smith v. Smith, supra.* Plaintiff contends that there is insufficient evidence to find that the failure was wilful. We disagree. There

was evidence, and the court so found as a fact, that plaintiff had been regularly employed during the entire period of delinquency and was presently able to comply with the order of the court. We find no merit in this assignment of error.

[5, 6] Plaintiff next assigns error to the order that he pay the full $1320.00 arrearage in child support. Plaintiff contends that he is entitled to credit against his obligation under the order for certain expenses incurred for clothing, food, recreation, and medical treatment. No cases were cited to the Court nor have any been found in which our courts have either denied or allowed credit for such voluntary expenditures. There is a clear division of authority in other jurisdictions. Annot., 47 A.L.R. 3d 1031 (1973). We think that the better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case. We cannot begin to detail every case in which credit would or would not be equitable. However, since we are enunciating this principle for the first time in this State, we feel a duty to offer some guidelines for the trial judge. The delinquent parent is not entitled as a matter of law to credit for all expenditures which do not conform to the decree. Nor should the delinquent parent be entitled to credit for obligations incurred prior to the time of the entry of the support order. The record indicates that some of plaintiff's payments for medical treatments may fall into this category. The delinquent parent is not entitled as a matter of law to a deduction proportionate to the amount of time spent with the child. Credit is not likely to be appropriate for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods. Many of the payments claimed by this plaintiff for recreation and miscellaneous seem to fall within these categories. Credit is more likely to be appropriate for expenses incurred with the consent or at the request of the parent with custody. Payments made under compulsion of circumstances are also more likely to merit credit for equitable reasons. The medical payments for Scott's tonsillectomy and related treatment would seem to fall within this category. See 47 A.L.R. 3d, *supra,* at §§ 5, 6, 7, 15-19. We emphasize that these are not hard and fast rules, and that the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given.

In the present case plaintiff requests credit for voluntary payments in the amount of $1,768.25. We remand for the trial court to determine, in accordance with this opinion, what expenditures, if any, the plaintiff is entitled to credit against the arrearage of $1,320.00.

[7] Plaintiff next assigns error to the order awarding defendant attorney's fees. Plaintiff's contention that under G.S. 50-13.6 findings of fact are required to support such an award in an action for custody and support has previously been determined to be without merit. *Stanback v. Stanback,* 287 N.C. 448, 215 S.E. 2d 30 (1975); *Fellows v. Fellows,* 27 N.C. App. 407, 219 S.E. 2d 285 (1975).

[8] Plaintiff next assigns error to the conclusion that the grandmother, Mrs. Dorothy Goodson, was in contempt for refusing to return the child to his mother. The court did not punish Mrs. Goodson for the contempt. Plaintiff was not aggrieved by the contempt order against Mrs. Goodson and has no standing to appeal in her behalf. G.S. 1-271; *Boone v. Boone,* 27 N.C. App. 153, 218 S.E. 2d 221 (1975). We find no merit in this assignment of error.

Plaintiff also assigns error to the admission of testimony at trial without a jury of a minister expressing an opinion on the type of life led by defendant and her husband. We find no merit to this assignment of error. 1 Stansbury, *supra,* § 124, p. 388.

We vacate those parts of the order finding plaintiff in contempt for refusing to return Scott to the defendant and directing him to pay the full arrearage in child support, and this cause is remanded for proceedings consistent with this opinion.

Affirmed in part.

Vacated in part and remanded.

Judges MORRIS and ARNOLD concur.

CAROLINE H. RIDDLE v. J. IVERSON RIDDLE AND MORGANTON SAVINGS AND LOAN ASSOCIATION

No. 7625SC588

(Filed 5 January 1977)

1. **Husband and Wife § 11; Injunctions § 2— support provided in separation agreement — failure of husband to comply — no injunctive relief for wife**

Where the parties stipulated that no alimony or support provisions from the separation agreement previously entered into by them were incorporated into the judgment dissolving the bonds of matrimony between them, but that the divorce judgment merely recited that a separation agreement had been entered into, injunctive relief was not available to the former wife to compel her former husband to make payments necessary for her support as provided only in the separation agreement, since she had an adequate remedy at law.

2. **Husband and Wife § 12— separation agreement — failure of husband to honor support provision — wife's cohabitation with another no defense**

In an action to enjoin defendant from terminating support payments provided for in a separation agreement executed by the parties where the agreement stated that such payments should continue until plaintiff died or remarried, the action of plaintiff in cohabiting with another man, even if substantiated, would not constitute a valid defense to defendant for his failure to comply with the agreement.

3. **Husband and Wife § 11— separation agreement — replacement vehicle to be provided by husband — failure of husband to comply — insufficiency of evidence**

In an action by plaintiff to recover the purchase price of a replacement automobile which defendant allegedly had refused to provide pursuant to a separation agreement between the parties, the trial court erred in adjudging that plaintiff recover such sum, since an issue of material fact arose as to whether defendant refused to select a vehicle for plaintiff and whether defendant was given an opportunity to do the actual trading as provided by the separation agreement.

APPEAL by defendant Riddle (hereinafter referred to as defendant) from *Kirby, Judge.* Judgment entered 14 May 1976 in Superior Court, BURKE County. Heard in the Court of Appeals 8 December 1976.

Plaintiff filed complaint on 14 September 1974 alleging that she and defendant, husband and wife, had entered into a separation agreement; that defendant agreed to pay her $600

per month until she either remarries or dies; and that defendant had threatened to terminate the payments required by the agreement. The agreement was made a part of the complaint. Plaintiff asked that an injunction be granted enjoining defendant from breaching and violating his contractual commitment.

In his answer, defendant admitted the execution of the separation agreement but alleged that plaintiff was living with another male person as husband and wife and they were "enjoying all the benefits of the marital relationship."

A preliminary injunction restraining defendant from breaching the contract by termination of the support payments was entered by Judge Ervin on 5 August 1974.

Plaintiff then filed a "supplemental complaint" alleging numerous violations of the separation agreement by defendant including his failure to provide plaintiff a replacement automobile, in consequence of which plaintiff had to pay for the automobile at a cost of $4,500 with interest at 8%. Defendant, in answer to the supplemental complaint, alleged that plaintiff's relationship with the other person was a complete and full abrogation of the agreement and, therefore, the agreement was null and void.

Plaintiff's motion for a partial judgment on the pleadings was thereafter denied.

Both parties moved for partial summary judgment. From the pleadings and affidavits introduced, Judge Kirby found that the following facts, among others, existed "without substantial controversy and no issue arises therefrom":

(1) The parties entered into the agreement alleged in the complaint and under the agreement defendant is required to pay plaintiff $600 each month until she either remarries or dies, whichever occurs first.

(2) Defendant has threatened to terminate the required payments.

(3) These payments constitute the primary source of funds required by plaintiff for her subsistence and she would be irreparably harmed by any termination.

(4) Plaintff is still living and has not remarried and any termination of payments from defendant to plaintiff would constitute a breach of a lawful obligation.

(5) Defendant has failed and refused to provide a replacement automobile as provided by the agreement, rendering it necessary for plaintiff to personally trade and pay for said automobile at a cost of $4,500 plus interest at 8%.

Based thereon, Judge Kirby entered an order and partial summary judgment concluding and providing that:

1. Both parties are bound by the provisions of the agreement.

2. Defendant's defense based on plaintiff's relationship with another person is not a valid and lawful defense to his failure or refusal to comply with the agreement.

3. Defendant is permanently enjoined and restrained from breaching the provision of the agreement requiring that he pay plaintiff $600 per month until her death or remarriage.

4. Plaintiff recover certain specific sums of money from defendant, including $4,500 with 8% interest thereon, in satisfaction of plaintiff's payment for the replacement automobile.

From the entry of the judgment, defendant appealed.

Patton, Starnes, Thompson & Daniel, P.A., by Thomas M. Starnes, for plaintiff appellee.

Simpson, Baker & Aycock, by Dan R. Simpson, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the entry of the permanent injunction restraining him from breaching the provision of the separation agreement requiring him to pay $600 to plaintiff until her death or remarriage. We think the contention has merit.

The parties stipulated that no alimony or support provisions from the separation agreement were incorporated into the judgment dissolving the bonds of matrimony between plaintiff and defendant; that the divorce judgment "merely recited that a separation agreement had been entered into by the parties." We think these stipulations are of primary importance in a determination of this appeal.

The question presented by this assignment is whether injunctive relief is available to a former wife to compel her

former husband to make payments necessary for her support as provided only in a separation agreement. While our research fails to disclose that either of the appellate courts of this State has addressed itself to this question, we think the position our courts have taken with respect to consent judgments based on support agreements is instructive.

This position is succinctly stated in *Bunn v. Bunn,* 262 N.C. 67, 69, 136 S.E. 2d 240, 242 (1964), in an opinion by Justice (now Chief Justice) Sharp as follows:

> " . . . Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony.
>
> "A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings . . . . "

The principle was restated by our Supreme Court in *Mitchell v. Mitchell,* 270 N.C. 253, 256, 154 S.E. 2d 71, 73 (1967), in an opinion by Justice (now Chief Justice) Sharp as follows: "A contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings even though the agreement has the sanction and approval of the court. . . . " *See also Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118 (1956), and *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529 (1944).

We find further support for our determination in *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118 (1946), where the court held that a separation agreement similar to the one in this case " . . . was an extrajudicial transaction, and although between husband and wife, and relating to the support of the wife, had no more sanction for its enforcement than any other civil contract; certainly not that of imprisonment through civil

contempt for noncompliance." With respect to enforcement of the agreement, the court in *Stanley* said:

> "An action may be maintained for breach of the contract, of course, and judgment awarded for sums shown to be due. Such actions, however, sound in contract, and result in a money judgment without execution *in personam,* under any label known to the law, including imprisonment for contempt."

Obviously, plaintiff's reason for seeking injunctive relief in this case is to be able to enforce the support provisions of the separation agreement by contempt proceedings. In view of the principle established and restated in the cases cited above, particularly *Bunn, Mitchell* and *Stanley,* we hold that injunctive relief is not available to her.

Plaintiff bases her request for injunctive relief primarily on the contention that she has no adequate remedy at law; that receiving the monthly support payments is necessary for her maintenance and support and a failure to receive them would result in irreparable injury. If this contention justified injunctive relief, could not the same argument be made in many contract cases including those of numerous lessors who depend on rental payments for their support?

The general rule is that an injunction will not be granted where there is a full, adequate and complete remedy at law. *In Re Davis,* 248 N.C. 423, 103 S.E. 2d 503 (1958). It has been well stated in 2 Lee, North Carolina Family Law § 201 (3d ed. 1963) that:

> "The court will enforce the contract just as written. The remedies for the enforcement of a separation agreement are the same as those provided for the breach of any other contract. . . . [S]he may bring an action on a separation agreement against her husband in her own name. She may recover a judgment for such installments as have matured and become available, together with interest on each installment from the day it became due."

We conclude that plaintiff has "an adequate remedy at law."

[2] Defendant next assigns as error the determination of the trial court that plaintiff's relationship with another person did

not constitute a defense to the enforcement of the separation agreement. This assignment lacks merit.

The applicable provision of the separation agreement provides that defendant is to pay plaintiff $600 per month until she "either remarries or dies, whichever occurs first." The agreement also states that it is the intention of the parties that each shall "go his or her way, and each live his or her personal life unmolested, unhampered, and unrestricted by the other . . . ." Nevertheless, defendant urges that his affidavits, although contradicted by plaintiff, establish that plaintiff has entered a relationship of cohabitation with another as though they were married thereby circumventing the intent of the agreement.

Under the agreement, plaintiff's relations with other people, short of marriage, do not offer defendant any defense to the enforcement of its provisions. The separation agreement must be enforced according to its own terms. Therefore, the trial court did not err in concluding that the actions of plaintiff, even if substantiated, would not constitute a valid defense to defendant for his failure to comply with the agreement.

[3] Defendant's final contention is that the trial court erred in adjudging that plaintiff recover the purchase price of a replacement automobile. This contention has merit.

The separation agreement provides that defendant is to furnish plaintiff with a replacement automobile every five years. Plaintiff has "the right to select the particular vehicle and the duty of making available the automobile she owns at the time of the replacement . . . . " Defendant is to "do the actual trading" for the automobile. Plaintiff, by affidavit, alleged that defendant "failed and refused, after demand" to do the actual trading, therefore, she was forced to borrow $4,500 for the purchase of an automobile. Defendant responded by affidavit that he had not the opportunity to trade the automobile so as to obtain the best price and that the first knowledge he had of plaintiff's actions was a telephone call from an automobile dealer advising him that he was to pay for the vehicle that plaintiff ordered. The trial judge granted summary judgment for plaintiff and awarded her $4,500 with interest.

Based on the affidavits, we think an issue of material fact arose as to whether defendant refused to select a vehicle for plaintiff and whether defendant was given an opportunity to

do the actual trading as provided by the separation agreement. This issue of fact would necessarily affect the amount of recovery for the purchase price of a replacement automobile. Therefore, as to this issue, we hold that the trial court erred in granting summary judgment.

The judgment from which defendant appeals granted plaintiff certain relief that defendant does not challenge; those portions of the judgment are affirmed. Therefore, our decision is: (1) that the part of the judgment granting plaintiff injunctive relief be vacated; (2) that the part of the judgment granting plaintiff a recovery of $4,500 plus interest to be vacated, this question to be determined by a trial on the merits; (3) that the remainder of the judgment be affirmed.

Vacated in part; affirmed in part; cause remanded.

Chief Judge BROCK and Judge MORRIS concur.

J. W. PENDERGRAST AND WIFE, CATHERINE W. PENDERGRAST v. R. C. AIKEN AND WIFE, M. E. AIKEN, W. L. AIKEN AND PERRY ALEXANDER CONSTRUCTION COMPANY

No. 7628SC561

(Filed 5 January 1977)

Nuisance § 7; Waters and Watercourses § 3— culvert in bed of stream — flooding — nuisance — effect of factors downstream — instructions

Where, in an action to recover damages from flooding allegedly caused by a nuisance created when defendants placed a 36-inch culvert in the bed of a stream flowing from plaintiffs' land onto and through defendants' land, the jury raised a question about the effect of evidence of the inadequacy of two 24-inch culverts which were located under a public street and carried water from defendants' property, the trial court did not err in instructing the jury that "if you find that the damage was not caused by the creation of a nuisance, but was caused by something further downstream, then plaintiffs could not recover."

Judge MARTIN dissents.

APPEAL by plaintiffs from *Martin (Harry C.), Judge.* Judgment entered 26 January 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 November 1976.

This is an action to recover damages allegedly sustained by plaintiffs as the result of a nuisance allegedly created by defendants.

The parties are adjoining property owners. Plaintiffs' property is about 60 feet wide and is bordered on the north by Summit Avenue, on the east by U. S. Highway 25 and on the south by defendants' property. Defendants' property is bordered on the east by U. S. 25 and on the south by Allen Avenue.

A stream enters plaintiffs' property on the north by a 30-inch culvert located beneath Summit Avenue. The stream flows in a southerly direction through plaintiffs' property and enters defendants' property at their common boundary. The stream goes over defendants' property and, at the time the alleged damages were caused, exited defendants' property on the south through two 24-inch culverts under Allen Avenue, defendants' south boundary. The two 24-inch culverts have since been replaced with two 60-inch culverts.

From Summit Avenue south the land of both plaintiffs and defendants slopes, generally, towards the stream and the Allen Avenue culvert.

Defendants placed a culvert about 280 feet long in the stream bed beginning at a point near plaintiffs' land and running in a southerly direction to a point near the two 24-inch culverts under Allen Avenue. The culvert installed by defendants was 36 inches in diameter.

Plaintiffs offered evidence tending to show that on several occasions, following heavy rains, after defendants installed the 36-inch culvert, the stream became impounded on plaintiffs' property behind the 36-inch culvert and the embankment above the culvert. The impounded water backed into the basement of plaintiffs' building and caused damage. Plaintiffs' evidence also tends to show that water did not enter the building prior to the installation of the culvert on defendants' land. One of plaintiffs' witnesses testified that he had been a tenant in plaintiffs' building since 1966 and that prior to 1973, he had never seen the stream out of its banks. (The culvert installed by defendants rises 36 inches above the stream bed. The top of the eastern bank of the stream is only 12 and 18 inches above the bed of the stream.)

Plaintiffs offered an engineer who testified that the 36-inch culvert installed by defendants was inadequate for the anticipated load of water. The engineer admitted, nevertheless, that the 36-inch culvert installed by defendants would carry a greater volume of water than the combined capabilities of the two 24-inch culverts under Allen Avenue at the south of defendants' property.

Defendants offered no evidence. The verdict on the issues was as follows:

"1. Did the defendants Aiken create a nuisance by installing and covering a 36-inch drain across their property?

ANSWER: Yes.

2. If so, did the defendants Aiken thereby cause damage to plaintiffs' property?

ANSWER: No."

Pursuant to Rule 59, plaintiffs filed a motion requesting that the verdict be set aside and a new trial. A hearing was held on plaintiffs' motion, and it was denied.

Wesley F. Talman, Jr., for plaintiff appellants.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., and Steven Kropelnicki, Jr., for defendant appellees.

VAUGHN, Judge.

Plaintiffs bring forward one assignment of error based on the sustaining of an objection to a question posed by him to one of his witnesses. The assignment of error cannot be sustained. The question was leading as well as argumentative. Moreover, what the evidence would have said does not appear in the record. Plaintiffs contend that what the witness would have said is clear from his previous testimony. If that is so, plaintiffs could not be prejudiced because the jury obviously heard the preceding testimony.

Plaintiffs bring forward a number of other assignments of error, all of which are based upon a single exception to supplementary instructions given by the judge in response to questions posed by the jurors after they had been given the case.

There is not a single exception to the charge as originally given by the court. We start, therefore, with the assumption that the judge fully, fairly and properly declared and explained the law arising on the evidence.

In order to consider defendants' exception, it appears necessary to set out what took place on the occasion when the jury returned to the courtroom:

"JUROR # 9. I have been appointed foreman. There is a question in regard to the act of God definition. It was pointed out, as I understood it, that if within a certain cycle you could expect a certain volume of rain, could reasonably expect, then it was not an act of your God, but if it was so unusual you couldn't anticipate it, then it was. But now what type of a cycle: ten years, five years, two years, one year?

COURT: I don't know that the instructions I gave you covered that precise question. Let me see.

First of all, the term 'act of God' applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. That doesn't precisely go to your question.

FOREMAN: That would include all history in the area, wouldn't it?

COURT: Use the word 'history'. Now let's see.

The owner of a barrier to surface water is not bound to provide against floods of which the usual course of nature affords no premonition. An extraordinary flood is one the coming of which is not to be anticipated in the natural course of nature. An ordinary flood is one the repetition of which, although at uncertain intervals, can be anticipated. The fact that similar floods had occurred has been held to tend strongly to show that they are not so extraordinary and unusual that they might not have reasonably expected to occur.

FOREMAN: Yes, sir, I believe—

COURT: —we come to answering your question.

FOREMAN: —that clarifies it a good bit.

COURT: All right, sir.

FOREMAN: One other thing—two other things, actually. One of the members asked, first of all, it is possible to answer yes to question # 1 and no to question # 2? That's a possibility.

COURT: Yes.

(Jury retires to assume their deliberations at 9:10 a.m.)

MR. TALMAN: May it please the court, Your Honor, the jury has a question.

(10:00 a.m.)

SHERIFF KINCAID: The jury would like to have the exhibit for the month of March, the rainfall.

COURT: Do you gentlemen have any objection to them having that exhibit?

MR. MORRIS: I'll have to find out Your Honor. Just a second.

(Counsel approach the Bench. Colloquy off the record.)

COURT: Let the record show that the jury requests the weather data for the month of March, 1973, being a part of Plaintiffs' Exhibit 16. Defendants Aikens' counsel objected to a part of Exhibit 16 being given to the jury during its deliberations, and counsel for the plaintiffs stipulated that all of Exhibit 16 could go to the jury. Defendant Aikens' counsel objected to any or all of Exhibit 16 being sent to the jury. The Court in its discretion will allow all of the Exhibit 16 to go to the jury room.

(Plaintiffs' Exhibit 16 taken to the jury room by the court.)

MR. MORRIS: Exception.

(Jury returns into open court at 12:14 p.m.)

COURT: Sheriff, if you will get those papers and bring them to me.

All right, members of the jury, I'll let you go take your lunch. Come back about a quarter to two, about 1:45. Is that all right?

FOREMAN: Yes, Your Honor. There is one point of law that either now or when we return—

COURT: Well, ask me about it now and maybe I can think about it.

FOREMAN: It concerns the property holder accepting the water from the person above them, and, in particular, that law in itself, and how it is governed by an intervening property holder of where there's property higher here, one in between, and one below. Where they're on a hill, however it would be governed by. In other words, whether—if the intervening water holder, or rather, property owner accepted the top, but it could not be released to the one lower than him and how that would affect the first property holder.

COURT: All right. You all may be excused. Come back about 1:45.

(After lunch recess.)

(IN THE PRESENCE OF THE JURY.)

COURT: Now let me see, members of the jury, if I can answer your question.

Let me remind you that this case is concerned with the rights between Mr. and Mrs. Pendergrast and the Aikens with reference to the Pendergrast property and the Aiken property which lies adjoining and to the south of the Pendergrast property.

All of the evidence in the case tends to show that the property occupied by the Aikens to the north or upstream from the Pendergrast property is not owned by the Aikens, but rather is owned by some other parties whose names were mentioned in the evidence, I don't recall, and the Aikens leased that property from them. So you're concerned with the rights between Pendergrast and his property and the Aikens' property lying adjoining it and to the south.

Now with that in mind, the law confers on the owner of each upper estate, such as the Pendergrast estate with reference to the southerly Aiken estate, an easement or servitude in the lower estate, the Aikens estate, for the drainage of surface waters flowing in its natural course and manner without obstruction or interruption by the

owners of the lower estate to the detriment or injury of the upper estate. Each of the lower parcels along the drainway is servient to those on the higher levels in the sense that each is required to receive and allow passage of the natural flow of the surface water from the higher land. Since the lower property is servient to the upper property, the property located upstream, the lower property is not permitted by law to interrupt or prevent the natural passage of water to the damage or detriment of the upper adjoining landowner.

Now does that answer your question, Mr. Foreman?

FOREMAN: No, sir. Our question really concerns the release of the water from the Aiken property onto Allen Street versus—in other words, if the release of the water onto Allen Street is limited beyond the limitation placed by the Aiken property, how that would affect it.

COURT: Now let me see if I can answer your question. Is your question this: if there is more water coming off of the Aiken property than the Allen Street culverts can handle, how does that affect the lawsuit?

FOREMAN: Yes, sir.

COURT: Speaking about the two twenty-four inch culverts going under Allen Street.

FOREMAN: If the thirty-six inch culvert releases more water than the two twenty-fours will handle, therefore it's backed up because of that, how does that affect it?

COURT: Well, let me say this: now the plaintiffs have the burden of proof on each issue, and the plaintiffs have the burden to prove that by the installation and covering of the thirty-six inch culvert the defendants created a nuisance, and that the creation of that nuisance is what caused the damage to their property.

COURT: Now, if the jury finds that the plaintiffs have failed to prove that the creation—well, first of all they've got to prove there's a nuisance. If you find that they do prove that there's a nuisance, now then if you fail to find that the plaintiffs have satisfied you that they were damaged as a result of the creation of the nuisance, then the plaintiffs cannot prevail. Now if the jury finds that the

plaintiffs' damage is not caused by the creation of a nuisance by the defendant, assuming that you find they have created a nuisance—I don't mean to infer what your verdict should be on that issue, but if you find that the damage was not caused by the creation of a nuisance, but was caused by something further downstream, then the plaintiffs could not recover.

Does that answer your question?

FOREMAN: Yes, sir.

COURT: All right. Here are your papers. (Jury retires to resume their deliberations at 1:56 p.m.)

COUNSEL FOR THE PLAINTIFF WAS GRANTED PERMISSION TO APPROACH THE BENCH, OBJECTS TO THE COURT'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY WHICH OBJECTION IS DENIED BY THE COURT.

MR. TALMAN: EXCEPTION NO. 9

(Jury returns into open court at 2:02)

COURT: Take the verdict, please, in PENDERGRAST v. AIKEN."

We have considered all of plaintiffs' arguments in support of the exception and conclude that plaintiffs have failed to present prejudicial error.

The burden was on plaintiffs to satisfy the jury by the greater weight of the evidence what damages, if any, they sustained by reason of defendants' action. The jury was at liberty to believe all, part or none of the testimony of any witness. It was for the jury to determine what inference could be drawn from any of the evidence and the importance that would be given that evidence. We agree with plaintiffs when they say they offered substantial evidence that would have permitted the jury to answer the issue of damages in some amount favorable to plaintiffs. We cannot agree, however, that the evidence compels such an answer in favor of them, the party with the burden of proof.

Appellate courts should not attempt to second guess the jury and order a new trial merely because they may disagree with the verdict. The judge who tried the case had the discre-

tionary power to set the verdict aside and, in his sound discretion, declined to do so.

It appears that the jury was diligent in its deliberations. Among other things they asked for additional instructions on flooding resulting from an act of God. They had previously been told that "[a] person whose acts joined with an act of God in producing injury is liable therefor." Over defendants' objections they were allowed to take local rainfall charts with them to the jury room. Obviously, plaintiffs were not entitled to recover damages unless the damages were caused by a nuisance created by defendants. When the jury raised the question about the inadequacy of the two 24-inch culverts under Allen Avenue, the judge could not express an opinion on the weight of the evidence in that regard.

Obviously, the jury could not answer the second issue in favor of plaintiffs unless they found that defendants' nuisance was a cause of plaintiffs' loss. That is precisely what the judge told the jury. In an abundance of fairness to plaintiffs, nevertheless, the judge did not rest with that short, but obvious declaration. He repeated much of his earlier charge relating to the duty defendants owed plaintiffs, in an accurate statement of the law as it applied to the evidence in the case being tried.

No error.

Judge BRITT concurs.

Judge MARTIN dissents.

FALLS SALES COMPANY, INC. v. BOARD OF TRANSPORTATION v. ASHEVILLE CONTRACTING COMPANY

No. 7629SC514

(Filed 5 January 1977)

1. Negligence § 5— blasting operations — third-party defendant strictly liable for damages

The contract between defendant Board of Transportation and third-party defendant contractor specified strict liability, regardless of negligence, by the contractor to the Commission for any damages caused by blasting; therefore, allegation and proof of negligence by

defendant in its action for indemnification against the third-party defendant was unnecessary, and third-party defendant's motions for summary judgment and directed verdict were properly denied.

2. **Compromise and Settlement § 3— offer to make repairs — no offer to compromise disputed claim — admissibility of evidence**

In defendant's third-party action against third-party defendant contractor for indemnification for any amount recovered from defendant by plaintiff for blasting damages, the trial court did not err in allowing a witness of defendant to testify regarding third-party defendant's offer to effect certain repairs on plaintiff's property, since there was no claim to be compromised at the time of third-party defendant's offer to make repairs and the statements did not amount to an offer to compromise a disputed claim, and since the testimony was not prejudicial because the defendant was proceeding at all times on the theory of breach of contract and at no point did it claim that the third-party was liable because of negligence.

Judge VAUGHN dissents.

APPEAL by third-party defendant from *Walker (Ralph A.), Judge.* Judgment entered 2 March 1976 in the Superior Court of HENDERSON County. Heard in the Court of Appeals 16 November 1976.

Plaintiff commenced an inverse condemnation proceeding against defendant alleging, among other things, a taking of plaintiff's property by virtue of rocks and boulders being deposited onto plaintiff's land as a result of blasting. Plaintiff contended that damages to a portion of plaintiff's property outside the easement occurred amounting to a condemnation of additional property for which it was entitled to compensation in the amount of $87,500. Defendant filed an answer and a third-party complaint alleging that any damage resulting from blasting was the responsibility of the third-party defendant, the independent contractor employed by defendant to construct the highway, as a result of Sections 7.11 and 7.14 of the specifications contained in the contract between defendant and third-party defendant, and that defendant was entitled to indemnification by third-party defendant for any amount recovered of it by plaintiff for the blasting damages. Sections 7.11 and 7.14 of the contract are as follows:

> "Section 7.11 Use of Explosives. When the use of explosives is necessary for the prosecution of the work, the contractor shall exercise the utmost care not to endanger life or property. The contractor shall be responsible for any and all damage resulting from the use of explosives."

"Section 7.14 Responsibility For Damage Claims. The contractor shall indemnify and save harmless the Commission . . . from all suits, actions, or claims of any character brought because of any injuries or damages received or sustained by any person, persons, or property on account of the operations of the said contract; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of said contractor. . . . "

Third-party defendant moved to dismiss defendant's action against it on the ground that defendant failed to state a claim upon which relief could be granted. The motion was denied. Third-party defendant then filed an answer, and subsequently an amended answer, asserting as defenses that all blasting was performed in a prudent, careful, and accepted manner and was done at the direction of defendant; that indemnification of defendant would amount to unjust enrichment of defendant because third-party defendant would in effect be purchasing an additional right of way from plaintiff for defendant; and that the contract between defendant and third-party defendant was impossible to perform due to defendant's failure to purchase a right of way sufficient for third-party defendant to carry out blasting operations within its boundaries.

Third-party defendant moved for summary judgment and filed an affidavit of Clarence Zeigler, an explosives expert who was hired by third-party defendant to supervise the blasting in question, stating that all methods and procedures used in the blasting operation in question were approved methods and procedures used in the trade and that defendant's inspectors were fully informed as to the procedures to be used in said operation and made no objection to the use of said procedures.

A hearing on the motion was held at which defendant presented testimony of Fred Davidson, engineer for defendant, that after the blasting he and third-party defendant visited the site of the damages and third-party defendant offered to make certain repairs. Third-party defendant objected to admission of this testimony, but the objection was overruled. Third-party defendant's motion for summary judgment was then denied.

At the pre-trial conference, defendant contended there were two issues to be determined at trial while third-party defendant

contended there were six issues to be determined, and all parties expressed their opinions that a separation of issues in the case would not be feasible. The court, however, ordered that the causes be separated and that the action between defendant and third-party defendant be tried first. All parties excepted to this order. Third-party defendant also filed a motion seeking an order restricting defendant from offering evidence of any offer made by third-party defendant to repair any damage caused to plaintiff's property by the blasting because such evidence would constitute evidence of an offer of compromise not admissible under the rules of evidence. This motion was denied.

At trial, defendant presented Fred Davidson who testified that he was the defendant's supervisor of the highway project in question; that his responsibility in regard to the blasting was to stake the area but the actual blasting was the responsibility of the contractor; that neither he nor any of defendant's inspectors is an expert in blasting procedures and they normally assume the contractor is knowledgeable about the blasting he is doing; that after the blasting in question he and third-party defendant investigated plaintiff's complaint about damages and third-party defendant offered to effect certain repairs; and that subsequent to this offer plaintiff instituted his inverse condemnation proceeding against defendant. Bart Bryson, defendant's real estate appraiser, testified as to the actual existtence and the nature and extent of the damage to plaintiff's property from the blasting. Third-party defendant presented Clarence Zeigler who testified regarding use of approved blasting procedures and the failure of defendant to object to those procedures. At the close of the evidence, both defendant and third-party defendant moved for directed verdicts. The court denied third-party defendant's motion and granted defendant's, finding that defendant was entitled to indemnification under the terms of its contract with third-party defendant, and certified its ruling for immediate appeal by third-party defendant.

Third-party defendant appealed and subsequently moved to set aside the verdict and for a new trial, but the motion was denied, from which denial third-party defendant also appeals.

Attorney General Edmisten, by assistant Attorney General Guy A. Hamlin, for the State.

Adams, Hendon & Carson, by George Ward Hendon, for third-party defendant.

MARTIN, Judge.

Third-party defendant contends that its motions to dismiss, for summary judgment and for directed verdict, should have been granted. It argues that defendant was required to allege and offer evidence of negligence on the part of the third-party defendant in order to survive those motions but failed to do so. Further, third-party defendant contends that the responsibility for damages contemplated by Section 7.11 of the contract means only such damage for which the contractor might be held liable due to a breach of due care. Third-party defendant points out that all the evidence establishes conclusively that it exercised the utmost care and since defendant failed to allege negligence, third-party defendant's motions should have been granted. As support for its position, third-party defendant cites *Highway Commission v. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198 (1968) and *Millsaps v. Contracting Company*, 14 N.C. App. 321, 188 S.E. 2d 663 (1972), *cert. denied*, 281 N.C. 623, 190 S.E. 2d 466 (1972). We think those cases are distinguishable from the case at bar.

In *Highway Commission v. Reynolds Co., supra,* the Highway Commission brought action against the contractor (Reynolds) for compensation paid to the owner of a building damaged by the contractor in the construction of a highway for the Commission. The trial court in that case found that the contractor's operations were conducted pursuant to and in accordance with its contract with the Commission and under the supervision of the Commission's resident engineer and two inspectors. The trial court further found as a fact that whatever damage was done to the restaurant building " . . . arose out of the ordinary and customary use [by the contractor] of standard and accepted machinery and road-building equipment used in the work in accordance with standard and accepted methods and techniques in the road construction industry; *that any such damages did not result from blasting operations.*" (Emphasis added.)

In *Reynolds* the court was talking about damages arising from the *ordinary* and *customary* use *of machinery* under the supervision of the Commission's resident engineer. It did not involve blasting damages and this fact was noted in the opinion.

In *Millsaps* the property owner brought suit against the contractor for blasting damages to his property, having previ-

ously recovered from the Highway Commission by condemnation proceedings for the identical damage. The court was concerned with the liability of a contractor to a property owner and not the liability of the contractor to the Board of Transportation. Moreover, there was no mention or discussion of any contract provisions dealing with blasting (Section 7.11 of the Standard Specifications) and liability in connection therewith.

[1] Blasting is an ultrahazardous activity, the results of which are impossible to predict. Thus, the Board should have the right to contract for its protection against an unusual hazard. We hold that the contract between defendant and third-party defendant specifies strict liability, regardless of negligence, by the contractor to the Commission for any damages caused by blasting. See *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900 (1963). Thus, allegation and proof of negligence by defendant in its action against the third-party defendant was unnecessary and third-party defendant's motions to dismiss, for summary judgment and directed verdict were properly denied.

[2] The next question presented by the third-party defendant is whether the court erred in allowing defendant's witness Fred Davidson to testify regarding third-party defendant's offer to effect certain repairs on plaintiff's property. It contends the agreement amounted to an offer to compromise a liability, and that such offers are always excluded in order to encourage the settlement of disputes out of court. In support of this argument third-party defendant cited 2 Stansbury, N. C. Evidence 2d, § 180 (Brandis Rev. 1973).

There was no claim to be compromised at the time of third-party defendant's offer to make repairs and the statements did not amount to an offer to compromise a disputed claim. In addition, the testimony was not prejudicial since the State was proceeding at all times on the theory of breach of contract and at no point did it claim that the third-party was liable because of negligence. Thus, it made no difference what the third-party defendant stated to the plaintiff. Moreover, in ruling on the motion for directed verdict, it is presumed that the judge considered only competent evidence in making his determination. This assignment of error is overruled.

Finally, third-party defendant contends the court abused its discretion in severing the third-party action for trial prior to

the trial of the principal action because a determination as to whether or not plaintiff had in fact sustained damages and to what extent should have been made before the determination as to which party would ultimately bear the responsibility for those damages. In view of the numerous issues contended by third-party defendant to be involved in the third-party action, we hold that the court did not abuse its discretion in severing the third-party action from the principal action, and that the third-party defendant was not prejudiced by the severence since it has had, or will have, its day in court on all issues.

The directed verdict in favor of defendant is

Affirmed.

Judge BRITT concurs.

Judge VAUGHN dissents.

MICHAEL E. MILLER AND CLIFFORD F. MILLER v. BOSTON VON HOUPE, JR., ADMINISTRATOR OF THE ESTATE OF THELMA IRENE DOWELL HOUPE, AND THOMAS LELAND DOWELL

No. 7629SC602

(Filed 5 January 1977)

Automobiles § 73— contributory negligence — insufficiency of evidence

In an action to recover for damages arising from an automobile collision, the trial court erred in submitting to the jury the issue of plaintiff's contributory negligence where there was no evidence that plaintiff was operating his vehicle on the wrong side of the road, or that he was negligent in failing to keep a proper lookout, to keep his truck under control, or to exercise due care to avoid the collision.

Judge CLARK concurring.

APPEAL by plaintiffs from *Lewis, Judge.* Judgment entered 3 March 1976 in Superior Court, McDOWELL County. Heard in Court of Appeals 8 December 1976.

This is a civil action wherein the plaintiffs, Michael E. Miller and Clifford F. Miller, seek to recover damages for personal injuries and medical expenses allegedly resulting from an automobile-truck collision in Iredell County, North Carolina.

At trial the plaintiffs offered evidence tending to show the following:

Rural Public Road 1892, commonly called Jennings Road, runs in a northerly-southerly direction in Iredell County, North Carolina. The two-lane paved road is approximately eighteen feet wide with a center line and has six-foot shoulders on either side. Between 7:00-7:30 a.m. on 14 June 1972, plaintiff Michael E. Miller, 17 years of age, was proceeding north on Jennings Road in a 1972 Ford pickup truck some 12 miles north of Statesville. Just south of a sharp curve to the west (plaintiff's left) his truck collided with a 1972 Chevrolet Impala driven by Thelma Dowell Houpe. (We refer to Mrs. Houpe as the defendant in the remainder of the opinion.) The plaintiff testified as follows:

> "I was driving a four wheel drive half ton Ford pick-up. It was broad daylight and the weather was clear and the shoulders of this road were basically level with the road itself.
>
> As I approached this point where the accident occurred, I was traveling 45 or 50 miles an hour.
>
> The first time I saw this other vehicle that I collided with, it was approximately 10 or 15 feet in front of me. I was traveling when I first saw it at about 45 or 50 miles per hour and that was the first time I had ever noticed this particular vehicle.
>
> There was no traffic behind me on the road and none in front of me in my lane traveling northward. Just before I saw this other car, I had taken my eyes off the road in front of me and checked both of my rear view mirrors to check traffic in the rear. When I looked back in front of me, that's when I saw this other car immediately and the collision ensued then. I had no opportunity to apply my brakes with the car that close.
>
> In that interval of time, I saw this lady doing something with her hair or face.
>
> * * *
>
> When I first saw the car, it was back there in the sharp part of the curve, but, you know, it wasn't doing anything suspicious and I didn't pay any attention to it and

that's when I checked my rear view mirror and the side mirror.

* * *

With reference to the center line of the highway, my car was on the right of the center line going north. The other vehicle, at the time my attention was directed to it, was on my side of the road. As to the distance or portion of the car on my side of the road, about over half of it or three-quarters of the car was on my side of the road.

I was able to see the occupant in the other car. There was one person in the other car.

The last thing I remember before going unconscious was seeing her face in the mirror fixing her hair or face or something as she was coming towards me. She was looking at her face in the mirror. This rear view mirror was located in her car right in the center of the windshield.

When my attention was first called to this car being on my side of the road, I didn't have time to take any action. I tried to hit my brakes and swerve, but it was so quick I didn't have any time to do anything. I tried to swerve to my right which would have been off the road to my side."

Homer Simpson, who witnessed the accident while looking out the window of his mobile home testified:

"From where I was standing I could not tell whether one vehicle or the other was on one side of the road or not. The reason that I couldn't tell, like I said, there was two vehicles meeting and I wasn't expecting an accident and I wasn't paying that close attention, but it just looked like normal traffic. It wasn't too far away.

In other words, I simply didn't have my mind directed toward such things as what side of the road they were on and things of that nature."

Plaintiff's truck came to rest on the shoulder of the northbound lane facing south. Defendant's car came to rest in the northbound lane facing back towards the north. There was a concentration of dirt, debris, glass, oil and anti-freeze in the vicinity of the two cars just east of the center line or in the northbound lane.

Defendant offered no evidence.

The jury found that plaintiffs' injuries and expenses were caused by the negligence of defendant, and that plaintiff Michael E. Miller by his own negligence contributed to his injuries. From a judgment on the verdict, plaintiffs appealed.

McQuire, Wood, Erwin & Crow by James P. Erwin and Charles R. Worley for plaintiff appellants.

Morris, Golding, Blue and Phillips by James F. Blue III for defendant appellees.

HEDRICK, Judge.

Plaintiff contends the court erred in submitting to the jury the issue of contributory negligence.

Defendants argue that the physical evidence at the scene of the collision when considered with the testimony of the plaintiff and the witness Simpson and when considered in the light most favorable to the defendants, as must be done in this case, *Anderson v. Butler,* 284 N.C. 723, 202 S.E. 2d 585 (1974), is sufficient to support a finding by the jury that at least a portion of plaintiff's truck was being operated on the west side of the road in defendant's lane at the time of the accident. We do not agree. No construction of the evidence will permit a finding that any portion of the truck being operated by plaintiff ever crossed over the center line into defendant's lane. All of the evidence tends to show that the collision occurred on the east side of the road.

Defendants contend the evidence is sufficient to raise an inference that plaintiff was negligent in that he failed to keep a proper lookout, failed to keep his truck under control, and failed to exercise due care to avoid the collision. In their brief defendants' state:

> "Under all the evidence concerning the physical layout of the scene, the width of the road, the shoulders and the vehicles, and the photographs, exhibits and diagram, there is ample evidence from which the jury could infer and find, even if it believed that the Houpe vehicle was completely in the wrong lane, that the appellant Michael Miller could have seen it there, had he been keeping a lookout and seen what there was to see, at a time when

under all the circumstances and the exercise of due care and control of his vehicle, he could have taken the necessary evasive action to avoid colliding with the other vehicle."

The foregoing statement is untenable simply because there is no evidence in this record from which the jury could find that any act or omission upon the part of the plaintiff was a proximate cause of the collision. This is true because there is no evidence in the record as to where the two vehicles were in relation to each other when defendant's automobile crossed over the center line into the northbound lane or plaintiff's lane of the road. From the evidence in the record the jury could only speculate as to whether plaintiff should have seen defendant's automobile on the wrong side of the road in his lane in time to have taken any action to avoid the collision. We hold the court erred in submitting the issue of contributory negligence to the jury.

Plaintiffs have additional assignments of error concerning the admission of testimony at trial and the charge to the jury, but since we remand the case to the superior court for a new trial on all the issues, *Robertson v. Stanley,* 285 N.C. 561, 206 S.E. 2d 190 (1974), we need not discuss these assignments of error.

Reversed and remanded.

Judge PARKER concurs.

Judge CLARK concurs in result.

Judge CLARK concurring:

I concur in the result, but I do not agree that there was not sufficient evidence to justify the submission of the contributory negligence issue to the jury. It appears from the evidence that after seeing the defendant's vehicle approaching around a curve the plaintiff ceased looking ahead and looked in two rearview mirrors (first the one inside the cab and then the one outside the cab) before again looking in the direction of his travel. The evidence was sufficient to justify the submission of the contributory negligence issue to the jury. The jury could have found that if plaintiff had maintained a rea-

sonable lookout ahead he should have seen the oncoming vehicle when it approached and entered his traffic lane and by proper control could have avoided the collision.

I agree there was no evidence that plaintiff's vehicle was across the center of the highway, and therefore the trial court erred in instructing the jury that it could find plaintiff contributorily negligent in failing to yield one-half of the traveled portion of the highway to defendant's oncoming vehicle. The evidence does not disclose the distance of defendant's vehicle across the center of the highway.

BETTY H. SMITH, PLAINTIFF v. MILLIE BARBOUR GARRETT, ADMINISTRATRIX OF THE ESTATE OF ROBERT LOUIS GARRETT, DEFENDANT AND THIRD-PARTY PLAINTIFF v. JUANITA SMITH BURNS, THIRD-PARTY DEFENDANT

JUANITA SMITH BURNS, PLAINTIFF v. MILLIE BARBOUR GARRETT, ADMINISTRATRIX OF THE ESTATE OF ROBERT LOUIS GARRETT, DEFENDANT

No. 7614SC533

(Filed 5 January 1977)

1. **Automobiles § 72— sudden incapacitation of driver — burden of proof — directed verdict improper**

In an action to recover damages arising from an automobile collision, the trial court erred in granting defendant's motion for a directed verdict where plaintiffs presented evidence that established a *prima facie* case of negligence on the part of defendant's intestate; defendant countered with testimony aimed at establishing the affirmative defense of sudden incapacitation; such testimony consisted of defendant's (the deceased driver's wife) statements; the credibility of this witness was for the jury; and a question of fact as to when deceased driver had his heart seizure arose from the evidence.

2. **Automobiles § 72— sudden emergency — behavior of driver confronted with — sufficiency of evidence of negligence**

In an action for damages arising out of an automobile accident where defendant instituted a third-party action against an alleged joint tort-feasor, the trial court erred in directing verdict for the third-party defendant where there was evidence from which the jury could conclude that prior to impact the third-party defendant saw the third-party plaintiff's car weaving but failed to take action to avoid the collision, and that after impact the third-party defendant, by failing to brake or otherwise control her car, did not exercise the reasonable care of an ordinarily prudent person under similar circumstances.

Smith v. Garrett and Burns v. Garrett

APPEAL by plaintiffs and third-party plaintiff from *Preston, Judge.* Judgment entered 14 November 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 November 1976.

These are two civil actions to recover for personal injuries resulting from one automobile collision. One action was instituted by Juanita Smith Burns, the driver of one car, against the estate of Robert Louis Garrett, the driver of the second car. The second action, filed simultaneously with the first, was brought by Betty H. Smith, a passenger in the Burns car, against the estate of Garrett. In the Smith (passenger) action the administratrix of the Garrett estate brought a third-party action against Burns alleging concurrent negligence on the part of Burns and therefore entitlement to contribution.

Plaintiffs' evidence tended to show that on 8 October 1972 plaintiff Burns was driving her car on the inside lane of the two southbound lanes of Horner Boulevard in Sanford. The deceased was proceeding in the outside lane approximately alongside of the Burns car. Deceased's wife, the defendant administratrix, was beside the deceased in the passenger seat. The deceased's car veered into the inside lane, the left rear of his car colliding with the right front of the Burns car. Upon and immediately after the collision, both cars veered diagonally across the two northbound lanes of Horner Boulevard and down an embankment where the Burns car struck a tree.

One of plaintiffs' witnesses, a passenger in the back seat of the Burns car, testified that just prior to the accident, he noticed the Garrett car weave slightly in its lane and then suddenly veer into the inside lane, at which time it collided with the plaintiff's vehicle. That witness testified that immediately at or after the impact, the deceased slumped over the steering wheel of his car. Another of plaintiffs' witnesses, Everette C. Williams, testified that he was driving thirty to forty yards to the rear of the Burns and Garrett vehicles. He testified that prior to the accident, both cars were proceeding in their proper lanes. Suddenly the Garrett car veered into the Burns car. Williams further testified that he did not see the Garrett car weave nor see Mr. Garrett slump over the wheel.

The defendant's evidence, through the testimony of Mrs. Garrett, tended to show that just prior to the collision, the deceased's right hand dropped from the wheel and his head jerked

back. He blinked twice and lost consciousness. He then slumped forward over the wheel with is left arm caught in the wheel. At this point the car veered to the left, despite Mrs. Garrett's attempt to gain control, and collided with the Burns car. Further testimony for the defendant showed that when the rescue squad attendant reached Mr. Garrett, he could find no pulse. Cardiac massage and mouth-to-mouth resuscitation were to no avail, and Mr. Garrett was pronounced dead on arrival at the hospital. There was testimony to the effect that prior to the accident, Mr. Garrett had been in good health and had no history of heart ailments.

At the close of plaintiffs' evidence and again at the close of all evidence, defendant moved for a directed verdict pursuant to Rule 50. Third-party defendant Burns also moved for a directed verdict on the defendant's claim for contribution. Both motions were granted by the trial court. Plaintiffs and third-party plaintiff appealed.

Moore & Keith, by Thomas W. Moore, Jr., for plaintiff Burns.

Badgett, Calaway, Phillips & Davis, by Richard G. Badgett; and Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for plaintiff Smith.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by James L. Newsom; and Bryant, Bryant, Drew & Crill, by Victor S. Bryant, Jr., for the defendant and third-party plaintiff.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., and J. G. Billings, for the third-party defendant.

BROCK, Chief Judge.

APPEAL OF PLAINTIFFS

[1] Plaintiffs argue that the court erred in granting the defendant's motion for a directed verdict. We agree. At trial the plaintiffs presented evidence that established a *prima facie* case of negligence on the part of the deceased. Thus, with no further showings, plaintiffs would be entitled to go to the jury.

In this case defendant countered with testimony aimed at establishing the affirmative defense of sudden incapacitation. In North Carolina the burden is on the party asserting sudden

incapacitation to prove the defense by the greater weight of the evidence. *Wallace v. Johnson,* 11 N.C. App. 703, 182 S.E. 2d 193 (1971). In *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), the North Carolina Supreme Court held improper the direction of a verdict in favor of the party with the burden of proof where that party's right to a judgment depends upon the credibility of his witnesses.

In the instant case the testimony of Mrs. Garrett as to when the sudden seizure occurred is an essential cog in establishing the affirmative defense. As the wife of the deceased and named defendant in the lawsuit, her credibility is definitely in issue. She argues that since her testimony was uncontradicted, it was positive evidence conclusively establishing the sudden incapacitation. This argument is not persuasive. "It is quite clear, however, that . . . evidence is not necessarily conclusive because it is uncontradicted. It is still for the jury if reasonable men may differ as to its truth or if conflicting inferences may reasonably be drawn from it." *Cutts v. Casey, supra* at 421.

As stated above, the credibility of Mrs. Garrett and her testimony is for the jury. Further, a question of fact is apparent from the record. Defendant's evidence shows that seizure occurred first, thereby causing the accident. If the jury believes this evidence and defendant's other evidence concerning the prior good health of the deceased, the logical inference is sudden incapacitation. Plaintiffs, however, offered evidence tending to show that the deceased was suddenly seized at or just after impact. If believed by the jury, this evidence could lead to the equally plausible inference that the accident was caused by the negligence of the deceased and that the sudden trauma of the impact induced his seizure. The resolution of this question of fact along with the credibility of the moving party were for the jury to determine; therefore, the directed verdict for defendant must be reversed.

APPEAL OF THIRD-PARTY PLAINTIFF

[2] In her third-party complaint the defendant, Mrs. Garrett, alleged that Burns was concurrently negligent in that:

> " . . . she operated said vehicle at a speed which was greater than reasonable or prudent under the conditions then existing in violation of General Statutes Section 20-141; she operated said vehicle without keeping a reasonable and

proper lookout; she failed to keep her said vehicle under reasonable and proper control; although she had ample opportunity to do so, and although she knew or, in the exercise of reasonable care should have known, of the risk of a collision and the necessity to take reasonable action to avoid the same, she nevertheless failed to slow her vehicle, or to turn it aside, or to take any other action whatever, as she could and should have done, to keep her said vehicle under control and to avoid a collision."

She argues that the trial court erred in directing a verdict for third-party defendant Burns in that there was sufficient evidence from which Burns' negligence could be inferred. We agree.

Plaintiff Smith chose not to sue Burns. Chapter 1B of the General Statutes authorizes contribution from a joint tort-feasor. Under G.S. 1A-1, Rule 14, the proper method to join an alleged tort-feasor is by third-party complaint, as was done here. The relationship between the original defendant and additional defendants is the same as under the former statute, G.S. 1-240. "The original defendants are as to the new defendants, plaintiffs, and as such required to establish their right of action." *Norris v. Johnson*, 246 N.C. 179, 182, 97 S.E. 2d 773, 775 (1957). Thus the burden of proof is on Garrett as third-party plaintiff to prove the concurring negligence of Burns as third-party defendant by the greater weight of the evidence.

In this light Burns' motion for a directed verdict is one against the party with the burden of proof. The evidence must therefore be considered in the light most favorable to Garrett with all reasonable inferences therefrom drawn in her favor. *Jones v. Development Co.*, 16 N.C. App. 80, 191 S.E. 2d 435 (1972). As third-party defendant, Burns argues that Garrett introduced no evidence showing negligence on the part of Burns. The scope of evidence that can be considered, however, includes not only the plaintiff's evidence but also that presented by the defendant to the extent it clarifies the plaintiff's case. *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972).

From the record it is apparent that the following facts were evinced through direct and cross-examination of Burns and other of plaintiffs' witnesses. Burns, through interrogatories, indicated that immediately before the collision, she noticed the Garrett car weaving. Both cars were travelling between 20 and 30 miles per hour. Plaintiffs' witness Williams testified that both

cars were travelling side by side until the Garrett car veered into Burns' lane. Further, plaintiffs' pleadings and evidence show that their injuries occurred not at the impact with the Garrett car but from the subsequent battering as their vehicle jumped a curb, proceeded down an embankment, and impacted against a tree. Plaintiffs' witness Williams noticed no skid marks on any part of the road traversed by the vehicles. Plaintiffs' witness Hall recalled no sounds of tires skidding or squealing. Burns could not recall braking her vehicle. From the point of impact on the boulevard to where the Burns car came to rest was 106 feet.

From these facts, taken in the light most favorable to the third-party plaintiff, there is sufficient evidence for the jury to infer negligence on the part of Burns. A jury could logically conclude that prior to impact, Burns had the opportunity and did in fact observe the Garrett car weaving and that she failed to take any action that a prudent person under the circumstances would have taken to compensate for the distress of the Garrett vehicle and to avoid the collision. Further, the jury could logically conclude that after impact, Burns, by failing to brake or otherwise control her car, did not exercise the reasonable care of an ordinarily prudent person under similar circumstances. Directed verdict for the third-party defendant was thus improper.

The directed verdicts for both defendant Garrett and third-party defendant Burns are reversed. This cause is remanded for a new trial.

New trial.

Judges PARKER and HEDRICK concur.

IN THE MATTER OF MELINDA REGINA DRAKEFORD

No. 7626DC566

(Filed 5 January 1977)

1. Constitutional Law § 34; Criminal Law § 26; Infants § 10— successive juvenile proceedings — double jeopardy

The constitutional prohibition against double jeopardy applies to successive juvenile proceedings.

2. Criminal Law § 26— test of double jeopardy

The test of former jeopardy is not whether defendant has been tried for the same *act,* but whether he has been put in jeopardy for the same *offense.*

3. Criminal Law § 26; Infants § 10— juvenile petitions — acquittal of assault — conviction of affray — double jeopardy

Where a juvenile delinquency petition alleging that respondent assaulted a fellow student on board a school bus with a razor blade in violation of G.S. 14-33(b)(1) was dismissed for lack of evidence, respondent was twice put in jeopardy for the same offense when she was adjudicated delinquent upon a subsequent petition based on the same incident alleging that she committed an affray in violation of G.S. 14-33(a) by assaulting a fellow student on board a school bus with a razor blade, since the assault was an essential element of the affray charge, and respondent's acquittal on the assault charge barred further petitions based on that charge.

APPEAL by respondent from adjudicatory order of 27 January 1976 by *Black, Judge,* and dispositive order of 11 February 1976 by *Hasty, Judge.* Both orders entered in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 November 1976.

On 6 November 1975, a petition was filed alleging that Melinda Regina Drakeford (hereinafter called "respondent") was a delinquent child as defined by G.S. 7A-278(2) and that on 20 October 1975, she assaulted a fellow student with a razor blade in violation of G.S. 14-33(b)1. The alleged incident took place while respondent was aboard a school bus en route to her junior high school. At a hearing on 25 November 1976, the petition was dismissed for lack of sufficient evidence.

Also on 25 November 1976, another petition was filed against respondent, alleging that on 20 October 1975 she committed an affray in violation of G.S. 14-33(a) by assaulting a fellow student on board the school bus with a razor blade. Respondent filed a plea of former jeopardy, and on 27 January 1976, a hearing on the second petition was held. The court denied respondent's motion of former jeopardy and found " . . . that the juvenile did in fact beyond a reasonable doubt make an affray to the terror and disturbance of other students . . . and adjudicate[d] respondent delinquent by reason thereof." On 11 February, the district court ordered that respondent be placed on probation for one year upon certain conditions.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

Mecklenburg Public Defender Michael S. Scofield, by Assistant Public Defender James Fitzgerald, for respondent appellant.

MORRIS, Judge.

In the sole assignment of error brought forward in her brief, respondent claims that the trial judge erred in denying her motion to dismiss. She contends that the assault charge in the initial juvenile petition was an essential element in the affray alleged in the subsequent petition and that, therefore, her plea of former jeopardy should have been sustained.

[1] The issue of whether the constitutional prohibition against double jeopardy applies to successive juvenile proceedings is a question of first impression in this jurisdiction. Traditionally, juvenile proceedings instituted pursuant to G.S. 7A-277, et seq., have not been considered to be synonymous with criminal trials. "Whatever may be their proper classification, they [juvenile proceedings] certainly are not 'criminal prosecutions'. Nor is a finding of delinquency in a juvenile proceeding synonymous with 'conviction of a crime'." *In re Burrus,* 275 N.C. 517, 529, 169 S.E. 2d 879, 886-87 (1969), *aff'd. sub. nom., McKeiver v. Penn.,* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971). Thus, while minors may not be totally deprived of certain due process rights in juvenile proceedings, *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967), the full gamut of constitutional guarantees has never been required. Our Supreme Court has held, for instance, that a public hearing and a jury trial are not required by the Constitution in juvenile actions. *In re Burrus, supra.* Similarly, other jurisdictions, adopting the traditional notion that juvenile proceedings are dissimilar to criminal prosecutions, have held that juvenile proceedings are not "jeopardy" and therefore cannot create problems with regard to double jeopardy. See, e.g., *Moquin v. State,* 216 Md. 524, 140 A. 2d 914 (1957).

We find the recent case of *Breed v. Jones,* 421 U.S. 519, 44 L.Ed. 2d 346, 95 S.Ct. 1779 (1975), to be particularly analogous to the case *sub judice.* There a petition was filed in the juvenile courts of California alleging that respondent Jones had committed acts which, if committed by an adult, would

constitute robbery under California law. A hearing was held on the matter, and the juvenile court sustained the allegations in the petition. Respondent, however, was subsequently found to be unfit for treatment as a juvenile, prosecuted as an adult and found guilty of robbery. He filed a petition of habeas corpus, claiming that the trial of his case as an adult placed him twice in jeopardy for the same offense. The District Court denied the petition, but the Ninth Circuit Court of Appeals reversed, holding that jeopardy had attached in the juvenile proceedings. *Breed v. Jones,* 497 F. 2d 1160 (9th Cir. 1974). On certiorari, the Supreme Court held that the adjudication in juvenile court constituted a trial so as to establish double jeopardy in a subsequent adult trial for the same offense. In holding that the juvenile adjudicatory proceeding was sufficiently similar to a trial for the purposes of jeopardy, the Court discussed traditionally-held notions regarding juvenile proceedings.

> "Although the juvenile court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions. *In re Gault,* 387 U.S. 1 (1967); *In re Winship,* 397 U.S. 358 (1970). . . .
>
> We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings,' *In re Gault, supra,* at 50, and that 'the juvenile process . . . be candidly appraised.' 387 U.S.,

at 21. See *In re Winship, supra,* at 365-366." 421 U.S. at 528-29, 44 L.Ed. 2d at 355, 95 S.Ct. at 1785.

[1] Although the Supreme Court in *Breed* was concerned with a juvenile proceeding followed by an adult trial, the rule of the case is based on the determination that jeopardy attached to the initial juvenile proceeding. Therefore, the principle is equally applicable where, as here, one juvenile action is followed by another.

Juvenile proceedings in North Carolina do more than merely determine the delinquency of the minor; they may result in severe curtailment of his freedom and, in some cases, in institutional commitment. Although we do not obliterate all distinctions between juvenile proceedings and criminal prosecutions, we believe, and so hold, that they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attached to the initial petition once an adjudicatory hearing on the merits was held. We must now consider whether the adjudication on the subsequent petition twice put respondent in jeopardy for the same offense.

G.S. 14-33(b), which formed the basis for the initial juvenile petition, provides:

> "Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:
>
> (1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon . . . "

After this petition was dismissed for lack of sufficient evidence, the second petition was filed. It was based on G.S. 14-33(a) which states:

> "Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days."

An affray is defined by the common law as a fight between two or more persons in a public place so as to cause terror to the people. *State v. Huntley,* 25 N.C. 418 (1843); 2A C.J.S., Affray, § 2, p. 518. Any party charged with an affray may be charged with the lesser included offense of an assault. *State v. Wilson,* 61 N.C. 237 (1867).

The initial petition alleged that on 20 October 1975 respondent

> " . . . did unlawfully and wilfully assault Mamie Hicklin (who was aboard school bus # 509 for Carmel Rd. Jr. High) with a razor blade, a deadly weapon, by cutting her on the left side of her face from the forehead to the bottom of her chin. Mamie Hicklin required treatment at Charlotte Memorial Hospital."

The second petition against respondent alleged that on 20 October 1975 she

> " . . . did unlawfully and wilfully make an affray to the terror and disturbance of other students on school bus # 509, a public school bus which was stopped on a public street. At such public place the child and Mamie Hicklin did assault each other, to wit: Melinda cut Mamie Hicklin on the left side of her face from the forehead to the bottom of her chin with a razor blade, causing her to receive treatment of Charlotte Memorial Hospital."

[2] It is obvious that both petitions arose from the same incident. This does not, however, automatically require a finding that jeopardy has twice attached. The test of former jeopardy is not whether respondent has been tried for the same *act,* but whether he has been put in jeopardy for the same *offense. State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Anderson,* 9 N.C. App. 146, 175 S.E. 2d 729 (1970). The offenses must be the same both in fact and in law. *State v. McIntosh,* 260 N.C. 749, 133 S.E. 2d 652 (1963), *cert. den.,* 377 U.S. 939, 12 L.Ed. 2d 302, 84 S.Ct. 1345 (1964).

A situation similar to the one at hand was presented in *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967). There, the defendant was convicted on two indictments. The first charged him with assault with a deadly weapon with intent to kill inflicting serious bodily injuries not resulting in death. It arose out of an incident on 25 June 1966 in which police

officer W. I. Robertson was shot with a .22 calibre pistol. Defendant was charged in the second indictment with resisting, delaying and obstructing a public officer in the discharge of his duty by firing at W. I. Robertson with a .22 calibre pistol on 25 June 1966. Our Supreme Court arrested judgment on the second indictment, stating:

> "By the allegations it elects to make in an indictment, the State may make one offense an essential element of another, though it is not inherently so, as where an indictment for murder charges that the murder was committed in the perpetration of a robbery. In such case, a showing that the defendant has been previously convicted, or acquitted, of the robbery so charged will bar his prosecution under the murder indictment. . . . " 270 N.C. at 233, 154 S.E. 2d at 70.

The Court then held that since defendant could not be convicted upon the charge of resisting a public officer without first being convicted on the assault charge, the judgment on the greater charge must be arrested.

[3] In the case *sub judice,* the affray charge upon which respondent was convicted had as an essential element the assault charge which had been dismissed for lack of evidence. Consequently, respondent's acquittal on the assault charge barred further petitions based on that charge. We believe, therefore, that respondent was twice put in jeopardy for the same offense and that the trial judge erred in failing to dismiss the petition of 25 November 1975.

For the reasons stated above, the judgment is vacated and the cause remanded for entry of order dismissing the petition.

Vacated and remanded.

Judges CLARK and ARNOLD concur.

BOYD J. BIDDIX AND MARY I. BIDDIX v. KELLAR CONSTRUCTION CORPORATION AND JERRY KELLAR

No. 7627SC582

(Filed 5 January 1977)

1. **Rules of Civil Procedure §§ 12, 56— judgment on pleadings — summary judgment**

A judgment was not a judgment on the pleadings and must be considered as a summary judgment where the court considered matters outside the pleadings. G.S. 1A-1, Rules 12(c) and 56.

2. **Courts § 9; Rules of Civil Procedure § 56— denial of summary judgment — subsequent allowance by another judge**

In a breach of contract action in which defendant pled a release as a plea in bar, a superior court judge erred in entering summary judgment for defendants based on the pleadings and affidavits where another superior court judge had previously denied motions of both parties for summary judgment, since ordinarily one superior court judge may not modify, overrule or change the judgment of another superior court judge in the same action.

APPEAL by plaintiffs from *Kirby, Judge.* Judgment entered 8 June 1976 in Superior Court, GASTON County. Heard in the Court of Appeals 7 December 1976.

This is an action for breach of contract, allegations of the complaint being summarized in pertinent part as follows:

On 31 January 1972 plaintiffs and the corporate defendant entered into a written contract whereby said defendant agreed to construct on certain lands belonging to plaintiffs a dwelling house according to plans and specifications prepared by defendants. Under the agreement plaintiffs agreed to pay defendants $23,600, said amount to be provided by a loan guaranteed by the Veterans Administration which defendants would help obtain.

On 31 January 1972, in a written supplement to said contract, defendants agreed that they would begin construction of said house within 60 days from the date plaintiffs' loan was approved by the Veterans Administration and that the house would be completed within six months from the date of said agreement.

On 12 April 1972 the Veterans Administration issued a commitment for a said loan, the loan to be payable over a period of thirty years at an interest rate of 7 percent per annum on a direct reduction basis.

Defendants did not complete the construction of said house until December 1973. On 12 November 1973 the allowable interest rates for Veterans Administration loans was increased from 7 percent to 8.50 percent per annum. By reason of defendants' breach of contract, the amount of interest plaintiffs will be required to pay will be $8,802 more than they would have been required to pay if the house had been completed within the time agreed and plaintiffs had obtained the 7 percent interest rate.

Plaintiffs asked for judgment in the sum of $8,802 plus interest from the date of judgment. They also demanded trial by jury.

Defendants filed answer admitting the execution of the original agreement on 31 January 1972 but denying all other material allegations of the complaint. As a third defense defendants alleged that on or about 7 February 1974 plaintiffs executed a release which completely discharged defendants from all further liability in connection with the construction of said house. The text of the release was set forth as an exhibit to, and by reference made a part of, the answer.

In a reply to defendants' further defense pleading the release, plaintiffs alleged that the purported release was never legally executed for the reason that the signatures of plaintiffs were procured by fraud, coercion and overreaching by the individual defendant; that their execution of the document was without consideration; and that the document did not even purport to release the corporate defendant from liability.

On 24 July 1974 defendants, pursuant to G.S. 1A-1, Rule 56, moved for summary judgment for the reason that the pleadings show that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

On 28 August 1974 plaintiffs moved for summary judgment pursuant to Rule 56 and supported their motion with affidavits of plaintiffs and other documents including their version of the purported release. On 2 April 1975 the affidavit of the individual defendant was filed and this affidavit included by reference the answer filed by defendants including their version of the purported release.

On 4 April 1975 Judge Winner, following a hearing on the motions for summary judgment, entered an order denying both motions. Plaintiffs excepted to the part of the order denying

their motion and defendants excepted to the part denying their motion.

The cause came on for hearing at the 23 June 1975 Civil Session before Judge Kirby on the "plea in bar" raised by the third defense in defendants' answer. The parties stipulated that the court "could render decision in term or out of term and in the district or out of the district."

On 8 June 1976 Judge Kirby entered a judgment which included the following findings of fact and conclusions of law:

"2. That the plaintiffs and the defendant, Kellar Construction Corporation entered into a contract to build a certain house upon certain property owned by the plaintiffs which contract was fulfilled by and on behalf of the defendant corporation.

"3. That pursuant to the construction of the aforesaid house, the plaintiffs herein secured a construction loan with Citizens National Bank in Gastonia, North Carolina and permanent loan financing with Aiken-Speir, Inc. and guaranteed by the Veterans Administration of the United States.

"4. That prior to the closing of the permanent loan, the defendant corporation requested the plaintiffs herein to sign a general release releasing each and everyone of the parties defendant from any and all obligations or demands growing out of the building construction and any other matter or thing whatsoever arising between them.

"5. That on or about February 7, 1974 the plaintiffs appeared with their counsel, Basil L. Whitener, at the law offices of W. N. Puett from (sic) Gastonia, North Carolina at which the loan papers were executed. Pursuant to the aforesaid loan closing agreement the defendants tendered to the plaintiffs a certain release agreement for their signature as part and parcel of the loan closing and advised each of the plaintiffs together with their attorney of the contents therein.

"6. That each of the plaintiffs together with their attorney indicated that they understood and recognized the contents of the aforesaid release and the same was being executed without any duress, express or implied, and was

the free and voluntary act and will of each of the plaintiffs and that the aforesaid release had been pleaded in bar by the defendants herein as a bar to the plaintiffs' cause of action bars the plaintiffs in this cause.

"7. That the aforesaid release was understood by each of the plaintiffs and was further explained to them by their attorney and was signed by each of them with the advice and consent of their attorney.

"8. That no undue pressure was brought by or on behalf of the defendants or either of them upon the plaintiffs, either express or implied, and that the aforesaid release was the free voluntary act and will of each of the plaintiffs.

"9. That adequate consideration for the release passed by and between the plaintiffs and defendants and that the release in all respects bars the plaintiffs' cause."

The court adjudged "[t]hat the plaintiff have and recover nothing by reason of their complaint and that the release executed by them was their free and voluntary acts and wills and is an absolute bar to any recoveries that they seek growing out of any transaction between the plaintiffs and the defendants herein."

Plaintiffs excepted to and appealed from Judge Kirby's judgment.

Basil L. Whitener and Anne M. Lamm for plaintiff appellants.

Jeffrey M. Guller for defendant appellees.

BRITT, Judge.

To clarify the record as to what was submitted to Judge Kirby for determination, the parties have filed a stipulation in this court stating that the judgment appealed from "is based on the plea in bar raised by the third defense in defendants' answer." Thus, it is now clear that jury trial was not waived by plaintiffs and that Judge Kirby did not make a determination of the cause on the merits.

That being true, we must determine procedurally the effect of this "plea in bar" under the new Rules of Civil Procedure.

G.S. 1A-1, Rule 7(c) provides that: "Demurrers, pleas, etc., abolished. Demurrers, pleas, and exceptions for insufficiency shall not be used." As stated in 2A Moore's Federal Practice § 7.06 (2d ed. 1975):

> "Demurrers and common law pleas cannot be used to raise the legal insufficiency of a pleading. The method of attacking the sufficiency of a pleading or presenting other defenses or objections is prescribed in Rule 12, and discussed thereunder. . . . The defense or objection should be treated for what it would be worth if it had been accurately denominated as a motion for certain relief. . . . "

Under Rule 8, a release is an affirmative defense that must be set forth by a party wishing to rely on it. In their answer, defendants pled the release as a "plea in bar" to plaintiffs' action.

[1] On its face, the judgment appealed from appears to be a judgment on the pleadings under G.S. 1A-1, Rule 12(c). However, that rule states that:

> " . . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . . "

The "findings of fact" entered by Judge Kirby could not have been based solely on the pleadings since the "facts found" are not fully substantiated by the pleadings. For example, finding of fact number 6 is almost an exact quote from the individual defendant's affidavit. Since the trial judge considered matters outside the pleadings, his action must be treated as summary judgment pursuant to Rule 56.

[2] It was improper for Judge Kirby to treat either motion as one for summary judgment because it is well established in North Carolina that no appeal lies from one superior court judge to another, and ordinarily one superior court judge may not modify, overrule, or change the judgment of another superior court judge made in the same action. 2 Strong, N. C. Index 2d, Courts § 9; *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972); *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971). Judge Winner had previously denied both parties' motions for summary judgment. Therefore, Judge Kirby erred when he entered judgment for defendants based on the pleadings and affi-

davits introduced since this was a reversal of Judge Winner's previous denial of summary judgment. Furthermore, some of the "facts" found by Judge Kirby were controverted.

It appears that all parties would like to have a determination by this court as to whether the alleged release, as a matter of law, bars plaintiffs' action. Among the reasons why we do not attempt to reach this question is that plaintiffs' version of the alleged release materially differs from defendants' version. The document that is made a part of defendants' answer states that it is made by "Jerry L. Kellar, doing business as Kellar Construction Company," and at no place mentions the corporate defendant. On the other hand, the document made a part of the affidavits of plaintiffs states that it was made by "Jerry L. Kellar, President of Kellar Construction Corp."; at no place is Jerry Kellar, individually, referred to. Thus, there could be a question of fact as to which of the defendants, if either, is entitled to any protection the release might afford.

For the reasons stated, the judgment appealed from is reversed and this cause is remanded for further proceedings.

Reversed and remanded.

Judges VAUGHN and MARTIN concur.

WILLIAM ANDY WHITT v. TIMA (A/K/A TINA) McFADDEN WHITT

No. 7618DC501

(Filed 5 January 1977)

1. **Husband and Wife § 12— separation agreement — executory provisions**

"Executory provisions" of a separation agreement are those provisions which require a spouse to do some future act in accordance with the terms of the agreement, such as to pay alimony and child support, and one spouse may not transform a provision in a separation agreement which is otherwise fully executed into an executory provision merely by fraudulently avoiding compliance with the executed covenant.

2. **Husband and Wife § 12— separation agreement — breach of duty to convey property — effect of reconciliation**

Where a separation agreement required plaintiff to convey two tracts of realty to defendant and defendant to convey to plaintiff her

interest in all other land held by the entirety, and plaintiff effectively transferred the two tracts to defendant but defendant refused to sign two of the deeds conveying her interest in entirety property to plaintiff, the provision requiring defendant to convey property to plaintiff was not executory, defendant's failure to sign the deeds was a breach of an executed contract, and defendant's duty to convey was therefore not voided by the subsequent reconciliation of the parties.

APPEAL by defendant from *Fowler, Judge.* Judgment entered 16 April 1976 in District Court, GUILFORD County. Heard in the Court of Appeals 21 October 1976.

This is an action for specific performance brought by plaintiff husband to compel defendant wife to convey certain properties to him pursuant to a separation agreement. The case was submitted upon facts stipulated by both parties and was tried by a judge sitting without a jury. The stipulated facts are summarized as follows. In the spring of 1970, defendant moved out of the marital bedroom into a separate bedroom subsequently shared by one of the children of the marriage. For some months thereafter, plaintiff and defendant discussed a permanent separation and the terms of a separation agreement and property settlement. These discussions resulted in a conference with an attorney in which plaintiff and defendant reached a tentative, oral agreement regarding the property settlement. The agreement provided, *inter alia,* that plaintiff was to convey two tracts of real property to defendant, and in return, defendant was to convey all other land previously held by the entirety.

On 15 August 1970, plaintiff and defendant again met with their attorney to sign the necessary documents. The deed of separation provided, *inter alia,* that:

> "Tima McFadden Whitt, party of the second part, does hereby agree to convey to the said William Andy Whitt, party of the first part, all other lands heretofore owned by said parties as tenants by the entirety."

The attorney discussed the instruments he had prepared so that plaintiff and defendant would each understand the effects of the documents. They then went to the Guilford County Magistrate's Office where plaintiff, after discussing the terms of the settlement with the magistrate, signed the deed of separation and all deeds pursuant thereto. The magistrate then administered a privy examination of defendant in the absence of

plaintiff and the attorney. Plaintiff was called back into the room where he observed defendant sign the deed of separation and what he assumed to be all of the deeds. Shortly thereafter, plaintiff discovered that defendant had not signed two of the deeds which had been prepared and presented to her for signature. That evening, plaintiff asked defendant to sign the remaining deeds. Although she initially agreed to sign, she subsequently refused to do so.

Defendant purchased a house trailer and had it placed on land which she received as part of her property settlement with plaintiff. Beginning in early August 1970, defendant resided in her trailer and kept custody of three of her children pursuant to the separation agreement. In December of that year, shortly before Christmas, defendant returned to her former residence, and she and plaintiff lived together again for approximately two years. Then, in January 1973, defendant moved back to the trailer and since 3 March 1973 has not returned to or lived in plaintiff's residence.

On 16 April 1976, the trial judge entered a judgment which incorporated the facts as stipulated and further found:

> "(B) On August 15, 1970, the time at which the parties hereto, together with counsel, went to the office of the Magistrate, it was understood and agreed that, upon the due execution by the Magistrate of the privy exam required on behalf of the defendant that each party, respectively, would then, there and at that time convey to each other, respectively, those lands as required of each in Paragraph (6) and Paragraph (7) of said Deed of Separation.
>
> There is no evidence before the Court that either party understood that the delivery or the exchange [of] deeds was to be at any time in the future or at any other time than upon the due execution by the Magistrate of the privy exam required of the wife.
>
> (C) Notwithstanding the aforesaid agreement and understanding of the parties, upon the execution of the privy exam by the Magistrate, the defendant knowingly and intentionally failed to sign two of the deeds required of her and knowingly and intentionally failed to deliver them to the plaintiff and immediately departed from the Magistrate's office without the plaintiff having an opportunity

to ascertain that two of said deeds had not been signed by her.

(D) The plaintiff, upon learning that the defendant had failed to sign two of the deeds, immediately, and at all times thereafter, made continual efforts to obtain the signature of the defendant to said deeds.

(E) On or about December 23, 1970, the plaintiff and the defendant resumed the marital relationship. The plaintiff and the defendant continued to live together as husband and wife until on or about the 3rd day of March, 1973, at which time the defendant moved from the residence occupied by the parties.

(F) From August 15, 1970, through and including March 3, 1973, and continuing thereafter, the plaintiff and the defendant, by their conduct, treated the Deed of Separation as an executed agreement insofar as the terms of Paragraph (7) were applicable. Specifically, the plaintiff continuously and repeatedly attempted to obtain the signature of the defendant on the deeds to the property which is the subject to this action.

On several occasions the defendant consented to sign said deeds but subsequently refused to in fact execute the same. The defendant understood at all times that her failure to execute the deeds constituted a refusal to comply with Paragraph (7) of the agreement. At no time, as evidenced by their conduct and actions as aforesaid, did either of the parties treat Paragraph (7) and its requirements as having been rescinded by the resumption of the marital relationship or as giving the defendant the right to comply at some indefinite time in the future subsequent to August 15, 1970."

The judgment concluded as a matter of law that the parties' deed of separation was an "executed agreement," that the defendant's covenant to convey was " . . . not executory in nature and required the defendant to comply with its terms concurrent with the execution of the entire agreement . . . " ; that defendant's failure to sign the two deeds constituted the breach of an executed contract; and that the resumption of the marital relationship by the parties did not void the provisions of the agreement requiring defendant to execute the deeds to plaintiff.

Based on the findings and conclusions, the judgment ordered defendant to convey the property in question to plaintiff. Defendant appeals from that judgment.

Pell, Pell and Weston, by Jerry S. Weston, for plaintiff appellee.

Younce, Wall and Suggs, by Robert V. Suggs, for defendant appellant.

MORRIS, Judge.

The sole issue for consideration in this case is whether the trial court erred when it concluded as a matter of law that the provision in the deed of separation, which required defendant to convey the property to plaintiff, was not executory and, therefore, was not voided by the subsequent reconciliation of the parties.

The general rule in North Carolina concerning the effect of a reconciliation upon the terms of a separation agreement was set forth in *Jones v. Lewis,* 243 N.C. 259, 261, 90 S.E. 2d 547, 549 (1955):

> "It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter became reconciled and renew their marital relations, the agreement is terminated for every purpose insofar as it remains executory. (Citations omitted.) Even so, a reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties . . . . "

See also *Newton v. Williams,* 25 N.C. App. 527, 214 S.E. 2d 285 (1975). Defendant contends that the provision in the deed of separation was executory in nature, or at least unexecuted, and that upon the resumption of the marital obligations of the parties, the provision was voided. We disagree.

[1] Defendant argues that since she did not sign all the deeds as she promised to do in the deed of separation, the provision requiring her to do so is "executory." In other words, she maintains that the provision is "executory" merely because it is as yet "unexecuted." This, however, is a *non sequitur.* An "executory contract" is one in which a party binds himself to do or

not to do a particular thing *in the future*. When all future performances have occurred and there is no outstanding promise calling for fulfillment by either party, the contract is no longer "executory," but is "executed." See: *In re Capital Service*, 136 F. Supp. 430 (S.D. Cal. 1955); *Mather v. Mather*, 25 Cal. 2d 582, 154 P. 2d 684 (1944); 17 C.J.S., Contracts, § 7, p. 576. Thus when our cases speak of the "executory provisions" of a separation agreement, they are referring to those provisions which require a spouse to do some future act in accordance with the terms of the agreement, such as to pay alimony, child support, etc. One spouse may not transform a provision in a separation agreement which is otherwise fully executed into an executory provision merely by fraudulently avoiding compliance with the executed covenant.

[2] Here, the deed of separation called for plaintiff to convey certain property to defendant and for defendant to convey to plaintiff all her interest in their property held by the entirety. While it could be argued that defendant's signing and delivery of the deeds was implicitly conditioned upon reciprocal conveyances by plaintiff, this condition was satisfied when plaintiff effectively transferred the property according to the terms of the agreement. There were no other additional conditions or covenants to be performed in the future by either spouse. Thus, the trial judge could properly conclude, as he did, that the provision in question was " . . . not executory in nature and required the defendant to comply with its terms concurrent with the execution of the entire agreement." Consequently it was also entirely proper for the judge to conclude that defendant's failure to sign the deeds constituted a breach of an executed contract, and that defendant's duty to convey was not voided by the parties' subsequent resumption of the marital relationship.

No error.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES McKINNEY JEETER AND JOHN FRANK CRAIG

No. 7626SC536

(Filed 5 January 1977)

Criminal Law § 70— tape recording — admissibility for corroboration — non-corroborating portion — admission harmless error

In a prosecution for crime against nature, the trial court did not err in allowing into evidence a tape recording of statements by three State's witnesses, since the recording corroborated testimony by the witnesses at trial; however, the court did err in allowing part of the recording into evidence which contained statements by a man identified only as "Rudolph," but such error was harmless since defendants made no objection prior to *voir dire;* defendants at no time requested that the recording be played so that the court and parties could listen; when the recording was admitted in evidence and played in open court before the jury, the defendants made no objections or motion to stop playing the recorded statement of Rudolph; defendants made no motion to strike that portion of the recording; and defendants did not ascertain the contents of the recording prior to trial by discovery under G.S. 15A-903(d).

APPEAL by defendants from *Griffin, Judge.* Judgments entered 3 February 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 November 1976.

Defendants were indicted for the crime against nature. The State's evidence tended to show that on the evening of 25 October 1975 in the Mecklenburg County Jail the defendants forced a fellow male prisoner to have sexual relations with them *per os* and *per anus.* The victimized inmate and two other inmates who witnessed the incident testified for the State. The State also introduced as corroborative evidence a tape recording which contained statements about the incident made to the Sheriff by the victim, the two inmates who testified, and an inmate named Rudolph, who did not testify. Prior to the introduction of the tape recording a *voir dire* examination was held during which Sheriff Stahl properly authenticated the recording. The tape was not played during the *voir dire* examination. The trial court made no findings of fact. The following appears in the record on appeal:

"(Whereupon, the Jury returned to the Courtroom and the following proceedings were had in their presence.)

MR. SAUNDERS: May it please the Court, the State would at this time offer into evidence State's Exhibit '1', a

tape recording made by Sheriff Stahl on the evening of the 25th of October, 1975, of a recorded conversation between Gary Alexander and the Sheriff and Dennis Campbell and the Sheriff.

MR. STROUD: At this time I would like to enter my objection for the record, your Honor.

COURT: All right. Members of the Jury, the Court is going to allow the tape recording to be played over the objection of the Attorney for the Defendants, but for this limited purpose, for the purpose of corroborating the testimony of the witnesses and for no other purpose. In other words, this tape recording is not substantive evidence, that is, evidence in and of itself. It is being introduced and you are being allowed to hear it for the purpose of corroborating any witness it does corroborate if you find it does, in fact, corroborate that witness, and for no other purpose. All right. Mr. Sheriff, if you will play the recording.

(Whereupon, tape recording was played in the presence of the jury.)"

The record on appeal contains a "Narrative of State's Exhibit # 1" and apparently is a summary of the recorded statements made by Dennis Campbell, Gary Alexander, and Nathaniel McManus, witnesses testifying for the State. Further, the following appears in the narrative of the exhibit in the record:

"(This man was referred to only as 'Rudolph'). I was in my bed. In the same room. First they grabbed him. He was hollering and trying to get the guard. They heard the guard come down the catwalk and they stopped. After the guard left, they were all on (unintelligible). Somebody threw a sheet over his head. I sleep on the high bunk bed. He was right under me. Everybody started getting on top of him. Neal, Cherry, and 'Preacher' (Jeeter) put their penises up his rectum."

Defendants offered testimony tending to show that the incident had never taken place and that the alleged victim complained to the Sheriff to gain revenge for what he felt was bullying by the other inmates. The jury found defendants guilty as charged.

Defendants appeal from judgments imposing imprisonment.

Attorney General Edmisten by Associate Attorney David S. Crump for the State.

Assistant Public Defender James Fitzgerald for defendant appellants.

CLARK, Judge.

The sole issue presented upon appeal is whether the trial court committed reversible error in admitting into evidence, over the general objection of the defendant, the entire tape recording made by Sheriff Stahl.

The recorded statements of the three witnesses who testified for the State were offered for the purpose of corroborating their testimony at trial. We find that those prior recorded statements were generally consistent with their trial testimony and that admission was justified in view of the prolonged cross-examination of these witnesses by the defendants relative to the identity of the various participants who forced the victim to participate in homosexual acts *per anus* and *per os*. Under these circumstances, and in light of the instructions to the jury limiting the evidence to corroboration if the jury in fact found that it did corroborate, we find that these tape recorded statements of the State's witnesses were admissible for corroboration. 1 Stansbury, N. C. Evidence § 52 (Brandis Rev. 1973).

The tape recorded statement of the unidentified "Rudolph," who did not testify at trial, was not admissible for the purpose of corroboration. Apparently, the State had no knowledge that this statement was on the tape which was offered in evidence. It appears from the record that the District Attorney offered in evidence only the recorded statements of the witnesses who had testified for the State.

To be admissible for any purpose a tape recording must be audible and must have been properly authenticated. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129 (1970); *Levi v. Justice* and *Searcy v. Justice,* 27 N.C. App. 511, 219 S.E. 2d 518 (1975), petition for discretionary review denied, 289 N.C. 298, 222 S.E. 2d 698 (1976). The trial court after *voir dire* hearing made no findings, but Sheriff Stahl testified that he recorded the conversations on a recording machine which was operating

properly; that no changes or deletions had been made in the recorded tape; and that the tape had been in his custody since made. He also identified the voices. Though it is the better practice for the trial judge to make findings relative to authenticity and audibility, where the State's evidence supports both and defendant offers no conflicting evidence, the admission of the tape recording in evidence without such findings of fact is harmless error. See *State v. Sharratt*, 29 N.C. App. 199, 223 S.E. 2d 906 (1976).

In *State v. Lynch, supra,* the court stated: "Upon an objection to the introduction of a recorded statement, in order to ascertain if it meets the foregoing requirements, the trial judge must necessarily conduct a *voir dire* and listen to the recording in the absence of the jury . . . . This procedure affords counsel the opportunity to object to any portions of the recording which he deems incompetent and permits incompetent matter to be kept from the jury in some appropriate manner." 279 N.C. at 17, 181 S.E. 2d at 571.

In the case before us the record does not disclose that the defendants made an objection prior to *voir dire.* Defendants at no time during *voir dire* requested that the tape recording be played so that the court and parties could listen. Nor does it appear that when the tape recording was admitted in evidence and played in open court before the jury, the defendants made any objection or motion to stop playing the recorded statement of Rudolph. Nor did defendants move to strike that portion of the recording. Nor did defendants ascertain the contents of the tape recording by discovery under G.S. 15A-903(d), which was enacted subsequent to *Lynch* and which specifically allows the inspection of electronic recordings.

We find that the inadmissibility of this evidence was waived by the defendants' failure to make a timely objection when they had had the opportunity to learn that the evidence was objectionable. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Edwards,* 274 N.C. 431, 163 S.E. 2d 767 (1968). If inadmissibility is not indicated by the question but becomes apparent by some feature of the answer, a motion to strike should be made as soon as the inadmissibility becomes known. 1 Stansbury, *supra,* § 27. "Invited error is not ground for a new trial." *State v. Payne,* 280 N.C. 170, 171, 185 S.E. 2d 101, 102 (1971).

Further, in view of the strength of the State's evidence, which included the testimony of the victim and two apparently disinterested eyewitnesses that was corroborated by prior recorded statements, the admission of Rudolph's recorded statement was not prejudicial and did not affect the outcome of the trial. The error, if any, was harmless. See Annot., 58 A.L.R. 2d 1024 § 8 (1958).

No error.

Judges MORRIS and ARNOLD concur.

WILLIAM D. BYRUM v. REGISTER'S TRUCK & EQUIPMENT COMPANY, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. THEISEN COMPANY (A CORPORATION), THIRD PARTY DEFENDANT

No. 763SC489

(Filed 5 January 1977)

Process § 14— foreign corporation — manufacture of trailers for N. C. company — jurisdiction by courts of this State — minimal contacts

Where a Florida corporation not transacting business in this State manufactured certain trailers for a North Carolina company from plans submitted by the North Carolina company, invoiced and titled the trailers to the North Carolina company, delivered the trailers in this State, and knew or had the reasonable expectation that the trailers were to be used or consumed within the boundaries of this State, the Florida corporation had sufficient minimal contacts with this State to satisfy the requirements of due process in order for the courts of this State to acquire personal jurisdiction over it pursuant to G.S. 55-145, G.S. 1-75.4(4)(b) and G.S. 1-75.4(5)(c) in an action to recover for defects in the trailers.

APPEAL by third party defendant, Theisen Company, from *Rouse, Judge.* Order entered 6 February 1976, Superior Court, CRAVEN County. Heard in the Court of Appeals 19 October 1976.

This action was instituted by William D. Byrum against Register's Truck and Equipment Company, Inc., (hereinafter referred to as Register) to recover damages allegedly sustained as the result of defects in a log trailer purchased from Register. Register's answer included a counterclaim for the cost of repairs against plaintiff and a third party complaint against

Theisen Company (hereinafter called Theisen). The original plaintiff is a resident of North Carolina. Register is a North Carolina corporation. Theisen is a Florida corporation not authorized to do business in this State. Service was had on Theisen by registered mail pursuant to the provisions of G.S. 1A-1, Rule 4(j) (9) (b). Theisen made a special appearance and moved for dismissal of the third party complaint on the ground that the courts of this State lack jurisdiction over its person. Affidavits were filed by Theisen and Register. The court entered an order finding facts, concluding that the court had personal jurisdiction over Theisen, and denied its motion. Theisen appealed.

Ward, Tucker, Ward & Smith, P.A., by Michael P. Flanagan, for third party plaintiff appellee.

Sumrell, Sugg & Carmichael, by James R. Sugg, for third party defendant appellant.

MORRIS, Judge.

Theisen's motion was filed 16 October 1974. On 5 January 1976, Judge Rouse entered an order requiring the parties to " . . . be prepared with affidavits and memoranda of law to argue the motions to dismiss . . . " on 2 February 1976. Register filed affidavits on 15 and 22 November 1974. However, Theisen did not file its two affidavits until 2 February 1976, the day of the hearing. The court in its order stated that it had reviewed " . . . the file, including Affidavits filed on the date of the hearing. . . " It found that certain trailers were manufactured by Theisen allegedly from plans provided it by Register; that Theisen titled the trailers manufactured by it in the name of Register and made an invoice for the trailers to Register; that Theisen is a Florida corporation not registered to do business in this State; that Register is a North Carolina corporation with its principal place of business in Craven County; that the trailers were delivered to Register and that no representative of Register was ever in Florida concerning the trailers; that an alleged breach of warranty or tort occurred within the boundaries of this State concerning the trailers; that Ward Theisen, President of Theisen, knew or had the reasonable expectation that the trailers were to be used or consumed within the boundaries of this State and were so used or consumed pursuant to the provisions of G.S. 55-145(a) (3) ; that the

delivery of the trailers to Register in this State was within the ordinary course of trade and that the trailers were manufactured by Theisen within the provisions of G.S. 1-75.4(4); that any dealings Theisen had with Harvey Cox were promises made to Cox to deliver goods within this State pursuant to the provisions of G.S. 1-75.4(5) (c) (d) and G.S. 55-145(a) (3). Based on those facts the court made the following conclusion of law: "That this Court has jurisdiciton over Theisen Company, a foreign corporation not transacting business within this State, and said jurisdiction is personal in nature pursuant to the provisions of G.S. Sec. 55-145 and G.S. Sec. 1-75.4."

There is no question but that the applicable statutes in this case are G.S. 55-145, "Jurisdiction over foreign corporations not transacting business in this State," and G.S. 1-75.4 et seq., the so-called "long-arm statute."

G.S. 1-75.4 confers jurisdiction over a person served pursuant to Rule 4(j) of the Rules of Civil Procedure where the court has jurisdiction over the subject matter.

> "(4) . . . in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> a. . . .
>
> b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade."

G.S. 55-145 provides that foreign corporations not transacting business in this State shall be subject to suit in this State on any cause of action arising

> "(1) Out of any contract made in this State or to be performed in this State . . . "

or

> "(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers . . . "

Defendant properly concedes that the transaction of Theisen with Register comes within these statutory provisions but argues that the facts and circumstances of this case do not satisfy the fundamental fairness guaranteed by the due process clause of the Fourteenth Amendment necessary in order for the courts of this State to obtain jurisdiction over Theisen.

In *Goldman v. Parkland*, 277 N.C. 223, 229, 176 S.E. 2d 784, 788 (1970), Justice Moore, writing for the Court, said:

> "This Court in *Byham v. House Corp., supra*, listed a number of factors, some essential and others only having weight, to be considered in determining whether the test of 'minimum contacts' and 'fair play' have been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the Legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. The Court then states: 'It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state,' citing *McGee v. International Life Ins. Co., supra.*
>
> In *McGee* the United States Supreme Court held it was 'fair' to subject a foreign corporation to jurisdiction when the only contact with the state of the forum (California) was a single life insurance policy mailed to the forum state and on which premiums had been mailed from the forum state to the foreign corporation in Texas, holding that such insurance contract had a 'substantial connection' with the forum state."

The record here indicates that service was had in accordance with the statute and Theisen had actual notice. Also our legislature has given authority to the courts of this State to entertain litigation against a foreign corporation to the extent permitted by the due process requirement.

Here the transactions between Theisen and Register clearly met the requirement of "some act by which the defendant pur-

posefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its laws." The record discloses that an agreement was made between Register and Theisen for the manufacture by Theisen of more than one trailer to be delivered to Register in North Carolina; that the trailers were manufactured by Theisen from plans provided by Register; that the trailers were invoiced to Register, delivered to Register in North Carolina; and that payment was made therefor upon delivery, the trailers having been titled to Register by Theisen.

Additionally G.S. 1-75.4(5)(c) confers jurisdiction in any action which "[a]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value . . . " This Court has held in numerous cases that a single contract is sufficient to satisfy the minimal contacts requirement. *Chadbourn, Inc. v. Katz,* 21 N.C. App. 284, 204 S.E. 2d 201, *aff'd.,* 285 N.C. 700, 208 S.E. 2d 676 (1974); *Trust Co. v. McDaniel,* 18 N.C. App. 644, 197 S.E. 2d 556 (1973); *Goldman v. Parkland,* 7 N.C. App. 400, 173 S.E. 2d 15, *aff'd.,* 277 N.C. 223, 176 S.E. 2d 784 (1970). We are of the opinion and so hold that the transaction before us had a "substantial connection" with this State and that the "minimum contacts" and "fair play" standards of *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957), have been met.

Affirmed.

Judges CLARK and ARNOLD concur.

EARL L. CREECH v. J. F. ALEXANDER, COMMISSIONER OF MOTOR VEHICLES FOR THE STATE OF NORTH CAROLINA

No. 7627SC611

(Filed 5 January 1977)

1. Automobiles § 1— drunken driving — refusal to take breathalyzer test — sentence in criminal case — effect on license revocation

Petitioner's guilty plea to a charge of driving under the influence and limitation of his driving privileges did not exempt him from the

mandatory requirement of G.S. 20-16.2 that his driver's license be revoked for refusal to submit to a breathalyzer test at the time of his arrest for driving under the influence.

2. **Automobiles § 2— drunken driving — refusal to take breathalyzer test without just cause or excuse — finding proper**

The trial court properly found that defendant had "without just cause or excuse, voluntarily, understandingly and intentionally" refused to submit to a breathalyzer test where the evidence showed that defendant was advised of his rights, including the fact that he could contact his attorney but that the test would not be delayed for over 30 minutes; defendant unsuccessfully attempted to phone his attorney and then contacted his wife and told her to have his attorney to meet him; approximately 20 minutes after defendant was informed of his rights the breathalyzer operator offered to administer the test, but defendant refused, stating that he wanted to have his attorney present; and the remainder of the 30-minute time limit passed without defendant having been informed of its expiration or having taken the test.

APPEAL by petitioner from *Friday, Judge.* Judgment entered 17 February 1976 in Superior Court, GASTON County. Heard in the Court of Appeals 9 December 1976.

On 6 June 1975, Earl L. Creech (hereinafter called "petitioner") filed a petition in Gaston County Superior Court against the North Carolina Commissioner of Motor Vehicles (hereinafter called "respondent"). The petition was made pursuant to G.S. 20-25 and requested the court to review the action of respondent in suspending petitioner's driving privileges for failure to take a chemical breath test as provided in G.S. 20-16.2. A hearing on the petition was held 11 February 1976, but petitioner presented no evidence. Respondent's evidence tended to show that on 3 March 1975, petitioner was arrested for public drunkenness. At the time of petitioner's apprehension, the arresting officer smelled a strong odor of alcohol on petitioner's breath. He also noticed that petitioner was imbalanced and needed guidance to walk and that his speech was "thick-tongued and mumbled." Petitioner was taken to the Intake Center at the Charlotte/Meckenburg Jail and subsequently charged with driving under the influence of intoxicating beverage.

Petitioner was taken before a duly licensed breathalyzer operator. At approximately 6:40 p.m., he advised petitioner of his rights regarding the taking of a breathalyzer test. He specifically informed petitioner " . . . that he had the right to call an Attorney and select a witness to review for him the testing

procedures but the test would not be delayed for this purpose for a period of in excess of thirty minutes from the time he was notified of his rights." Petitioner was then given a written copy of the rights which had been read to him. He attempted to phone his attorney but was unable to complete the call, so he contacted his wife and requested that she tell the attorney to meet him. Approximately 20 minutes after petitioner was informed of his rights, the breathalyzer operator offered to administer the test, but petitioner indicated that he wanted to have his attorney present. Thereafter, petitioner was not informed as to the expiration of the 30-minute limit for the test. At 7:45 p.m. the arresting officer noted on the alcohol influence report that petitioner had refused to take the breathalyzer test " . . . because he was unable to contact his lawyer in time."

Petitioner subsequently pleaded guilty to the charge of driving under the influence and was given a limited driving privilege. After a hearing before the Deputy Hearing Commissioner of the Department of Motor Vehicles, respondent revoked petitioner's driving privileges pursuant to G.S. 20-16.2 for refusal to submit to the breathalyzer test.

At the close of respondent's evidence, petitioner moved to rescind respondent's revocation of his license, and the motion was denied. On 17 February 1976, Friday, Judge, filed a judgment that found that petitioner had been arrested upon reasonable grounds for driving under the influence of intoxicating beverages and that

> " . . . a person authorized to administer a chemical test informed the petitioner verbally and in writing furnishing a signed document setting out all of the petitioner's rights under the provisions of G.S. 20-16.2(a), but the petitioner, without just cause or excuse, voluntarily, understandingly and intentionally refused to submit to such test."

The court then concluded that " . . . petitioner willfully refused to take the chemical test of breath in violation of law, and the order of the respondent complained of is justified in fact and in law. . . . " and affirmed respondent's order of revocation.

Attorney General Edmisten, by Deputy Attorney General Jean A. Benoy, for respondent appellee.

Dolley & Katzenstein, by Charles J. Katzenstein, Jr., for petitioner appellant.

MORRIS, Judge.

[1] In his first assignment of error, petitioner contends that the trial court erred in denying his motion to rescind respondent's revocation order. He argues that the purpose of G.S. 20-16.2, which provides for mandatory revocation of driving privileges upon refusal to submit to chemical testing of blood or breath, is to produce evidence to assist the State in convicting motorists charged with driving under the influence in violation of G.S. 20-138. Petitioner maintains that this purpose was fully accomplished when he pleaded guilty to driving under the influence and that no further purpose could be served by suspension of his driving privileges for his refusal to take the test. Thus, according to petitioner, his plea of guilty effectively "cured the defect" of his earlier refusal to take the breathalyzer test. We disagree.

This question was effectively resolved in *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E. 2d 553, *petition for reh. den.*, 279 N.C. 397, 183 S.E. 2d 241 (1971). The petitioner in that case pleaded guilty to driving under the influence after refusing to take the chemical breath test. He was sentenced to a 12-month suspension of his license on the charge. Thereafter, his license was suspended for 60 days for his refusal to take the test, and he contended that his sentence on the guilty plea constituted the "full penalty" which the State could extract. Sharp, J. (now C.J.), disagreed, stating:

> "The suspension of a license for refusal to submit to a chemical test at the time of arrest for drunken driving and a suspension which results in a plea of guilty or a conviction of that charge are separate and distinct revocations . . . . Petitioner's guilty plea in no way exempted him for the mandatory effects of the sixty-day suspension of his license if he had wilfully refused to take a chemical test. . . .
>
> Under implied consent statutes such as G.S. § 20-16.2, the general rule is that neither an acquittal of a criminal charge of operating a motor vehicle while under the influence of intoxicating liquor, nor a plea of guilty, nor a conviction has any bearing upon a proceeding before the licensing agency for the revocation of a driver's license for a refusal to submit to a chemical test. 60 C.J.S., *Motor Vehicles*, § 164.16 (1969) . . . . " 279 N.C. at 238, 182 S.E. 2d at 561-62.

See also *Vuncannon v. Garrett, Comr. of Motor Vehicles,* 17 N.C. App. 440, 194 S.E. 2d 364 (1973). Accordingly, the trial court did not err in denying petitioner's motion. This assignment is overruled.

[2] In his second assignment of error, petitioner contends that the trial court erred in finding that he " . . . without just cause or excuse, voluntarily, understandingly and intentionally refused to submit . . . " to the breathalyzer test. Again, we disagree.

When a case is tried before a judge sitting without a jury, the findings of the court are as conclusive on appeal as a jury verdict if they are supported by any competent evidence. *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971). This is true even though the evidence might sustain findings to the contrary. *Blackwell v. Butts,* 278 N.C. 615, 180 S.E. 2d 835 (1971). Here, the evidence shows that petitioner was arrested after a law enforcement officer noticed that petitioner staggered, had slurred speech and smelled of alcoholic beverages. Petitioner was informed of his rights, both orally and in writing, including the fact that he could contact his attorney but that the test would not be delayed for over 30 minutes. After 20 minutes had passed, petitioner was again asked to take the test but refused stating that he wanted to wait for his attorney. The remaining time passed without petitioner's taking the test. Once the breathalyzer operator fully informed petitioner of his rights with regard to the breath test, there certainly was no obligation upon him to remind petitioner of the effect of his refusal to submit to the test. Petitioner's delay in taking the test, after being advised of the effect of his refusal, was at his own peril. Therefore, the trial court could properly find, as it did, that defendant had " . . . without just cause or excuse, voluntarily, understandingly and intentionally refused to submit . . . " to the breathalyzer test.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JACK R. KRAUS

No. 7612SC573

(Filed 5 January 1977)

Crime Against Nature § 2— defendant's confession — no other evidence of crime — nonsuit proper

The trial court in a prosecution for crime against nature erred in overruling defendant's motion for nonsuit where there was no evidence outside defendant's confession which had any probative value in establishing the fact that the crime charged was committed.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 18 February 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 November 1976.

Defendant pled not guilty to the charge of crime against nature with Leroy Teddy Barfield.

Prior to trial the defendant made a motion to suppress the evidence of a confession made by the defendant to J. M. Hall and F. S. Vlasak, officers of the Fayetteville Police Department. After hearing the testimony of the named officers and the defendant at *voir dire,* the court made findings of fact, concluded that the confession was freely and voluntarily made, and denied the motion to suppress. Defendant admits in his brief that he can find no error in this ruling. We treat this assignment of error as abandoned.

At trial the State offered in evidence the confession made by defendant to police officers Hall and Vlasak, and also the testimony of Gracie Barfield, mother of Leroy Teddy Barfield. This evidence is recited in the opinion. Defendant's motion for nonsuit was denied. The defendant offered no evidence.

Defendant was found guilty as charged and from judgment imposing suspended term of imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney James E. Scarbrough for the State.

Assistant Public Defender John A. Decker for defendant appellant.

CLARK, Judge.

The appeal presents the question of whether there is evidence of extrinsic corroborative circumstances, apart from the extrajudicial confession, which has some probative value in establishing the fact that the crime against nature was committed.

In his confession to the police officers, defendant stated that he took Teddy Barfield to his apartment about 2:30 a.m. on 1 June 1976; that they drank some beer; that Teddy initiated sexual contact and asked defendant to perform fellatio; that defendant did as requested; and that they lay together naked and "hunched on each other."

To sustain a conviction in any criminal case, the prosecution must prove (1) that the crime charged was committed and (2) that the defendant was the perpetrator of the crime. *State v. Thomas,* 15 N.C. App. 289, 189 S.E. 2d 765 (1972).

A naked extrajudicial confession, uncorroborated by any other evidence, is not sufficient to sustain the conviction of a defendant charged with the commission of a felony. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954). There must be evidence *aliunde* the confession which has some probative value in establishing the fact that the crime charged was committed. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772 (1960); *State v. Jensen,* 28 N.C. App. 436, 221 S.E. 2d 717 (1976); 30 Am. Jur. 2d Evidence § 1137 (1967). If the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with a confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury. *State v. Thompson, supra; State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396 (1961).

The overwhelming authority in this country, including the Supreme Court of the United States, supports the rule that an uncorroborated extrajudicial confession is insufficient to sustain a conviction. *Smith v. United States,* 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954); 30 Am. Jur. 2d Evidence § 1136 (1967); Annot., 127 A.L.R. 1131 (1940); Annot., 45 A.L.R. 2d 1316 (1956). The rule has particular importance in prosecutions for sexual offenses. *State v. Cope, supra.* In *Cope* the

defendant was charged with (1) incest, (2) crime against nature, and (3) rape. The State offered evidence of defendant's confessions to arrresting officers and to the jailer that he had committed incest and a crime against nature. Defendant denied committing the crimes and repudiated the confessions. The alleged victims also repudiated earlier statements implicating the defendant. It was held that defendant's motion for judgment of nonsuit should have been sustained on the ground that there was no evidence *aliunde* the extrajudicial confession that had probative value in establishing the fact that the crimes charged had been committed.

State v. Whittemore, supra, relied on by the State, is distinguishable. In that case the codefendants were charged with crime against nature and carnal knowledge of a virtuous female between age 12 and 16. One defendant made an extrajudicial confession. His victim testified that this defendant put his hands and mouth on her privates and rubbed his penis on her privates. The court stated that this testimony, though it failed to establish penetration, was sufficient in connection with the confession to establish the fact that the crimes had been committed and to support the convictions. The extrinsic evidence clearly had some probative value in establishing the fact that the crime had been committed.

In the case before us the only evidence which in any way tended to corroborate defendant's confession was the testimony of Teddy Barfield's mother that defendant left her home with her son about 2:30 a.m., and the testimony of Policeman Hall that on the day of the alleged crime Teddy Barfield showed him the house to which he and defendant had allegedly gone and that defendant answered the door when the officer knocked. This extrinsic evidence has no probative value in establishing any of the elements of the crime charged. We find that this evidence, when considered apart from the extrajudicial confession, does not have any probative value in establishing the fact that the crime charged was committed. The trial court erred in overruling defendant's motion for nonsuit.

The judgment of the trial court is

Reversed and the case is dismissed.

Judges MORRIS and ARNOLD concur.

A. CARL PENNEY AND WIFE, BRENDA B. PENNEY v. RICHARD E. CARPENTER AND WIFE, SHARON M. CARPENTER

No. 7621DC609

(Filed 5 January 1977)

Contracts § 19— whether agreement constituted novation — jury question

In an action for breach of a provision of a contract for sale of a house that the furnace in the house would "be in good repair and operating at close," a jury question was presented as to whether an addendum to the contract in which plaintiff purchasers agreed to provide for necessary furnace repairs which had been suggested by a heating company representative constituted a novation which superseded the original agreement relating to the furnace.

APPEAL by plaintiffs from *Clifford, Judge.* Judgment entered 22 March 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 9 December 1976.

This is an action for breach of contract. Allegations of the complaint are summarized in pertinent part as follows:

On 28 November 1973 the parties entered into a written contract in which plaintiffs agreed to purchase from defendants and defendants agreed to sell to plaintiffs, a parcel of land with improvements thereon (a dwelling house) located at 517 Jersey Avenue in the City of Winston-Salem. One of the provisions of the contract was that the furnace in the house would "be in good repair and operating at close. To be inspected by qualified person."

Defendants have breached said contract by providing a furnace that was not in good repair nor operating at the time the transaction was closed on 15 February 1974. Plaintiffs have had to replace said furnace with a new heating system at a cost of $1710 and defendants have refused to comply with plaintiffs' demand to pay that amount. Plaintiffs asked for judgment in said amount and for trial by jury.

In their answer defendants denied owing plaintiffs anything, alleging that the parties entered into another written agreement subsequent to the one pleaded by plaintiffs.

Plaintiffs presented evidence tending to show:

On 28 November 1973 the parties entered into the contract referred to in the complaint. On 7 December 1973 Darold Baity,

the owner of AAA Heating and Air Conditioning Company in Winston-Salem, inspected the furnace. He found the basement where the furnace was located littered with trash and debris, and found water around the furnace. He recommended that certain repairs to the furnace be made at a cost of $225 or $250.

In January 1974 the parties executed a document entitled "Addendum To Contract" which contained provisions that plaintiffs would: (1) provide for necessary furnace repairs which AAA Heating and Air Conditioning Company representative suggested on 7 December 1973, including cost of the inspection; and (2) arrange for a reputable contractor to inspect the property and obtain his opinion as to the "good state of repair" of the roof, plumbing, heating and wiring.

The sale was closed on 15 February 1974. Several weeks later the furnace was inspected by a city inspector and, because of his findings, plaintiffs had to replace the entire heating system at a cost of $1687.

Plaintiffs offered the testimony of Hubert French, a city boiler inspector, and Darold Baity with respect to their inspection of the furnace and premise in March 1974. The court sustained defendants' objection to the testimony but allowed the witnesses to testify for the record in the absence of the jury. After reciting their respective qualifications, they stated that they found that the inner and outer walls of the furnace had rusted out and that the boiler was leaking water, raising the possibility of an explosion. In Baity's opinion the boiler was leaking on 7 December 1973 and the leak could not have developed between that date and March 1974.

Following the introduction of plaintiffs' evidence defendants moved for directed verdict pursuant to Rule 50. The motion was allowed and from judgment dismissing their action with prejudice, plaintiffs appealed.

David B. Hough for plaintiff appellants.

Badgett, Calaway, Phillips & Davis, by Chester C. Davis, for defendant appellees.

BRITT, Judge.

Did the trial court err in allowing defendants' motion for directed verdict and dismissing the action? We hold that it did.

Defendants' motion for directed verdict presented the question whether, as a matter of law, the evidence offered by plaintiffs, when considered in the light most favorable to them, was insufficient to be submitted to the jury. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972); *Sink v. Sink,* 11 N.C. App. 549, 181 S.E. 2d 721 (1971).

We think the principle of novation or substitution of a new contract between the parties applies in this case, raising questions for jury determination. It is clear that parties may modify their agreement by entering into a new contract prescribing their rights and liabilities in regard to the entire subject matter and the new agreement amounts to a novation. *Fowler v. Insurance Co.,* 256 N.C. 555, 124 S.E. 2d 520 (1962); *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826 (1961).

In 2 Strong, N. C. Index 2d, Contracts § 19, we find:

> "Whether a new contract between the same parties discharges or supersedes a prior agreement between them depends upon their intention as ascertained from the instrument, the relation of the parties, and the surrounding circumstances.
>
> * * *
>
> "Where the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument, the question is one of law for the court, but where the second agreement does not show on its face that it must have been intended as a substitution for the prior agreement, and the facts relating to the intent of the parties are controverted, the question of intent is for the jury."

In the case at bar, defendants contend the addendum to the contract, entered into on ____ January 1974, completely changed the terms of the original agreement with respect to their liability for the furnace; plaintiffs contend otherwise. There arises, therefore, a question for a jury to determine, namely, the intention of the parties, based upon the writings, the relation of the parties and the surrounding circumstances. We hold that the court erred in not submitting the case to the jury.

We also hold that the court erred in not admitting the proffered testimony of Hubert French and Darold Baity. The qualifications which they showed were sufficient to entitle them to provide expert testimony with respect to the furnace and boiler.

For the reasons stated, the judgment appealed from is

Reversed.

Chief Judge BROCK and Judge MORRIS concur.

ZENO H. PONDER, SR. v. NINA LOU RUSTIN PONDER

No. 7624DC519

(Filed 5 January 1977)

Divorce and Alimony § 13— absolute divorce action — separation for one year — insufficiency of evidence

The trial court in an action for absolute divorce did not err in granting defendant's Rule 41(b) motion for dismissal where plaintiff failed to meet his burden of showing that he and defendant lived separate and apart for one year preceding the institution of this action.

APPEAL by plaintiff from *Lacey, Judge.* Judgment entered 30 January 1976, District Court, MADISON County. Heard in the Court of Appeals 17 November 1976.

Plaintiff brought this action for absolute divorce on 26 March 1976, alleging that plaintiff and defendant were married on 14 November 1942 and lived together as husband and wife until 25 January 1974; that all the children born of the marriage are over 18 years of age and emancipated; that the plaintiff and defendant executed agreements, copies of which were attached to the complaint, effecting a complete and final property settlement between them; and that since 25 January 1974 they had lived continuously separate and apart.

Defendant's answer admitted all allegations except the allegation that the parties had separated on 25 January 1974, and had lived separate and apart since that time and that the agreements effected a property settlement between them. She

further averred that she and defendant were married to each other on 14 November 1942 and, except for one brief period in 1972, had lived continuously since that time as husband and wife; that they entered into certain arrangements on 25 January 1974 for the purpose of relieving her of further participation in certain business ventures in which she and plaintiff had been engaged for a number of years but that it was not a property settlement preliminary to or as in integral part of any separation or divorce; that the parties have lived in the same residence in Madison County since 1958 and that " . . . during the period of their marriage the defendant has been a loyal and dutiful wife to her husband and mother to her children and has not at any time separated herself from her husband except for one brief period in 1972 when the parties lived separate and apart for approximately one week but renewed their marital relationship immediately thereafter and the defendant has not at any time abandoned her responsibility to her home and to her children"; and that for more than one year preceding the institution of this action the plaintiff has resided continuously in the residence of the parties and the parties have not at any time during that period lived separate and apart.

At the conclusion of plaintiff's evidence, defendant moved, pursuant to Rule 41(b) for dismissal for that plaintiff had failed to offer evidence sufficient to establish that the parties had lived separate and apart for one year preceding the institution of the action. The court granted the motion, and plaintiff appealed from the judgment entered.

Ronald W. Howell for plaintiff appellant.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant appellee.

MORRIS, Judge.

Plaintiff assigns as error the court's allowing defendant's motion for dismissal pursuant to Rule 41(b) of the Rules of Civil Procedure made at the close of plaintiff's evidence. This is his only assignment of error argued on appeal.

Rule 41(b) provides that

" . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer

evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

The court made the following findings of fact:

"1. This action was instituted on the 26th day of March, 1975, by the filing of a verified Complaint and the issuance of a summons.

2. Service was had upon the defendant by the Sheriff of Madison County on 3 April 1975 in Madison County, North Carolina.

3. Defendant has filed a verified Answer in this cause.

4. Neither the plaintiff nor the defendant has requested a jury trial.

5. The plaintiff and the defendant were married to each other on 14 November 1942 and thereafter lived together as man and wife.

6. The parties presently reside in a residence on Ivy Hill Road in Madison County, North Carolina, and their address is Route 2, Marshall, North Carolina.

7. All children born of the marriage are now more than eighteen years of age.

8. The parties are now residing in the same dwelling house where they have lived together for more than fifteen years.

9. That although the parties sleep in separate bedrooms and have discontinued sexual relations at the present time they occupy bedrooms in the same dwelling house and under the same roof.

10. The defendant prepares meals for the plaintiff to be consumed and which are consumed in the dwelling house where they reside.

11. The defendant uses the same automobile she has used for a number of years and the same is registered in the name of the plaintiff.

12. The plaintiff operates his business from an office located in the residence occupied by the parties.

13. The defendant has not at any time vacated or removed herself from the dwelling house occupied by the parties.

14. Until approximately eight months ago the plaintiff paid all the automobile expenses of the defendant.

15. Other members of the family continue to visit with the plaintiff and the defendant in the residence occupied by the parties.

16. There has been no cessation of cohabitation between the plaintiff and the defendant in the dwelling house they presently occupy.

17. The parties have not lived separate and apart for any length of time immediately preceding the institution of this action and more particularly have not lived separate and apart for one year at any time prior to the institution of this action."

Upon those facts the court concluded that the plaintiff and defendant have not lived separate and apart for any length of time prior to the institution of the action, have not ceased cohabitation as husband and wife, and that plaintiff is not entitled to an absolute divorce.

The facts found are fully supported by the evidence. Plaintiff does not except to any finding. The facts found support the conclusions of law made by the court.

"Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. For the purpose of obtaining a divorce under G.S., 50-5(4), or G.S., 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living

together in the ordinary acceptation of that descriptive phrase. This was the holding in *Dudley v. Dudley,* 225 N.C. 83, in an opinion written for the Court by *Justice Denny.* Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties. *Dudley v. Dudley, supra; Williams v. Williams, supra; Woodruff v. Woodruff, supra." Young v. Young,* 225 N.C. 340, 344, 34 S.E. 2d 154, 157 (1945).

In this case, the plaintiff has failed in his burden of showing that he and defendant have lived separate and apart for any time preceding the institution of the action. The evidence indicates the contrary. There was nothing in the agreements respecting property entered into by the parties which would indicate that they were settling property rights preparatory to separation or divorce.

The judgment entered by the trial court is

Affirmed.

Judges CLARK and ARNOLD concur.

FRANK MOIR MONTGOMERY v. BARBARA ANN MONTGOMERY

No. 7617DC576

(Filed 5 January 1977)

1. **Divorce and Alimony § 22— child custody and support order — findings and conclusions**

   In a child custody and support proceeding, the trial court is required to find specific ultimate facts to support the judgment and to state separately its conclusions of law thereon.

2. **Trial § 58— conclusion of law defined**

   A conclusion of law is the court's statement of the law which is determinative of the matter at issue between the parties and must be based on the facts found by the court.

3. **Divorce and Alimony § 24— child custody — findings required**

   A child custody order should contain findings of fact which sustain the conclusion of law that custody of the child is

awarded to the person who will best promote the interest and welfare of the child. G.S. 50-13.2.

4. **Divorce and Alimony § 23— child support — findings required**

A child support order should contain findings of fact which sustain the conclusion of law that the support order meets the 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. G.S. 50-13.4(c).

5. **Divorce and Alimony § 24— child visitation rights — findings required**

An order awarding child visitation rights should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child.

6. **Divorce and Alimony §§ 23, 24— child custody, support, visitation — insufficiency of findings and conclusions**

Trial court's order contained insufficient findings of fact and conclusions of law to support its award of child custody, support and visitation rights.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 1 March 1976, District Court, STOKES County. Heard in the Court of Appeals 18 November 1976.

In an action for absolute divorce on the ground of separation, defendant-wife, who did not contest the divorce, made a motion under G.S. 50-13.5(b)(5) for custody and support of the two children born of the marriage, Fredrick Len, age 12, and Carla Jean, age 8. In her motion defendant stated that plaintiff had had custody of both children for 15 months because she had been seriously ill and unable to assume custody; that she had since recovered her health; and that plaintiff refused to allow her to visit the children.

In his reply to the motion, plaintiff stated that defendant-wife was not a fit and proper person to have custody; and that since he properly cared for the children over the last 15 months, he should continue to have custody.

After an evidentiary hearing the court entered the judgment awarding custody of the son, Fredrick Len, to plaintiff-father, custody of the daughter, Carla Jean, to defendant-mother, with visitation rights to both. Also, the plaintiff was ordered to make support payments in the sum of $25.00 per month to defendant for support of the daughter. Plaintiff appealed.

John Edward Gehring for plaintiff appellant.

No brief filed for defendant appellee.

CLARK, Judge.

This appeal raises the issue of whether the judgment of the trial court awarding custody, support payments, and visitation rights contains findings of fact and conclusions of law sufficient to sustain the awards.

The judgment of the trial court found, in part, the following:

"IV. Based upon the greater weight of the evidence, the finding of fact is that at and during the time of separation the wife herein, Barbara Ann Montgomery, was hospitalized and by necessity the husband, Frank Moir Montgomery, had the custody of the two (2) minor children and moved from Stokes County to Forsyth County.

V. That the wife, Barbara Ann Montgomery, has now recovered from her illness and is fully capable of caring for the children properly and is a fit and proper person to provide a wholesome home life that is conducive to the well-being of the minor children.

VI. The father has cared for the children during his former wife's illness and it is found as a fact that this has been satisfactory for the welfare of the children.

VII. Both children are regular in their attendance of school and the boy has made satisfactory progress in his school work and activities; the girl is an exceptional student and her school work has been highly satisfactory.

VIII. It was admitted by both parents during testimony that each was a fit and proper person to have custody of the children."

[1, 2] In a proceeding for custody and support of a minor child, the trial court is required to "find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment." G.S. 1A-1, Rule 52(a)(1). The trial court is required to find specific ultimate facts to support the judgment, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately

supported by competent evidence. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Savage v. Savage,* 15 N.C. App. 123, 189 S.E. 2d 545, *cert. denied,* 281 N.C. 759, 191 S.E. 2d 356 (1972). A "conclusion of law" is the court's statement of the law which is determinative of the matter at issue between the parties. *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971). A conclusion of law must be based on the facts found by the court and must be stated separately. *Williams v. Williams,* 13 N.C. App. 468, 186 S.E. 2d 210 (1972). The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result. 89 C.J.S., Trial, § 615b (1955).

[3] To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will "best promote the interest and welfare of the child." G.S. 50-13.2. *Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974); *Williams v. Williams,* 18 N.C. App. 635, 197 S.E. 2d 629 (1973).

[4] To support an award of payment for support the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the support payments ordered are 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 care." G.S. 50-13.4(c). *Crosby v. Crosby, supra; Williams v. Williams,* 18 N.C. App. 635, 197 S.E. 2d 629 (1973).

[5] To support an award of visitation rights the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967); *In re Custody of Stancil,* 10 N.C. App. 545, 179 S.E. 2d 844 (1971).

[6] There are insufficient findings and no conclusions of law in the judgment appealed from to support the award of custody, support payments, and visitation rights by the trial court. Paragraph V of the judgment contains conclusions or opinions supported by the evidence before the court, but they are not conclusions of law determinative of the custody issue, i.e.,

which party will best promote the interest and welfare of the child, Carla Jean Montgomery? The judgment contains no findings or conclusions which support the award of custody of Fredrick Len Montgomery to the plaintiff-father, or findings or conclusions which support the provisions for visitation rights or for support payments.

The requirement for appropriate findings of fact and conclusions of law is not designed to encourage ritualistic recitations by the trial court. The requirement is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Without such findings and conclusions, it cannot be determined whether or not the judge correctly found the facts or applied the law thereto. *Jones v. Murdock,* 20 N.C. App. 746, 203 S.E. 2d 102 (1974). Since the judgment appealed from does not contain sufficient findings of fact and no conclusions of law to support its dispositive provisions, the judgment is vacated, and this cause is remanded for proceedings consistent with this decision.

Vacated and remanded.

Judges MORRIS and ARNOLD concur.

CLAY HOWARD HAWKINS v. EDNA SHAW HAWKINS

No. 7621SC559

(Filed 5 January 1977)

1. Malicious Prosecution § 1— elements of offense

To make out a case of malicious prosecution it is necessary that the plaintiff show (1) malice, (2) want of probable cause, and (3) a favorable termination of the proceedings upon which his action is based.

2. Malicious Prosecution § 13— criminal proceedings instituted by defendant — sufficiency of evidence of malicious prosecution

In an action to recover for malicious prosecution of plaintiff by defendant based on three criminal actions, the trial court erred in directing verdict for defendant where plaintiff's evidence tended to show that of the three proceedings instituted against him by defendant, two were dismissed and the third resulted in acquittal; evidence of the dismissal of two of the charges against plaintiff was a suffi-

cient showing of want of probable cause; and the inference arising from want of probable cause was sufficient to take to the jury the question of whether malice was present.

3. Trover and Conversion § 1— conversion of mobile home — sufficiency of evidence

In an action to recover for the wrongful conversion of a mobile home, the trial court erred in directing verdict for defendant where plaintiff's evidence tended to show ownership in himself and an unauthorized exercise of dominion and control over the mobile home by defendant; moreover, the fact that plaintiff had obtained a judgment against a third person to whom defendant had sold the mobile home would not bar plaintiff's claim against defendant, since each party participating in a wrongful conversion may be sued by the owner without the joinder of the other because each is jointly and severally liable.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 16 April 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 18 November 1976.

In this action, instituted 13 September 1974, plaintiff seeks to recover on two claims for relief: (1) for malicious prosecution of plaintiff by defendant based on three criminal actions, and (2) for the wrongful conversion of a mobile home. The parties stipulated that they were previously married; that on 24 March 1960 they acquired as tenants by the entirety a house and lot at 2962 East Sprague Street in Winston-Salem; and that upon their divorce in May, 1974 they became owners of the property as tenants in common.

Plaintiff's evidence tended to show:

On 28 August 1973 defendant obtained a warrant charging plaintiff with trespass on "the lands of Edna Hawkins . . . Located at 2962 E. Sprague St., Winston-Salem, N. C." On 2 March 1974 defendant signed a warrant charging plaintiff with depositing trash and litter consisting of 100 black tacks "in the driveway of Edna Hawkins, located at 2962 E. Sprague St." On 1 July 1974 she obtained a warrant charging plaintiff with trespassing on "the lands of Edna Shaw Hawkins located at 2962 Sprague St." Plaintiff was tried for littering and found not guilty. He was never tried for trespassing and both of the trespass charges were dismissed.

In 1969 or 1970 plaintiff purchased a 1963 Scenic model mobile home in which he and defendant lived until they separated in 1971. They both moved out of the mobile home and it

remained vacant until later that year when defendant sold it to Henry Foster for $500. Defendant told Foster that she could not give him a certificate of title because plaintiff had erased her name from the title. Plaintiff obtained the certificate of title in 1969 or 1970 but misplaced it. A new certificate of title, issued on 5 June 1972, was introduced into evidence. Plaintiff received no money from the sale of the mobile home by defendant. Since the sale, plaintiff has obtained a judgment against Foster for conversion of the mobile home.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict as to both claims for relief. The trial court granted the motion and from judgment entered for defendant, plaintiff appealed.

Westmoreland and Sawyer, by Barbara C. Westmoreland and Gregory W. Schiro, for plaintiff appellant.

Wilson and Morrow, by John F. Morrow, for defendant appellee.

BRITT, Judge.

Plaintiff contends that the trial court erred in granting a directed verdict for defendant at the close of plaintiff's evidence. We think the contention has merit.

[1] To make out a case of malicious prosecution it is necessary that the plaintiff show (1) malice, (2) want of probable cause, and (3) a favorable termination of the proceedings upon which his action is based. *Taylor v. Hodge,* 229 N.C. 558, 50 S.E. 2d 307 (1948).

[2] Plaintiff has shown a favorable termination of all three proceedings which were instituted against him by defendant. He showed that both trespass charges were dismissed prior to trial and that he was acquitted of the littering charge. This constituted a sufficient showing of a favorable termination in plaintiff's favor.

We now consider want of probable cause. "Probable cause, in cases of this kind [malicious prosecution], has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Morgan v. Stewart,* 144 N.C. 424, 57 S.E. 149 (1907); *Cook v. Lanier,* 267 N.C. 166, 147 S.E. 2d 910

(1966). Want of probable cause is regarded as a mixed question of law and fact. *Taylor v. Hodge, supra.*

As stated in *Cook v. Lanier, supra:* "Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest . . . is admissible, both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a *prima facie* want of probable cause." In *Abbitt v. Bartlett,* 252 N.C. 40, 44, 112 S.E. 2d 751, 754 (1960), our Supreme Court also said: "It is well established with us that when a committing magistrate, as such, examines a criminal case and discharges the accused, his action makes out a *prima facie* case of want of probable cause . . . . " However, the acquittal of a defendant by a court of competent jurisdiction does not make out a *prima facie* case of want of probable cause. *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609 (1950).

We think the evidence showing the dismissal of the two trespass charges against plaintiff was a sufficient showing of want of probable cause.

Next, we consider malice, the third essential element of an action for malicious prosecution. "Although a want of probable cause may not be inferred from malice, the rule is well settled that malice may be inferred from want of probable cause, e.g., as where there was a reckless disregard of the rights of others in proceeding without probable cause." *Cook v. Lanier,* 267 N.C. at 170, 147 S.E. 2d at 914. Malice sufficient to take the case to the jury may be inferred from the want of probable cause. *Brown v. Martin,* 176 N.C. 31, 96 S.E. 642 (1918). *Mitchem v. Weaving Co.,* 210 N.C. 732, 188 S.E. 329 (1936). We think that the inference arising from want of probable cause is sufficient in the present case to take to the jury the question of whether malice was present.

We hold that plaintiff presented sufficient evidence to establish, *prima facie,* the three elements of malicious prosecution set forth in *Taylor v. Hodge, supra.*

Plaintiff also contends that the trial court erred in directing a verdict for defendant with respect to his claim for conversion of the mobile home. This contention has merit.

Conversion is defined as " 'an unauthorized assumption and exercise of the right of ownership over goods or personal chat-

tels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E. 2d 559 (1966); *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E. 2d 181 (1975). "A sale of the personal property of another person is an actionable conversion where it is wrongful or unauthorized by law or the consent of the owner and is in defiance of his rights." 89 C.J.S., Trover and Conversion § 48.

[3] Taking the evidence in the light most favorable to plaintiff, we think the evidence presented was sufficient to take the case of wrongful conversion to the jury. Plaintiff has sufficiently shown ownership in himself and an unauthorized exercise of dominion and control over the mobile home by defendant. As a bar to this claim defendant argues the fact that plaintiff has obtained a judgment against Mr. Foster to whom defendant sold the mobile home. This argument is not persuasive. Each party participating in a wrongful conversion may be sued by the owner without the joinder of the other, since each is jointly and severally liable. *Denny v. Coleman*, 245 N.C. 90, 95 S.E. 2d 352 (1956). We hold that the trial court erred in granting the motion for a directed verdict as to the claim for conversion.

We have considered the other assignments of error argued in plaintiff's brief but deem it unnecessary to discuss them as they probably will not arise upon a retrial of this cause.

For the reasons stated, the judgment directing a verdict for defendant is reversed and the cause is remanded.

Judgment reversed and cause remanded.

Judges VAUGHN and MARTIN concur.

CHARLES M. WYATT v. JUDY P. WYATT

No. 7625DC591

(Filed 5 January 1977)

1. Parent and Child § 7— father's duty to support children

It is the father's legal obligation to support his minor children.

2. Divorce and Alimony § 23; Parent and Child § 7— child support — ability to pay

A child support order must be based not only on the needs of the child but also on the ability of the father to meet the needs.

3. Divorce and Alimony § 23— child support — ability to pay

The trial court's finding that plaintiff father had the ability to pay $110.00 per month for support of his child plus medical expenses of the child was supported by competent evidence in the record.

4. Divorce and Alimony § 23— child support action — award of legal fees — reasonable worth of services

The partial listing of legal expenses was an insufficient finding of fact as to the reasonable worth of attorney's fees to support the court's award of $600.00 to defendant mother for partial reimbursement for legal fees in an action for child support. G.S. 50-13.6.

APPEAL by plaintiff from *Tate, Judge.* Judgment entered 12 April 1976 in District Court, BURKE County. Heard in the Court of Appeals 8 December 1976.

On 18 May 1973 Charles Wyatt and Judy Wyatt entered into a separation agreement whereby Charles Wyatt, the plaintiff, agreed to pay $65.00 a month and all medical expenses in support of his minor child, Melissa. The agreement also provided that upon settlement of a personal injury suit in his favor, the plaintiff would increase his support payments. The parties were divorced on 24 September 1973. The divorce decree did not contain a specific order for child support.

Subsequent to the divorce and after favorable settlement of the personal injury action, defendant requested an increase from the plaintiff; he refused. Defendant then filed a motion in the divorce action asking the court to enter an order for child support. The district court's order in favor of the father was appealed to this Court, which reversed the order on 1 October 1975. *Wyatt v. Wyatt,* 27 N.C. App. 134, 218 S.E. 2d 194 (1975). The trial court was found to be in error when it said that the parties were bound by the separation agreement, where the trial court had found the child in need of maintenance and support and the father with the ability to pay. On remand the trial court conducted additional hearings to ascertain the current needs of the child and the ability of the father to pay.

On 16 December 1975, after testimony by both plaintiff and defendant, the trial court found that the child's needs

amounted to $228.20 per month, that the child was substantially in need of maintenance and support from the father, and that the father had the present ability to support the child. The court ordered the plaintiff to pay $110.00 a month in support plus all medical expenses of the child. The court further found that defendant's motion was in good faith, that she did not have the means to defray her legal expenses, and that plaintiff had sufficient earnings to contribute to defendant's legal expenses. The plaintiff was thereby ordered to pay $600.00 to defendant as partial reimbursement for legal fees. The findings and award were announced in court on 16 December 1975. The order was signed and filed on 12 April 1976. From this order plaintiff appeals.

McMurray, Triggs & Hodges, by John H. McMurray and Robert E. Hodges, for plaintiff.

Byrd, Byrd, Ervin and Blanton, by Joe K. Byrd, for defendant.

BROCK, Chief Judge.

Two questions are presented to this Court for review. First, were there sufficient findings of fact by the trial court on the ability of the plaintiff to meet what the court found to be the needs of the child? Secondly, was the court correct in ordering payment of legal fees without finding as facts that the fees were reasonable and that the plaintiff had refused to provide support which was adequate under the circumstances existing at the time of the institution of the proceeding?

[1, 2] As to the first question, it is well settled in North Carolina that it is the father's legal obligation to support his minor children. *Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976). The amount of child support awarded is in the discretion of the trial judge and will be disturbed only on a showing of abuse of that discretion. *Sawyer v. Sawyer*, 21 N.C. App. 293, 204 S.E. 2d 224 (1974). The trial court's discretion, however, is not absolute and unreviewable. The order must be based not only on the needs of the child but also on the ability of the father to meet the needs. *Holt v. Holt, supra.* But where there is a finding of ability to pay supported in the record by competent evidence, that finding will be conclusive. *Sawyer v. Sawyer, supra.*

In the previous opinion in this case, this Court held there had been findings of need and of ability to pay beyond the $65.00

provided monthly by the plaintiff. At the second hearing to ascertain the current ability of the plaintiff to pay, the court made detailed findings as to plaintiff's income and expenses. There was evidence that his financial situation had changed since the first hearing due to the birth of twins to his second wife. But there was also evidence that his monthly earnings had increased, that his Veterans Administration student benefits had increased, and that his present wife was employed and also receiving child support payments from her previous husband. There was evidence that plaintiff owned golf equipment worth $500.00 and that he maintained an annual membership at a golf club. Just prior to the second hearing, plaintiff purchased a $4,000.00 automobile for his second wife.

[3] The finding of the trial court that the plaintiff had the ability to pay the support ordered is supported in the record by competent evidence. No abuse of discretion appears concerning the support order.

[4] As to the second question, plaintiff contends there were insufficient findings of fact to support the award of attorney's fees. We agree.

General Statute 50-13.6 authorizes the court to order payment of legal fees if there are findings of fact that the fee is reasonable, that the moving party is acting in good faith without sufficient means to defray legal expenses, and 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 suit. In this case there are adequate findings showing that the defendant acted in good faith without sufficient financial means and that plaintiff had refused to provide adequate support.

The partial listing of legal expenses, however, is an insufficient finding of fact as to the reasonable worth of attorney's fees. *Rickenbaker v. Rickenbaker,* 21 N.C. App. 276, 204 S.E. 2d 198 (1974); *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420 (1971).

That part of Judge Tate's order setting child support is affirmed. That part of the order awarding attorney's fees is

vacated and remanded for further proceedings in accordance with this opinion.

Affirmed in part, vacated in part, and remanded.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES PALMER, ALIAS JAMES BURRELL

No. 769SC594

(Filed 5 January 1977)

Assault and Battery § 11— indictment — assault with "stick" — insufficient allegation of deadly weapon

An indictment charging that defendant assaulted a named person "with a stick, a deadly weapon, by beating him about the body and head" was insufficient to charge an assault with a deadly weapon since it does not appear from the indictment that the weapon, *ex vi termini*, was a deadly weapon and the indictment does not contain a sufficient description of the weapon and the circumstances of its use to show its character as a deadly weapon.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 11 May 1976 in Superior Court, PERSON County. Heard in the Court of Appeals 8 December 1976.

Defendant was charged in a bill of indictment which read as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 13th day of June, 1975, in Person County James Palmer, alias James Burrell unlawfully and wilfully did feloniously assault Grover A. Whitfield, Sr., with a stick, a deadly weapon, by beating him about the body and head. The assault was intended to kill and resulted in serious bodily injury, in that some teeth were knocked out and face was beat very badly."

The jury returned a verdict of "guilty of assault with a deadly weapon." A sentence of two years' imprisonment was imposed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

James W. Tolin, Jr., for the defendant.

BROCK, Chief Judge.

As can be seen from the verdict, defendant was acquitted of the charge of an assault with intent to kill and acquitted of the charge of an assault inflicting serious bodily injury. The remaining charge of assault with a deadly weapon was found against defendant.

Although the question was not raised by the State or the defendant, we must, upon our own initiative, take notice of the sufficiency or insufficiency of the indictment to charge an assault with a deadly weapon. We hold that the indictment is insufficient to charge an assault with a deadly weapon and that judgment must be arrested.

The stick identified at trial as the stick with which defendant struck the victim has been examined by this Court and found to be a hard wooden stick weighing two pounds and eleven ounces. It is approximately forty-three and one-fourth inches long, two inches in diameter at the club end, and one and one-half inches in diameter at the handle. Obviously it could have been described in the bill of indictment sufficiently to show its character as a deadly weapon, but this was not done. It was described as a stick. Merely labeling it a deadly weapon is not sufficient.

In *State v. Porter,* 101 N.C. 713, 7 S.E. 902 (1888), the indictment charged that the accused "did unlawfully and wilfully assault, beat and wound one Candace Porter with a deadly weapon, to wit, a certain stick, to the great damage of . . . " In *Porter* the Court held:

> "the court must be able, from an inspection of the charge, in the terms in which it is made in the indictment, to see that its jurisdiction attaches, that the weapon with which the assault was made was a deadly instrument, not merely by calling it '*deadly,*' unless by so describing it by name, or with such attending circumstances as show its character as such, and when so described the jurisdiction becomes apparent and will be exercised.

"The present indictment manifestly falls short of this requirement, for while called a deadly weapon it is designated simply as a stick, with no description of its size, weight or other qualities or properties from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life or inflict great physical injury upon the assailed."

In *State v. Phillips,* 104 N.C. 786, 10 S.E. 463 (1889), which has been termed by our Supreme Court as a borderline case *(see State v. Wiggs,* 269 N.C. 507 at 514), the indictment charged that the accused " . . . with a certain deadly weapon, to wit, with a club . . . " In *Phillips* the Court concluded that the word "club," *ex vi termini,* can be declared such an instrument as would probably produce death or great bodily harm when used to strike a blow.

In *State v. Wiggs,* 269 N.C. 507, 153 S.E. 2d 84 (1967), it was charged that the accused "did willfully, maliciously and unlawfully assault the person of one B. B. Coats with a deadly weapon, to wit, a gallon glass jar by threatening to hit him with the said jar." In *Wiggs* the Court held the allegation did not sufficiently charge an assault with a deadly weapon to support a verdict and judgment for that offense. In *Wiggs* the opinion referred with approval to *State v. Porter, supra,* in stating that "to sustain an indictment as sufficiently charging an assault with a deadly weapon, it must appear from the indictment that the weapon, *ex vi termini,* is a deadly weapon, or that the description of the weapon and the circumstances of its use are sufficient to show its character as a deadly weapon."

For the failure of the indictment to sufficiently charge an assault with a deadly weapon, the offense for which defendant was tried and convicted, judgment must be arrested. However, the State, if it so desires, may seek a valid warrant under G.S. 14-33(b)(1) charging defendant with assault with a deadly weapon. "Jeopardy attaches only when, *inter alia,* a defendant is tried upon a valid warrant or indictment." *State v. Jernigan,* 255 N.C. 732, 122 S.E. 2d 711 (1961). *See also* 2 Strong, N. C. Index 2d, Criminal Law, § 26, p. 522.

Judgment arrested.

Judges BRITT and MORRIS concur.

WILLIAM L. LAMBERT v. DUKE POWER COMPANY, A CORPORATION

No. 7626SC585

(Filed 5 January 1977)

Electricity § 8— plaintiff working on sign — knowledge of uninsulated wire — contributory negligence

In an action to recover for personal injuries sustained by plaintiff when he came in contact with an uninsulated wire while working on a large outdoor sign, evidence was sufficient to show that plaintiff was contributorily negligent as a matter of law where it tended to show that plaintiff had previously worked on the sign and had been warned of the presence of the wire by his coworker, and plaintiff admitted that he knew of the existence of the wire but thought that he could safely work around it.

APPEAL by plaintiff from *Thornburg, Judge.* Summary judgment entered 1 April 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 December 1976.

Plaintiff alleged in his complaint that on 12 June 1970 he was employed by Interstate Advertising Company and was engaged in putting a new facing on a large outdoor advertising sign beside Independence Boulevard in Charlotte. In performing his work, plaintiff was required to move along the entire length of the top of the sign to pull up the new facing and fasten it onto the billboard. While moving along the top of the sign, plaintiff came in contact with an uninsulated wire which was owned and " . . . maintained by the defendant above the sign at a point where an adult human being working on the sign would come in contact with the wire and be injured." The electrical shock caused plaintiff to fall approximately 30 feet to the ground and resulted in serious injuries to him. Defendant, in its answer, denied the material allegations of plaintiff's complaint and alleged intervening negligence by Interstate Advertising Company, and contributory negligence on the part of plaintiff.

After extensive pretrial discovery, defendant moved for summary judgment. It stipulated, solely for the purposes of the motion, that it had been negligent but argued that plaintiff was contributorily negligent. On 1 April 1976, Thornburg, Judge, after reviewing all the evidence, granted defendant's motion, stating

"And, the parties having stipulated that the defendant was primarily negligent for purposes of a determination on this motion only, it appearing to the Court that the testimony of the plaintiff contained in his deposition and in his answers to the interrogatories of the defendant contained in the aforementioned file show that the plaintiff was contributorily negligent as a matter of law and that defendant is entitled to judgment as a matter of law . . . "

Plaintiff appeals from this order.

Other relevant facts are set out in the opinion below.

Jones, Hewson and Woolard, by Harry C. Hewson and John D. Warren, for plaintiff appellant.

William I. Ward, Jr., and W. Edward Poe, Jr.; Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins III, for defendant appellant.

MORRIS, Judge.

The sole question for consideration on this appeal is whether the trial judge properly entered summary judgment for defendant. Upon a motion for summary judgment, the court does not attempt to resolve issues of fact but to determine whether there is a genuine issue of material fact to be tried. *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974); *Reavis v. Campbell,* 27 N.C. App. 231, 218 S.E. 2d 873 (1975). The moving party must make it perfectly clear that he was entitled to judgment as a matter of law. *Builders Supply Co. v. Eastern Associates,* 24 N.C. App. 533, 211 S.E. 2d 472 (1975).

Plaintiff contends that defendant did not establish as a matter of law that plaintiff was contributorily negligent and thereby barred from recovery. We disagree.

Answers to interrogatories and plaintiff's own deposition show that plaintiff had worked on top of the same sign on at least two previous occasions; that he believed a co-worker " . . . did mention there was a high tension line above the sign"; that prior to the accident he occasionally looked over and saw the wire but was looking downward at the time he came in contact with it; that when the accident occurred, plaintiff was standing on two iron rails which ran along the inside

of the sign approximately 12 inches from its top; that he had been leaning over to pull up the new wood panel into place when he raised up slightly and turned around to go to the center of the sign; that he was aware of the presence of the wire but thought that " . . . [i]t appeared far enough away that it was safe to work"; and that as he turned, the uninsulated wire touched him on the neck just below his right ear and the resulting electrical shock threw him to the ground.

In *Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966), plaintiff's intestate died as a result of electrical shock when the blower pipe of his truck came in contact with an uninsulated wire of the defendant power company. The evidence showed that the deceased knew of the existence of the wire and its proximity to the point at which he brought his truck in contact with it. The Supreme Court held that plaintiff's intestate was contributorily negligent as a matter of law.

> "Even if negligence by either of these defendants could reasonably be inferred upon the evidence in this record, the evidence leads inescapably to the conclusion that the deceased . . . was guilty of contributory negligence. Knowing of the presence of the power line, and having filled his tank on previous occasions, the deceased, for some unknown reason, permitted the metal blower pipe . . . to come in contact with the power line. This tragic lapse of attention to a known danger in the immediate vicinity must be deemed negligence by the deceased." 268 N.C. at 551, 151 S.E. 2d at 4.

Here, the evidence shows that plaintiff had previously worked on the sign and had been warned of the presence of the wire by his co-worker. He admitted that he knew of the existence of the wire but thought that he could safely work around it. We believe plaintiff's conduct evidenced " . . . a tragic lapse of attention to a known danger . . . " and thereby constituted contributory negligence as a matter of law. See also *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *discretionary review den.*, 289 N.C. 296, 222 S.E. 2d 695 (1976).

For the reasons stated above, the summary judgment is

Affirmed.

Judges CLARK and ARNOLD concur.

NORMAN W. COCKRELL, ADMINISTRATOR OF THE ESTATE OF MARY LYNN COCKRELL v. CROMARTIE TRANSPORT COMPANY AND JOHNNY HAROLD CAVANAUGH

No. 7612SC600

(Filed 5 January 1977)

Automobiles § 89— defendant found not negligent — failure to submit last clear chance

Since the doctrine of last clear chance does not apply unless both parties are found to be negligent, the jury's verdict finding that defendant was not negligent rendered moot the question of whether the court erred in failing to submit to the jury the issue of last clear chance.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 27 February 1976 in Superior Court, CUMBERLAND County. Heard in Court of Appeals 8 December 1976.

This is a civil action wherein the plaintiff, Norman W. Cockrell, seeks to recover damages for the wrongful death of his daughter, Mary Lynn Cockrell, allegedly resulting from a car-truck collision caused by the negligence of defendant Johnny Harold Cavanaugh who was driving a truck owned by defendant Cromartie Transport Co. Defendants counterclaimed seeking to recover for personal injuries to Cavanaugh and property damage to the truck owned by Cromartie Transport Co. allegedly resulting from the negligence of plaintiff's intestate in the operation of the automobile. After both parties offered evidence, the following issues were submitted to the jury and answered as indicated:

"1. Was Mary Lynn Cockrell killed as a result of the negligence of the Defendant, Johnny Harold Cavanaugh?

ANSWER: No

2. Did Mary Lynn Cockrell by her own negligence contribute to her death?

ANSWER: Yes

3. What amount of damages, if any, is Norman W. Cockrell, Administrator of the Estate of Mary Lynn Cockrell, deceased, entitled to recover by reason of the death of Mary Lynn Cockrell?

ANSWER: .....

4. Was the Defendant, Johnny Harold Cavanaugh, injured as a result of the negligence of Mary Lynn Cockrell?

ANSWER: Yes

5. If so, what amount of damages is the Defendant, Johnny Harold Cavanaugh, entitled to recover for personal injuries sustained by him?

ANSWER: $5,000.00

6. Was the property of the Defendant, Cromartie Transport Company, damaged as a result of the negligence of Mary Lynn Cockrell?

ANSWER: Yes

7. If so, what amount of damages is the Defendant, Cromartie Transport Company, entitled to recover for property damage?

ANSWER: $10,000.00"

From a judgment entered on the verdict, plaintiff appealed.

Downing, David, Vallery & Maxwell by C. Douglas Maxwell, Jr., for plaintiff appellant.

McCrae, McCrae & Perry by James C. McCrae for defendant appellees.

HEDRICK, Judge.

Plaintiff has brought forward and argued only two assignments of error. The first relates to the court's refusal to allow one of plaintiff's witnesses to give his opinion as to the speed of defendant's truck immediately before the collision. With respect to this assignment of error, plaintiff in his brief states the following:

> "The Plaintiff is painfully aware of the fact that the record does not contain the witness' opinion, had he been allowed to give it. Therefore, the failure to admit the opinion cannot be considered prejudicial to the Plaintiff."

By his other assignment of error plaintiff contends the court erred in failing to submit to the jury the issue of last clear chance. The doctrine of last clear chance does not apply unless both parties are found to be negligent. Therefore the

jury's verdict finding Cavanaugh not to be negligent renders moot the question of whether the court erred in not submitting to the jury the issue of last clear chance.

No error.

Judges PARKER and CLARK concur.

ARNOLD R. LOWERY, AND SONJA LOWERY v. FINANCE AMERICA CORPORATION, FORMERLY GAC FINANCE INCORPORATED OF NORTH CAROLINA

No. 7621DC584

(Filed 19 January 1977)

1. **Interest § 3— Truth in Lending Act — increase in obligation — disclosure requirements**

Provisions of a loan agreement that "Lender may, at its option, make advances to Debtors from time to time aggregating not more than the statutory maximum of $900.00" and that "Lender is hereby committed to make loans up to a high credit of $900.00" did not call for a series of advances on a single loan commitment but created a line of credit upon which separate loans would be made; therefore, when the amount of the debtors' obligation to the lender was thereafter increased, the second transaction was a new transaction which was subject to the disclosure requirements of the Federal Truth in Lending Act and Federal Regulation Z. 15 U.S.C. § 1639; 12 C.F.R. § 226.8(i) and (j).

2. **Interest § 3— Truth in Lending Act — insurance disclosures**

Written disclosures relating to insurance premiums must appear on the same side of either the note evincing the debt or some separate disclosure statement; however, the disclosure statement need not contain the insurance requisition. 12 C.F.R. § 226.8(a).

3. **Interest § 3— Truth in Lending Act — finance charge — premiums for credit insurance**

Premiums for credit insurance cannot be excluded from the finance charge unless the fact that insurance is not required by the creditor is "clearly and conspicuously disclosed in writing to the customer." 12 C.F.R. § 226.4(a)(5)(i).

4. **Interest § 3— Truth in Lending Act — finance charge — failure to include credit insurance premiums**

A lender violated the Federal Truth in Lending Act and Federal Regulation Z by excluding the cost of credit life and disability insurance from the amount of the finance charge disclosed to the borrower

for the reason that the insurance disclosures were not clear, conspicuous and in meaningful sequence where the disclosure statement contained a group of boxes at the top of the page disclosing insurance and other costs, the insurance costs were typed in two boxes designated "Credit Dis." and "Credit Life," and the written explanation that the insurance was optional was contained in paragraphs at the bottom of the page.

5. Interest § 3— Truth in Lending Act — insurance authorization — necessity for date

A lender violated the Truth in Lending Act by obtaining an insurance authorization which contained no date. 12 C.F.R. § 226.4 (a) (5) (ii).

6. Interest § 3— Truth in Lending Act — payment schedule — disclosure of number of payments

A repayment schedule in a disclosure statement stating "Loan Is Payable In Monthly Payments The First One X $38.75 And 17 X $37.00 Each Except Final Payment Shall Be Unpaid Balance With Interest After Maturity at 6% Per Annum" was insufficient under the Truth in Lending Act since (1) the total number of payments must be expressed in a single figure, and (2) the final clause is so unclear as to obscure the preceding disclosures.

7. Interest § 3— Truth in Lending Act — inaccurate disclosure of security interest

A lender violated the Truth in Lending Act by inaccurately disclosing the nature of the security interest in after-acquired household goods where the lender's disclosure statement indicated it had a security interest in all of the borrowers' after-acquired household goods when, in fact, G.S. 25-9-204(4)(b) limited the security interest to household goods acquired within ten days after the lender loaned the money to the borrower. 15 U.S.C. § 1639(a)(8); Federal Regulation Z, 12 C.F.R. § 226.8(b)(5).

8. Interest § 3— Truth in Lending Act — unintentional error — clerical error

Section of the Truth in Lending Act absolving a creditor from liability for an unintentional and "bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error" relates only to clerical errors, mistakes in arithmetic and similar errors. 15 U.S.C. § 1640(c).

9. Interest § 3— Truth in Lending Act — good faith act — reliance on invalid regulations

Section of the Truth in Lending Act absolving a creditor from liability for "any act done or omitted in good faith in conformity with any rule, regulation or interpretation thereof by the Board" relates only to situations where a disclosure statement, prepared in accordance with the rules or regulations, is later determined to be invalid because the relied upon rules or regulations are invalid or no longer in effect.

10. Interest § 3— Truth in Lending Act — insufficient disclosure — recovery of penalty and attorney's fees

Where a lender's disclosure statements were defective as a matter of law, the borrowers were entitled to recover the statutory penalty and their reasonable attorney's fees, notwithstanding they suffered no actual damage. 15 U.S.C. § 1640(a)(2)(A); 15 U.S.C. § 1640(a)(2).

APPEAL by plaintiffs from *Clifford, Judge.* Judgment entered 11 March 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 7 December 1976.

Plaintiffs, Arnold and Sonja Lowery, brought this action against defendant, Finance America Corporation (FAC), to recover the statutory penalty for violations of the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.*, (the Act), and Federal Regulation Z, 12 C.F.R. § 226.1, *et seq.*, (Regulation Z), adopted by the Federal Reserve Board pursuant to the Act. FAC counterclaimed, alleging plaintiffs' default on the loans. Having jurisdiction under 15 U.S.C. § 1640(e), the court, without a jury, decided this matter upon the allegations of the amended pleadings and the stipulations of fact made in the pretrial order.

By their amended complaint, plaintiffs allege that they borrowed money from FAC on 7 December 1972 and 8 June 1973. They further allege that FAC failed to make certain disclosures required by the Act, 15 U.S.C. § 1639, and Regulation Z, 12 C.F.R. § 226.8. Accordingly, they ask for the statutory civil penalty, twice the finance charge on each transaction, plus costs and reasonable attorneys' fee. 15 U.S.C. § 1640(a). FAC, in its answer and counterclaim, alleges that the necessary disclosures were made and asks to receive the amount outstanding and due to it on the Lowerys' promissory note, plus interest. The Lowerys, in their reply, allege that the amount of FAC's statutory liability to them exceeds the amount outstanding on their note to FAC. They ask for a declaratory judgment, plus a judgment for the excess, costs and attorneys' fees.

The stipulated facts are as follows: On 7 December 1972 the parties entered into a loan agreement, formalized in four documents. The first was a Loan Agreement (exhibit 1), subscribed by the Lowerys, which provided that FAC was "committed to make loans up to . . . $900.00" to the Lowerys. The Loan Agreement was "made on the terms and conditions set forth [t]herein and was incorporated by reference" in the re-

maining three documents. The second document (exhibit 2) consisted of a disclosure statement plus a voluntary insurance requisition. At the top of this document appeared a block of boxes as follows:

First Name / Initial / Last Name	Spouse	$119.92 ⇦ FINANCE CHARGE			Official Fees	Total of Payments
Arnold R. Lowery	Sonja				$2.00	$667.75
Street and Number		Other Insurance	Credit Life	Credit Dis.		Amount Financed
(Illegible)		$ NONE	$19.98	$19.43	NONE	$547.83
City, State, Zip Code	APR	Loan Is Payable In Monthly Payments, The First One			First Payment Due	Final Payment Due
Winston-Salem, N. C. 27107	25.70%	X $38.75 and 17 X $37.00			1-15-73	6-15-74
		Each Except Final Payment Shall Be Unpaid Balance With Interest After Maturity at 6% Per Annum				
		ANNUAL PERCENTAGE RATE				

This document indicated that the loan was secured by a security interest in "all of the Household Goods belonging to the Borrowers," including after-acquired household goods. Next, the document explained, in this order, the default provisions, prepayment provisions, credit insurance provisions, and the range of annual percentage rates, which depended on the size and terms of the loan. The document was signed by Arnold Lowery. Below his signature was a "Voluntary Insurance Requisition," relating to the insurance disclosures, made above, which informed the borrower in ordinary size type that credit life and credit disability insurance were not required by the lender in connection with the advance. The requisition itself said that the borrower "elect[ed] to have the Lender obtain Credit Life and/or Credit Disability insurance" for him, after the lender revealed the cost of this insurance to him. Lowery's signature again appeared beneath this requisition.

The third document was a Federal Disclosure Statement, Borrower's Copy (exhibit 3). This was identical to exhibit 2, except it omitted the insurance requisition and contained a statement revealing that there were no comakers on the note. It was not signed by Lowery. Finally, the Statement of Contract-Voucher (exhibit 4) repeated all the information in the boxes on the disclosure forms (exhibits 2 and 3), except the annual percentage rate. This Contract-Voucher explained that the contract consisted of the Loan Agreement, the Federal Disclosure Statement, the check and/or the Contract-Voucher. It repeated the default provisions and prepayment provisions. It stated

that by signing the attached receipt the borrower agreed to repay the cash advance, and it reiterated that credit insurance was not required and that the loan was secured by household goods. The document then stated the amount of cash advanced, $547.83, and substracted the insurance premiums and recording charge, a total of $41.41, leaving $506.42 as the cash given to the Lowerys. Both Arnold and Sonja Lowery signed this receipt.

The Lowerys reduced their outstanding debt to FAC to $407.88. Then, on 8 June 1973, they obtained more money from FAC. The 8 June 1973 transaction was based on the December Loan Agreement. In addition, the parties executed three new documents. The Federal Disclosure Statement (exhibit 6) was identical in form to that of 7 December 1972. The boxes at the top appeared as follows:

First Initial Last Name	Spouse	$218.10 ⇦ FINANCE CHARGE			Official Fees	Total of Payments
Arnold R. Lowery	Sonja				$ NONE	$1118.10
Street and Number		Other Insurance	Credit Life	Credit Dis.		Amount Financed
(Illegible)		$ .60	$44.64	$32.56	NONE	$900.00
City, State, Zip Code	APR	Loan Is Payable In Monthly Payments, The First One			First Payment Due	Final Payment Due
Winston-Salem, N. C. 27107	21.57%	X $48.60 and 23 X $46.50			7-15-73	6-15-75
		Each Except Final Payment Shall Be Unpaid Balance With Interest After Maturity At 6% Per Annum				
		ANNUAL PERCENTAGE RATE				

The Statement of Contract-Voucher (exhibit 7) showed a cash advance to the Lowerys of $900.00, less a check to them for $414.32, which left a total of $485.68 in cash owed to them. All of this cash was immediately used to pay the balance due on the 7 December 1972 loan, plus the insurance premiums on the 8 June 1973 loan.

The final document involved in this transaction was the check for $414.32 (exhibit 5). On the back of the check was a statement to the effect that credit insurance was not required. Beneath this was a statement entitled "Voluntary Credit Life And/Or Disability Insurance Requisition." It was thereafter provided that the undersigned could "elect to have lender" obtain insurance coverage "checked below." Both credit life insurance, at a cost of $44.64, and credit disability insurance, at a cost of $32.56, were checked. Although it was not dated, both

Lowerys signed this voluntary insurance requisition. In a space below the insurance requisition the Lowerys endorsed the check, thereby "acknowledg[ing] receipt of Federal Disclosure Statement and Statement of Credit-Voucher."

There is an outstanding balance of $885.85, plus interest, due to FAC. From a judgment that FAC recover the outstanding balance plus interest, and that the Lowerys recover nothing, the Lowerys appeal.

Herman L. Stephens for plaintiff appellants.

Henry C. Frenck for defendant appellee.

ARNOLD, Judge.

Plaintiffs assign error to the court's holding that "the June 8, 1973, transaction is a subsequent advance under a prior agreement to extend credit and is not subject to" the disclosure requirements of the Act. They contend that the December 1972 and June 1973 loans were separate transactions, and that both were subject to the disclosure requirements of the Act and Regulation Z. Plaintiffs' position is that the court erred in refusing to award them the statutory penalty and reasonable attorney's fee. According to plaintiffs, the disclosures were insufficient in each transaction because (1) FAC excluded the insurance premiums from the amount of the finance charges; (2) FAC did not disclose the total number and amount of payments; and (3) FAC did not accurately disclose the nature of the security interest.

[1] The trial court erred in holding that the 8 June 1973 transaction was not a new transaction but only a subsequent advance, made pursuant to the 7 December 1972 Loan Agreement, which was not subject to additional disclosure requirements of the Act and Regulation Z. The June 1973 loan was a new transaction, and additional disclosures were required.

Two sections of Regulation Z are pertinent, 12 C.F.R. § 226.8(i) and (j). Plaintiffs rely on 12 C.F.R. § 226.8(j) which provides: "If . . . an existing obligation is increased, such transaction shall be considered a new transaction subject to the disclosure requirements" of the Act and Regulation Z. The amount of the December 1972 obligation was increased from $667.75 to $1,118.10 in June 1973.

FAC relies on 12 C.F.R. § 226.8(i) which dispenses with additional disclosures "[i]f a loan is one of a series of advances made pursuant to a written agreement under which a creditor is or may be committed to extend credit to a customer up to a specified amount." FAC contends that its Loan Agreement (exhibit 1) is such a "written agreement." We disagree.

The purpose of 12 C.F.R. § 226.8(i) is to eliminate unnecessary and redundant disclosures. *See,* Public Position Letter of the Federal Reserve Board, No. 456 (17 March 1971). A second disclosure need not precede a second advance when the customer has already "approved in writing the annual percentage rate or rates, the method of computing the finance charge or charges, and other terms" of the second advance.

In the Loan Agreement of December 1972 it provides:

> "Lender may, at its option, make advances to Debtors from time to time aggregating not more than the statutory maximum amount of $900.00. . . . Lender is hereby committed to make loans up to a high credit of $900.00. . . . "

This does not comport with 12 C.F.R. § 226.8(i) since it does not provide for a "series of advances." It merely indicates that FAC will make additional loans from "time to time" in the future. The Loan Agreement does not call for a series of advances on a single loan commitment, but it creates a line of credit upon which separate loans will be made.

Moreover, the disclosures made prior to the December 1972 loan are insufficient to satisfy § 226.8(i). The annual percentage rate, finance charge and other terms disclosed then were different from those of the June 1973 loan. The amount financed, the total of payments, the number of payments, the finance charge and insurance premiums were all increased. The annual percentage rate decreased from 25.70 percent to 21.57 percent, which tends to show there were two transactions instead of a series. And, finally, the 1973 transaction increased the 1972 obligation. "If . . . an existing obligation is increased, such transaction shall be considered a new transaction subject to the disclosure requirements [of Regulation Z and the Act]." 12 C.F.R. § 226.8(j).

[4] We further conclude that the trial court erred by failing to find that FAC violated the Act and Regulation Z by excluding the cost of credit life insurance and credit disability insur-

ance from the amount of finance charge disclosed in both transactions. FAC treated the credit insurance premiums as parts of the amount financed and not as parts of the finance charges. This is correct procedure only if

> "(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and
>
> "(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof." 15 U.S.C. § 1605(b).

Plaintiffs argue that FAC failed to comply with the above section in both transactions, and that in the June 1973 transaction the insurance requisition appearing on the back of the check lacked the date as required by 12 C.F.R. § 226.4(a)(5)(ii).

[2] Written disclosures relating to insurance premiums are among those which must appear on the same side of either the note evincing the debt or some separate disclosure statement. 12 C.F.R. § 226.8(a). FAC adopted the latter method of disclosure in this case. Insurance disclosures appear on the Federal Disclosure Statement, Borrower's Copy (exhibit 3), and the combination disclosure statement-insurance requisition which was signed by Arnold Lowery and retained by FAC (exhibit 2).

Plaintiffs contend that the insurance requisition must appear on the Federal Disclosure Statement. However, the disclosure statement need not contain the insurance requisition. *Burton v. G.A.C. Finance Co.*, 525 F. 2d 961 (5th Cir. 1976); *Gillard v. Aetna Finance Co., Inc.*, 414 F. Supp. 737 (E.D. La. 1976). The Act and Regulation Z do not speak of the insurance requistion as a disclosure, nor do they expressly require the insurance requisition to be among the disclosures. What are required to be disclosed are the cost of the insurance and the fact that insurance is not a factor in the decision to grant or withhold a loan.

[3] According to Regulation Z, 12 C.F.R. § 226.6(a), "The disclosures required . . . by this part shall be made clearly, conspicuously, [and] in meaningful sequence. . . . " Premiums for credit insurance cannot be excluded from the finance charge unless the fact that insurance is not required by the creditor is "clearly and conspicuously disclosed in writing to the customer." 12 C.F.R. § 226.4(a) (5) (i).

[4] The insurance disclosures contained in the Federal Disclosure Statement given to the Lowerys are not clear, conspicuous and in meaningful sequence. First, the cost of the insurance is neither clearly nor conspicuously revealed. The cost is typed in two of many boxes at the top of the page. These boxes are designated "Credit Life" and "Credit Dis." The meaning of these words is not clear to laymen for whose protection the Act and Regulation are meant. 15 U.S.C. § 1601. Since the insurance cost disclosures are not clear, these cost disclosures also are not conspicuous. *See, Woods v. Beneficial Finance Co.,* 395 F. Supp. 9 (D. Oregon, 1975).

Second, the insurance disclosures are not in a meaningful sequence. The boxes containing the insurance costs are at the top of the page while the written explanation that the insurance is optional is contained in paragraphs at the bottom of the page. Unrelated material is contained between the insurance costs and the written explanations. There is not even any reference in the written text to the boxes of information at the top of the page. *Id.*

FAC did not disclose the insurance information in a clear, conspicuous and meaningful way, and for that reason the cost of the insurance ought to have been included in the amount of the finance charge. This error by FAC violates 15 U.S.C. § 1605(b) and 12 C.F.R. § 226.4(a) and makes FAC liable for the statutory penalties.

We are aware of factually similar cases which reach contrary results. *See, e.g., Gillard v. Aetna Finance Co., Inc., supra; Simmons v. American Budget Plan, Inc.,* 386 F. Supp. 194 (E.D. La., 1974). The court in *Simmons* said of a disclosure statement using a group of boxes to disclose insurance and other costs, that "defendants' form was sufficiently clear that minimal possibility of confusion existed." *Id.* at 199. These cases are *sui generis.* Each case, as the one before us, must be decided on its own facts. In this case we do not find the disclosures to be

"sufficiently clear" in either the December 1972 or June 1973 transaction.

[5] Plaintiffs correctly argue that FAC failed to obtain a *dated* insurance authorization for the June 1973 transaction. This violates 12 C.F.R. § 226.4(a) (5) (ii), requiring a "specific dated and separately signed affirmative written indication of [the] desire" to obtain insurance.

[6] Among the boxes at the top of the Federal Disclosure Statement is one which explains the repayment schedule. It says:

> "Loan Is Repayable In Monthly Payments The First One X $_____ And _____ X $_____ Each Except The Final Payment Shall Be Unpaid Balance With Interest After Maturity At 6% Per Annum."

The Lowerys assert that this form is inadequate because it does not state the total number of payments; because it uses a confusing formula to disclose the number and amounts of payments; and because the final clause, "Each Except Final Payment Shall Be Unpaid Balance With Interest After Maturity At 6% Per Annum," is confusing. Their argument has merit.

First, the case of *Powers v. Sims and Levin Realtors,* 396 F. Supp. 12 (E.D. Va., 1975), says that the total number of payments must be expressed in a single figure. The disclosure is not sufficient when the borrower has to add the total number of payments for himself. Second, we find that even if the disclosures were otherwise sufficient, the final clause is so unclear as to obscure the preceding disclosures, and violates 12 C.F.R. § 226.6(c).

[7] A final argument by the Lowerys is that the court erred in not finding that FAC violated the Act by inaccurately disclosing the nature of the security interest taken in after-acquired household goods. The court did err. 15 U.S.C. § 1639(a) (8), and Regulation Z, 12 C.F.R. § 226.8(b) (5) both require that the disclosure of a security interest clearly identify the property to which the security interest relates. FAC's disclosure statements indicate that FAC has a security interest in all of the borrowers' after-acquired household goods. In fact, G.S. 25-9-204(4) (b) limits this security interest to household goods acquired within ten days after the lender loans the money to the borrower. The disclosure statement is misleading by indicating that FAC has a greater security interest than in fact it does. *Tinsman v.*

Moline Beneficial Finance Co., 531 F. 2d 815 (7th Cir., 1976); *Woods v. Beneficial Finance Co., supra.*

[8, 9] FAC argues that certain "good faith" defenses present in the Act protect it from liability. We disagree. FAC relies on 15 U.S.C. § 1640(c), which protects the creditor who makes an unintentional and "bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." As the reference to "procedures" implies, 15 U.S.C. § 1640(c) is limited to clerical errors, mistakes in arithmetic and other errors of this sort. *Ratner v. Chemical Bank*, 329 F. Supp. 270 (S.D. N.Y., 1971). FAC also relies on 15 U.S.C. § 1640(f), which says:

> "No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation or interpretation thereof by the Board . . . . "

Section 1640(f) is a recent addition and has been construed only a few times. The leading case, *Ives v. W. T. Grant Co.*, 522 F. 2d 749 (2d Cir., 1975), limits the rule to situations where a disclosure statement, prepared in accordance with the rules or regulations, is later determined to be invalid because the relied upon rules or regulations are invalid or no longer in effect. *See, Houston v. Atlanta Federal Sav. & Loan Ass'n.*, 414 F. Supp. 851 (N.D. Ga., 1976); *Gillard v. Aetna Finance Co., Inc., supra.* FAC has not met its burden of showing that it prepared its statement "in conformity with any rule, regulation or interpretation." Accordingly, 15 U.S.C. § 1640(f) provides no help for FAC.

[10] Since the facts of this case are not in dispute we hold that the FAC disclosure statements are defective as a matter of law. Plaintiffs are entitled to the statutory penalty provided by 15 U.S.C. § 1640(a)(2)(A). It matters not that the Lowerys suffered no actual damage, since the purpose of the penalty provisions is to encourage the public to enforce the Act. *Ratner v. Chemical Bank, supra.* In addition, the Lowerys are entitled to recover their reasonable attorney's fees. 15 U.S.C. § 1640(a)(3). This provision, also, is meant to encourage enforcement of the Act.

Judgment was entered for FAC on its counterclaim in the amount of $885.85, plus interest at 6% per annum calculated

from 24 January 1974. The Lowerys do not challenge this part of the judgment, and it is affirmed.

Reversed in part and remanded.

Judges MORRIS and CLARK concur.

ESTHER B. BOOKER, WIDOW AND GUARDIAN AD LITEM FOR ELIZABETH A. BOOKER, DANIEL LOYD BOOKER, DAVID WAYNE BOOKER AND MARTHA JANE BOOKER, MINOR CHILDREN OF ROBERT S. BOOKER, DECEASED, EMPLOYEE v. DUKE MEDICAL CENTER, EMPLOYER AND GLENS FALLS INSURANCE COMPANY, CARRIER

No. 7614IC461

(Filed 19 January 1977)

1. **Master and Servant § 68— occupational disease — applicable statute**

In an action to recover death benefits for the widow and minor children of an employee of defendant who died as a result of serum hepatitis, the version of G.S. 97-53(13) which was in effect during the first six months of 1971, the time during which the employee contracted the disease, was applicable to this case.

2. **Master and Servant § 68— serum hepatitis — no occupational disease**

The Industrial Commission erred in concluding that, under G.S. 97-53(13) as it existed during the first six months of 1971, serum hepatitis was an occupational disease, since an occupational disease is one which is caused by a series of events of a similar or like nature occurring regularly or at frequent intervals over an extended period of time, or the disease arises gradually from the character of the employee's work and as a result of the cumulative effect of a series of events, while serum hepatitis may be transmitted from person to person by one single event.

APPEAL by defendants from opinion and award of North Carolina Industrial Commission entered 20 January 1976. Heard in the Court of Appeals 13 October 1976.

This is a proceeding under the Workmen's Compensation Act to obtain death benefits for the widow and minor children of Robert S. Booker, who died 3 January 1974 as result of serum hepatitis. For more than six years prior to his death, Booker was employed in the Clinical Chemistry Laboratory at the Duke Medical Center, his employment being subject to the

Workmen's Compensation Act. During 1970 and 1971 his duties as a laboratory technician involved testing blood serum from blood samples taken from hospital patients. In removing the rubber stoppers from the blood sample tubes, he frequently got small amounts of blood on his fingers. Some of these blood samples were from patients suffering from hepatitis, but this was not always known and the samples were not always so labeled. In the opinion of Mr. Booker's supervisor, more than one sample passing through the Laboratory each day contained the hepatitis associated antigen.

The major route of transmission of serum hepatitis is by contact of blood or blood products from a person suffering with or carrying the disease through some point of entry, such as a break in the skin or by direct injection, into another person's body. Only one such exposure to a very small amount of contaminated blood is required to transmit the disease. The incubation period is from six weeks to six months.

On 4 July 1971 Mr. Booker was diagnosed as suffering from serum hepatitis. Until three or four days prior thereto he had been totally asymptomatic. He suffered from serum hepatitis continuously from the time he contracted it until his death resulted from the disease on 3 January 1974. However, he continued to work at the Duke Medical Center Laboratory until 1 October 1973, when he became totally disabled. At the time of his death, one hearing had been held on 18 October 1973, before a Hearing Commissioner of the North Carolina Industrial Commission on Mr. Booker's claim for benefits under the Workmen's Compensation Act, and a further hearing had been scheduled. Mr. Booker's death occurred before the further hearing could be held on his claim.

On 16 December 1974 the present claim was filed by his widow and minor children. Hearing was held on this claim on 10 September 1975. The Hearing Commissioner found, among other facts, that at some time between December 1970 and May 1971, Booker contracted serum hepatitis "due to exposure to hepatic blood in his employment," that "[t]he general public is not as exposed to this disease as is a laboratory technician," and that "[s]aid occupational disease resulted in his death." The Hearing Commissioner awarded claimants compensation at the rate of $50.00 per week for 350 weeks beginning 4 January 1974. On appeal, the Full Commission adopted as its own the

opinion and award of the Hearing Commissioner, with the exception that it increased the amount of the weekly payments from $50.00 to $80.00. The Full Commission made this increase on the basis of its conclusion of law that "[t]he rights and liabilities of the parties to this action are governed by the statute as it existed" at the date of Mr. Booker's death, thereby making applicable to this case the amendments to the Workmen's Compensation Act effected by Sec. 4 of Ch. 515 of the 1973 Session Laws, which increased the maximum allowable weekly benefits in a death case to $80.00.

From the opinion and award made by the Full Commission, the employer and its carrier appealed.

Dalton H. Loftin for appellees.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by Josiah S. Murray III and Robert B. Glenn, Jr., for defendant appellants.

PARKER, Judge.

G.S. 97-2(6), which remains today as it was originally enacted when the North Carolina Workmen's Compensation Law was first adopted in 1929, provides:

> "Injury.—'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, *and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.*" (Emphasis added.)

In this case there was no finding, nor was there sufficient evidence from which the Industrial Commission could have made a finding, that Mr. Booker contracted serum hepatitis as a result of any accident. At the 18 October 1973 hearing, Booker testified:

> "I do not know of any particular accident which has happened during my four year period of handling blood which was the cause of my suffering hepatitis. I do not know the day on which I contracted hepatitis nor do I know or have any specific knowledge as to how I did contract hepatitis.

I do not know of any particular accident which has happened during my tenure at Duke as a result of which I suffered this hepatitis.

I was not involved in any particular accident."

Mrs. Booker testified at the 10 September 1975 hearing that her husband liked to work in the garden and that he had hobbies "which would cause him from time to time to have the normal amount of scratches or abrasions or whatever about his hands." This testimony apparently furnished the basis for the Commission's findings of fact that "Booker's hobby was gardening, and as a gardner, from time to time he would nick or cut his fingers," and "[i]t was not unusual occasionally for him to work in the laboratory at Duke Medical Center with unhealed nicks or scratches on his hands." However, there was no finding that Booker actually had any such unhealed nicks or scratches at any time during the period when, according to all of the evidence, he contracted serum hepatitis. Nor was there evidence that blood of hospital patients, whether contaminated or otherwise, ever came in contact with Booker's fingers, scratched or unscratched, as a result of an "accident" as that word is generally understood. Indeed, Booker testified that his work brought him into contact with blood samples every day as a routine matter, and that he "would get small amounts of blood on [himself] from time to time as a regular and repeated and usual and frequent occurrence of [his] employment." An occurrence which is regular, repeated, usual, and frequent, can hardly be considered an "accident" within any generally accepted definition of that word. Certainly it cannot be so considered for purposes of the North Carolina Workmen's Compensation Act in view of the following express provision in G.S. 97-52:

"The word 'accident,' as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this Article."

Therefore, since there was no finding, or evidence to support a finding, that any accident occurred from which the dis-

ease "naturally and unavoidably" resulted, the Industrial Commission necessarily based its award upon its conclusion that Booker died as a result of an "occupational disease." Thus, the crucial question presented by this appeal is whether that conclusion made by the Industrial Commission can be sustained under the pertinent provisions of our Workmen's Compensation Act. Decision of that question requires that we first determine what statutory provisions apply to this case.

By express language of our statute, only the disases and conditions enumerated in G.S. 97-53 shall be deemed to be occupational diseases within the meaning of our Workmen's Compensation Act. Serum hepatitis is not expressly listed by name and can be considered an occupational disease only if it is included in the general definition contained in subsection (13). That subsection, as amended by Ch. 965 of the 1963 Session Laws and as it was in effect during the first six months of 1971 when Mr. Booker contracted serum hepatitis, was as follows:

> "(13) Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.
>
> The provisions of this subsection shall not apply to cases of occupational diseases not included in said subsection prior to the effective date of this Act unless the last exposure in an occupation subject to the hazards of such disease occurred on or after the effective date of this Act."

Effective 1 July 1971, and applying "only to cases originating on and after" that date, subsection (13) of G.S. 97-53 was amended to read as follows:

> "(13) Any disease, other than hearing loss covered in another subsection of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

[1] Thus, at the threshold of our inquiry we are confronted with the necessity of determining which version of subsection (13) is applicable to this case. We hold that the version which was in effect when Mr. Booker contracted the disease, rather than the subsequently enacted version, applies for purposes of deciding this case. The 1971 Act was ratified on 14 June 1971, and the Legislature demonstrated a clear intention that it operate prospectively only by providing that it be effective from and after 1 July 1971 and "apply only to cases originating on and after" that date. For purposes of the Workmen's Compensation Act a case is normally considered as "originating" on the date when the accident giving rise to injury occurred or, in case of an occupational disease, when the disease is contracted. We believe this to be the construction intended by the Legislature in adopting the 1971 Act. To hold otherwise would be to provide *ex post facto* coverage for diseases contracted under conditions existing before the statute providing coverage was enacted. Accordingly, we shall apply the provisions of the 1963 rather than those of the 1971 Act in deciding this case. Our determination in this regard is supported by the decisions in *Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965) and *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958); *see also* 81 Am. Jur. 2nd, Workmen's Compensation, § 89, pp. 772-73; Annot., 82 A.L.R. 1244 (1933).

We now turn to the crucial question presented by this appeal, whether the conclusion of the Industrial Commission that Booker died from an occupational disease can be sustained, applying for purposes of deciding that question the statute as it existed prior to 1 July 1971. Listed among the "Findings of Fact" made by the Hearing Commissioner, which were adopted as its own by the Full Commission, was the following:

> "9. At sometime between December of 1970 and May of 1971, Booker contracted an infection of an internal organ of the body due to exposure to hepatic blood in his employment, the said disease being serum hepatitis. This disease is characteristic of the occupation of a laboratory worker such as Booker. The general public is not as exposed to this as is a laboratory technician. Said occupational disease resulted in his death on January 4 (sic) 1974."

The findings made in the second and third sentences above quoted are obviously relevant only if the 1971 amendment to

subsection (13) of G.S. 97-53 were applicable. Since we hold that amendment is not applicable, we may treat the findings made in the second and third sentences as surplusage, and we need not consider defendants' contentions that these findings were not supported by competent evidence. The findings made in the first sentence above quoted were, in our opinion, supported by competent evidence, and such findings are binding on this appeal. There is also no question that Booker died as a result of serum hepatitis, and the *factual* findings made in the last sentence are also supported by competent evidence (except for the immaterial error in the date of death, which the parties stipulated occurred on 3 January 1974). However, the characterization of the disease in the last sentence as an "occupational" disease was not a finding of fact but was merely the Commission's conclusion of law, the validity of which is the principle question presented by this appeal. In our opinion, and we so hold, the Commission committed error in making this conclusion.

It may be conceded that the first sentence of subsection (13) of G.S. 97-53, as that subsection was in effect prior to the 1971 amendment, if interpreted broadly and if viewed in isolation and apart from the remainder of the Workmen's Compensation Act, might support the Commission's conclusion. So interpreted, the Workmen's Compensation Act would become, in effect, a species of compulsory health insurance, insuring all employees against the hazard of any infectious or contagious disease contracted on his employer's premises during working hours. However, the first sentence of subsection (13) may not properly be viewed in isolation from the rest of the Workmen's Compensation Act. The heading of G.S. 97-53, in which subsection (13) appears, as well as the second sentence of subsection (13) itself, speaks of "occupational diseases." We reject the appellees' contention that the first sentence of subsection (13) is to be looked to alone as containing in itself a definition of that term; to accept that contention would, as above noted, convert our Workmen's Compensation Act into a species of broad scale compulsory health insurance, which we do not believe was the Legislature's intention. On the contrary, by including subsection (13) in G.S. 97-53, which provides that "[t]he following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article," it is our opinion that the Legislature intended to provide coverage only

for diseases which, whether specifically named in other subsections or coming within the admittedly very broad language of subsection (13), would also come within well understood definitions of the term "occupational diseases." In this connection, Barnhill, J. (later C.J.), speaking for the Court in *Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951) said (at pp. 130-31):

> "The Legislature, in listing those diseases which are to be deemed occupational in character, was fully aware of the meaning of the term 'occupational disease.' Indeed, it in effect, defined the term in G.S. 97-52 as a diseased condition caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time, in employment.
>
> The term has likewise been defined as a diseased condition arising gradually from the character of the employee's work. These are the accepted definitions of the term."

Further in the opinion in that case the court said (p. 131):

> " . . . [A]n occupational disease is a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. *It is the cumulative effect of the series of events that causes the disease.*" (Emphasis added.)

[2] Applying these definitions to the facts disclosed by the evidence in the present case, it is apparent that the serum hepatitis contracted by Booker was not an occupational disease. There was no evidence to show that serum hepatitis is a diseased condition "caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time," or that it arises "gradually from the character of the employee's work" and as result of the cumulative effect of a series of events. On the contrary, all of the evidence shows that serum hepatitis may be transmitted from person to person by one single event. If that event can be shown and if it constituted an "accident" within the purview of the Workmen's Compensation Act, then coverage for the resulting disease is provided by G.S. 97-2(6), but if, as here, it is not possible to show any particular event constituting an accident from which the disease "naturally and unavoidable" resulted, coverage is not provided by that section.

(It is, of course, entirely possible that even a disease which is specifically listed by name as an occupational disease in G.S. 97-53 may, in particular circumstances, result from a single event constituting an accident. Under such circumstances, the disease, although specifically named in G.S. 97-53, would not be an occupational disease, but coverage would fall under G.S. 97-2(6). *Watkins v. Murrow,* 253 N.C. 652, 118 S.E. 2d 5 (1961) furnishes an example of such a situation.)

We recognize, of course, that in his employment Mr. Booker was exposed to a recurring hazard of contracting a disease which placed him in a position of risk greater than that to which members of the public are generally exposed. The same is true of many hospital employees. We hold only that under the statute as written when Mr. Booker contracted the disease, serum hepatitis could not properly be considered an occupational disease and the Industrial Commission erred in so concluding.

The opinion and award appealed from is

Reversed.

Judges BRITT and CLARK concur.

W. M. SIMS ET UX, CAROL C. SIMS v. VIRGINIA HOMES MANUFACTURING CORPORATION

No. 7610SC512

(Filed 19 January 1977)

1. **Negligence § 37— negligent construction and installation of mobile home — jury instructions proper**

In an action to recover damages for negligence in the manufacture, construction, and installation of a double-wide mobile home, the trial court in its instructions properly declared and explained the law arising on the evidence and properly related the law of negligence and damages to the facts in the case.

2. **Negligence § 34— negligent construction and installation of mobile home — plaintiffs' duty to build foundation — no contributory negligence**

In an action to recover damages for negligence in the manufacture, construction, and installation of a double-wide mobile home, the trial court did not err in failing to submit to the jury an issue of

contributory negligence based on defendant's contention that plaintiffs' injuries resulted from the alleged failure of plaintiffs to construct properly the foundations for the mobile home units, which was plaintiffs' responsibility, since defendant failed to show that any negligence of plaintiffs proximately caused the injuries complained of.

APPEAL by defendant from *Hall, Judge.* Judgment entered 22 January 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 16 November 1976.

On 22 March 1973 the plaintiffs instituted suits against Oakwood Mobile Homes, Inc. (Oakwood) and Virginia Homes Manufacturing Corporation (Virginia) for negligence in the manufacture, construction, and installation of a double-wide mobile home. In the first trial of this matter in November of 1974, directed verdicts in favor of Oakwood and Virginia were entered at the close of plaintiffs' evidence. On appeal to this Court, the directed verdict for Virginia was reversed. 27 N.C. App. 25, 217 S.E. 2d 737 (1975). The suit against Virginia was tried again in January of 1976. At that trial issues of negligence and damages were presented to the jury, but the trial court refused to submit to the jury an issue of contributory negligence. The jury's verdict held Virginia negligent, and the judgment awarded plaintiffs $8,000.00 in damages. Virginia appeals. Additional facts and evidence necessary to understanding this Court's holding are set out in the body of the opinion.

Kimzey, Mackie & Smith, by James M. Kimzey and Stephen T. Smith, for plaintiffs.

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., and John N. Fountain, for defendant.

BROCK, Chief Judge.

Defendant Virginia has raised thirty-six assignments of error based on two hundred thirteen exceptions. Thirty-four assignments were brought forward in defendant's brief for argument. These assignments of error take issue with virtually every phase of the trial proceedings except the presentation of defendant's own evidence. From this welter of argument, two questions emerge.

[1] First, did the trial judge commit reversible error in his jury charge by failing to declare and explain the law arising on the evidence and by failing to relate the law of negligence and

damages to the facts in the case? General Statute 1A-1, Rule 51(a) states:

> "In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties."

In its thirty-third assignment of error, defendant argues that the judge failed to explain the law of negligence arising on the evidence. The judge's instructions, covering twelve pages of the record, were organized in the following manner. The jury was first charged on the plaintiffs' burden of proof, followed by instructions on the law of negligence, which included explanations of duty of care, standard of care, breach of duty of care, injury, proximate cause, and foreseeability. Thereafter, the judge reviewed portions of both plaintiffs' and defendant's evidence. In reviewing plaintiffs' evidence, he related testimony concerning many defects in the units delivered to and installed for the plaintiffs.

Immediately succeeding his review of the evidence, the judge instructed the jury on the application of the law to the evidence as follows:

> "Now on the first issue, members of the jury, I instruct you that if the Plaintiffs have satisfied you by the greater weight of the evidence that the Defendant, or its workman, failed to use good and proper materials, or failed to use due care in manufacturing the structure or mobile home according to specifications, or failed to do the work in a workmanlike manner, or failed to use due care in installing the structure on the Plaintiff's lot; that such conduct would constitute negligence and if the Plaintiffs have further satisfied you by the greater weight of the evidence, that such negligence in any one or more of these respects was the proximate cause of damages to the Plaintiffs, it will be your duty to answer the first issue yes."

This charge is adequate. In recounting plaintiffs' testimony just prior to the charge quoted above, the judge related evidence of

faulty plumbing, faulty wiring, sub-specification fixtures and appliances, and instability in the floors and walls. The evidence, if believed by the jury, was sufficient to permit the jury to find the defendant negligent under the quoted charge.

In the thirty-fifth assignment of error, defendant argues that the court failed to properly explain the law of damages arising on the evidence. The trial judge charged the jury as follows:

> "Now on that second issue, I instruct you that all damages, that if you reach and consider that issue, that all damages naturally and proximately resulting from the Defendant's negligence, it would be the difference in the fair market value of the mobile home and had there been no negligence of the Defendant, and its fair market value in the condition it was in when delivered and installed; and fair market value means the price that property will bring when it is offered for sale by one who is willing to sell but under no compulsion to do so, and it's purchased by one who is ready, able and willing to buy, but under no necessity of buying."

This charge on the measure of damages conforms to the general rule of damages for injury to personal property. 3 Strong, N. C. Index 2d, Damages, § 4, p. 170.

Defendant argues that the charge is not specific enough on the elements of time, place, and condition of the structure. The lack of the degree of specificity desired by the defendant is not error. Where the charge as to the measure of damages is not inherently erroneous, a defendant cannot complain of the instruction when he failed to request amplifications of the instruction given. *Brown v. Griffin,* 263 N.C. 61, 138 S.E. 2d 823 (1964); *Owenby v. R. R.,* 165 N.C. 641, 81 S.E. 997 (1914). In the case at bar the trial judge, at the end of his charge, asked the parties if they desired further instructions. The defendant asked for no further amplification.

Defendant also argues that the judge failed to relate pertinent facts while charging on the measure of damages. Thus, it is argued that the jury had insufficient evidence on which to base a measurement. During his review of plaintiffs' evidence, just prior to his charge on applying the law of negligence, the judge stated the injuries testified to by the plaintiffs along with

the evidence tending to show the fair market value of the trailer with and without the alleged negligent acts. Where the court reviews in detail the evidence of plaintiff's injuries, the failure to repeat such evidence in stating the rule for the admeasurement of damages will not be error. *Dinkins v. Booe*, 252 N.C. 731, 114 S.E. 2d 672 (1960); 3 Strong, N. C. Index 2d, Damages, § 16, p. 193.

Defendant further argues that in two places the judge misstated evidence amounting to a comment or opinion on the facts in violation of G.S. 1A-1, Rule 51(a). In one instance the judge stated that defendant's own expert witness testified that the units were improperly installed, where in reality the witness had not so testified. We find no error here because the judge immediately caught his error and stated to the jury that the witness had not testified in the manner charged.

In the second instance plaintiffs had testified that in installing the units, defendant's employees, in order to correct the alignment of the two units, placed a board against one unit and drove a truck against the board and unit repeatedly to push the unit flush with the other. In relating this evidence to the jury in his charge, the judge, while stating that a truck was used to bump one unit together with the other, inadvertently failed to state that a board had been used as a buffer. We do not find this error prejudicial; furthermore, an inadvertence by the court in recapitulating the evidence will not be grounds for reversible error unless it is called to the attention of the court in time for correction. *Clay v. Garner*, 16 N.C. App. 510, 192 S.E. 2d 672 (1972); *Boring v. Mitchell*, 5 N.C. App. 550, 169 S.E. 2d 79 (1969). At the end of his charge, the trial judge gave the parties an opportunity to request corrections and further instructions. Plaintiffs availed themselves of this opportunity, but defendant declined to do so.

[2] The second major question raised in this appeal concerns the trial court's failure to submit to the jury an issue of contributory negligence. Defendant requested the issue, but the judge refused the request. The essential determinations are whether defendant presented evidence of negligence on the part of the plaintiffs and whether such negligence was a proximate cause of the plaintiffs' injuries.

Defendant bases its contributory negligence position on the alleged failure of plaintiffs to properly construct the foun-

dation for the units, which was their responsibility. Defendant's expert witness, a consulting engineer, testified that he was employed in March 1974 to inspect and report on the condition of the home and foundation. Direct examination of the expert tended to show two problems with the foundation. First, six concrete block piers supported the middle of the house where the two halves of the double-wide home were joined. One of the six piers was cracked. The frame of the house was seated on the cracked pier, thus supported by it, but the amount of support was questionable. Secondly, from photographs taken by defendant after the March 1974 inspection, the consultant testified to the presence of cracks in the foundation walls. The cracks indicated settling in the foundation, and settling would cause the instability in the floors, walls, and ceilings. There was further testimony that plaintiffs had not constructed the footings of the foundation at a sufficient depth for the particular soil conditions of the lot, thus leading to the settling.

On cross-examination plaintiffs' counsel elicited the following from defendant's expert. After his inspection he submitted a written report to defendant on 24 March 1974. That report stated that the foundation was in good shape. The expert testified that if there had been evidence of settling, it would have been reflected in the report. The units were installed in May of 1970; the complaint was filed in March of 1973; and as late as March 1974, no settling was evident in the foundation. It is clear from defendant's own witness that the injuries complained of by plaintiffs were not the result of improper construction of the footings by plaintiffs.

As for the broken pier, there is no evidence how the pier came to be cracked. While the crack may have been caused by the negligence of the plaintiffs, the pier could just as likely have been cracked by defendant's employees in installing the units. In an allegation of contributory negligence, the burden of proof is on the defendant to show actionable negligence on the part of the plaintiff. Since the defendant failed to show how any negligence of the plaintiffs proximately caused the injuries complained of, the trial judge did not err in refusing to submit an issue of contributory negligence.

The remainder of defendant's assignments of error deal either with objections to evidentiary rulings made by the trial court or the failure of the trial court to grant defendant's mo-

tions for a directed verdict. After careful consideration of these assignments, we find that prejudicial error sufficient to warrant a new trial has not been shown.

No error.

Judges PARKER and HEDRICK concur.

McKENZIE SUPPLY COMPANY v. MOTEL DEVELOPMENT UNIT 2, INC., W. K. UPCHURCH CONSTRUCTION COMPANY, INC., RICHARD COLLINS, VERA COLLINS, IVON COLLINS, T/A COLLINS ELECTRIC COMPANY AND ITS SUCCESSOR, COLLINS COMPANY, INC., AND FEDERAL INSURANCE COMPANY

No. 7616SC599

(Filed 19 January 1977)

1. **Frauds, Statute of § 5— promise to pay debt of another — main purpose rule**

An oral promise to pay the debt of another is outside the statute of frauds and enforceable if the promisor has the requisite personal, immediate and pecuniary interest in the transaction.

2. **Frauds, Statute of § 5— general contractor's oral promise to pay subcontractor's account — main purpose rule**

The oral promise of the general contractor of a motel construction project to pay for electrical supplies furnished by plaintiff to the electrical subcontractor for the project came within the main purpose rule and was therefore enforceable where, at the time the promise was made, the subcontractor was in financial difficulty, the general contractor had paid the subcontractor $51,840 on its $72,000 electrical subcontract, and the general contractor had sufficient allocated funds remaining for payment of plaintiff's account with the subcontractor, and where the general contractor spent more than $30,000 to complete the electrical work after the subcontractor quit work on the project; therefore, the trial court erred in the exclusion of testimony by two disinterested witnesses that the general contractor's agent had told them that the general contractor would pay the subcontractor's account with plaintiff.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 8 April 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 December 1976.

Plaintiff seeks to recover $7,924.81 for electrical supplies furnished for the wiring and electrical installations in the

construction of the Ramada Inn Motel near Lumberton. The complaint alleges that the materials were ordered, beginning in December 1973, by Wayne Morris, supervisor for the electrical subcontractor, Collins Electric Company (hereafter referred to as Collins Electric), a Florida partnership whose members were defendants Richard, Gerald and Ivon Collins; that Collins Electric terminated work in the spring of 1974 after a dispute with the general contractor, defendant W. K. Upchurch Construction Company, Inc. (hereafter referred to as Upchurch); that Upchurch thereafter employed Wayne Morris and finished the electrical work on the project for the owner, defendant Motel Development Unit 2; that plaintiff thereafter continued to furnish electrical supplies because of the promise made by Upchurch that it would pay for the supplies; and that on 22 August 1974, plaintiff filed a Claim of Lien in the amount of $7,924.81 against defendant-owner, Motel Development Unit No. 2.

Defendant Upchurch denied that this promise had been made, pled the statute of frauds, and alleged that the supplies were furnished only to Collins Electric which subcontracted the electrical work for $72,000. Upchurch cross-claimed against Collins Electric for the subcontract overrun of $16,914.62.

Collins Electric did not file answer to the complaint or to the cross-claim.

The case was tried without a jury. Wayne Morris testified that Collins Electric began to have financial problems in February, 1974, making late and irregular payments to its employees on the project; that defendant Upchurch began paying the other Collins employees early or in the spring of 1974, but Collins Electric continued paying him (Morris) until September, 1974. In May 1974, plaintiff complained to Morris that Collins Electric was not current in the payment of its account and talked about closing the account. Shortly thereafter a meeting was held between Terry Owens, project manager for defendant Upchurch, and Larry Pope, office manager for plaintiff relative to payment of the Collins account.

Plaintiff also offered in evidence the testimony of Morris and Jerry Ivey, job foreman for Collins Electric, relative to conversations they had with Terry Owens, project manager for defendant Upchurch, about payment of plaintiff's account with Collins Electric. Defendant Upchurch objected to the admission

of the evidence on the ground that any promise made by Owens for Upchurch to answer for debts of Collins Electric was within the statute of frauds. The objections were sustained by the court. For the record, Morris and Ivey testified that Owens told them that defendant Upchurch would pay the account owed to plaintiff by Collins Electric.

Plaintiff also offered the testimony of Larry Pope and S. N. McKenzie, office manager and owner respectively of plaintiff, that in late May, and again in June 1974, Terry Owens promised that defendant Upchurch would pay the existing account owed by Collins Electric and would pay for future electrical supplies ordered for the project. The defendant Upchurch did not object to the introduction of this evidence.

Pope further testified that on 31 May 1974, Collins Electric paid plaintiff $961.26, the balance due on its account through April, 1974. Plaintiff furnished supplies in May, 1974, amounting to $3,020.70, and continued to deliver supplies until 25 July 1974, when the balance due on the account was $7,270.63. In response to invoices mailed to it by plaintiff, on 8 August 1974, defendant Upchurch sent a letter to plaintiff requesting that it contact Collins Electric for clarification of the account, since Collins had indicated that some of the invoices had been paid. Plaintiff made no further sales to defendants.

Defendant Upchurch offered the testimony of Terry Owens to explain the transactions among Upchurch, Collins Electric, and plaintiff.

The trial court made findings of fact, including the finding that Terry L. Owens did not make any promises on behalf of defendant Upchurch to pay the account of defendant Collins Electric to plaintiff, and awarded judgment in favor of plaintiff against Collins Electric for $7,924.81, plus interest, in favor of defendant Upchurch against Collins Electric for $16,914.62, plus interest, on its cross-action, but denied recovery by plaintiff against defendant Upchurch and defendant Federal Insurance Company. Plaintiff appealed.

Joseph C. Ward, Jr., for plaintiff appellant.

Page & Britt, P.A. by W. Earl Britt for defendant appellees.

CLARK, Judge.

The sole issue raised by this appeal is whether the exclusion of the testimony of Wayne Morris and Jerry Ivey relating to the promise of Terry Owens that defendant Upchurch would pay for the electrical supplies furnished by plaintiff to Collins Electric was prejudicial error. This ruling of the trial court was based on defendant Upchurch's claim that the promise was within the statute of frauds.

When the trial court excluded the proffered testimony of the witnesses Morris and Ivey, the pleadings and stipulations and evidence had established in pertinent part the following facts:

1. Defendant Motel Development Unit 2 was the owner of the land near Lumberton on which the Ramada Inn was constructed.

2. Defendant Upchurch was the general contractor.

3. Terry Owens was the project manager for defendant Upchurch.

4. Collins Electric was the electrical subcontractor under a written agreement with defendant Upchurch to do the electrical work for $72,000.

5. At the time of the alleged conversations between the witnesses Morris and Ivey with Terry Owens in late May 1974, (a) Collins Electric was in financial difficulty, (b) the defendant Upchurch had paid to Collins Electric $51,840.00 on its $72,000 electrical subcontract.

6. After May 1974, defendant Upchurch paid additional sums for labor and supplies to complete the electrical work, which resulted in a substantial cost overrun.

In the light of these circumstances, was the testimony of the witnesses Morris and Ivey that Terry Owens promised that defendant Upchurch would pay the plaintiff for electrical supplies used in the project within the statute of frauds?

The North Carolina statute of frauds, G.S. 22-1, provides in pertinent part:

> "No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or

miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized."

[1] Both North Carolina and other jurisdictions have long recognized the rule that the promise to pay the debt of another is outside the statute and enforceable if the promise is supported by an independent and sufficient consideration running to the promissor. 37 C.J.S., Statute of Frauds, § 21 (1943). This rule is generally referred to as the "main purpose rule" or the "leading object rule." In *Burlington Industries v. Foil,* 284 N.C. 740, 202 S.E. 2d 591 (1974), the court stated: "Generally, if it is concluded that the promissor has the requisite personal, immediate, and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding." See also *Warren v. White,* 251 N.C. 729, 112 S.E. 2d 522 (1960); Note, *Statute of Frauds—The Main Purpose Doctrine in North Carolina,* 13 N. C. L. Rev. 263 (1935).

The trial court found as a fact that Terry Owens did not promise to pay for the electrical supplies delivered or to be delivered by plaintiff. This finding of fact is supported by the testimony of Terry Owens. Ordinarily, findings of fact supported by competent evidence are conclusive on appeal. *Transit, Inc. v. Casualty Co.,* 285 N.C. 541, 206 S.E. 2d 155 (1974).

[2] However, in determining this crucial fact the court did not consider the excluded evidence of the promise as testified by the apparently disinterested witnesses Morris and Ivey. The exclusionary ruling of the trial court was based on the proposition that the promise of Owens was within the statute of frauds and not enforceable. There was ample competent evidence to support a finding that Upchurch had personal, immediate, and pecuniary interest in completing the construction project which included the use of electrical supplies in finishing the electrical work subcontracted to Collins Electric. At the time the promise was made defendant Upchurch had paid to Collins Electric $51,840.00 under a subcontract for $72,000, and defendant Upchurch had sufficient allocated funds remaining for paying plaintiff's account. Upchurch's interest in completing the electrical work as specified in the subcontract with Collins Electric

was evidenced by the expenditure of more than $30,000 on this phase of the project after 5 June 1974, when the last payment was made to Collins. Whether Owens, whose authority as agent for Upchurch was not questioned, made the promise was crucial to plaintiff's case. The trial court erred in excluding this testimony of the witnesses Morris and Ivey on the ground that as a matter of law the promise was within the statute of frauds and not enforceable. This error resulted in the exclusion of evidence crucial to the determination of the case and was prejudicial to the plaintiff. *Eaves v. Coxe*, 203 N.C. 173, 165 S.E. 345 (1932).

This error relates only to defendant Upchurch, and not, as plaintiff argues, to both Upchurch and Federal Insurance Company. Plaintiff did not except to the finding that on the date its lien was filed, there were no funds owed by Upchurch to Collins Electric. Where there are no effective exceptions to the findings of fact, the findings will be presumed to be correct and a judgment supported by the findings will be affirmed. See cases cited in 1 Strong, N. C. Index, Appeal and Error, § 57.1 (3d Ed. 1976).

The judgment is reversed and this cause is remanded for a

New trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. MICHAEL THOMAS WILLIAMS

No. 763SC595

(Filed 19 January 1977)

1. Criminal Law § 84; Searches and Seizures § 1— warrantless search — no search incident to lawful arrest — evidence seized should be suppressed

In a prosecution for possession of marijuana the trial court should have granted defendant's motion to suppress marijuana taken from his person during a search which defendant contended was not incident to a lawful arrest where the evidence tended to show that an officer observed defendant clasp hands with another man on the street in an area of high drug traffic; defendant entered the lobby of a motel where the observing officer was located; the officer

approached defendant, asked for identification, and upon being told that defendant had none, instructed him to face the wall and assume a position for frisking; defendant immediately ran but was caught by the officer; defendant was then told he was under arrest and was searched; and marijuana was found on his person.

2. Arrest and Bail §§ 3, 6— unlawful arrest — right of defendant to flee

A person has the right to resist an unlawful arrest, and one may flee from an unlawful arrest. Moreover, where defendant exercises his right to flee from an unlawful arrest, the flight of the accused cannot be added to other relevant facts to give the officer probable cause for making a warrantless arrest.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 27 May 1976 in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 December 1976.

Defendant was tried for possession of marijuana. At trial defendant moved to suppress the introduction into evidence of marijuana taken from his person. He contended that there was no probable cause for his arrest and that therefore the search which uncovered the marijuana was not incident to a lawful arrest. After the motion was denied, defendant pleaded guilty pursuant to G.S. 15A-979(b). From a sentence suspending imprisonment, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General Robert P. Gruber for the State.

Henderson, Baxter & Davidson by David S. Henderson and Gerard H. Davidson, Jr., for defendant appellant.

CLARK, Judge.

The Fourth Amendment to the Federal Constitution prohibits unreasonable searches and seizures and provides that no warrant shall be issued without probable cause. Warrantless searches are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions which are jealously and carefully drawn. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). Through the Fourteenth Amendment, this principle applies to the states as well. *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963); *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970). A search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. *United States v. Robinson,* 414 U.S. 218,

94 S.Ct. 467, 38 L.Ed. 2d 427 (1973); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971). "An arrest is constitutionally valid when the officers have probable cause to make it." *State v. Eubanks,* 283 N.C. 556, 559, 196 S.E. 2d 706, 708 (1973).

In the present case, the sole justification offered for the warrantless search which resulted in the seizure of the marijuana introduced as evidence at trial was that the search was incident to a lawful arrest. If the arrest were unconstitutional, then the evidence should not have been admitted under the federal exclusionary rule imposed upon the states in *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), and recognized by G.S. 15A-974(1). See *State v. Eubanks, supra,* (distinguishing the exclusionary effect of unconstitutional and illegal arrests).

[1] Determinative of the question presented by this appeal is whether the evidence supports the findings of the trial court that the arrest of the defendant was made after flight, and that the officer had probable cause to make the arrest.

The findings at issue were based solely upon the testimony of the arresting officer, Sgt. J. W. Buck of the Narcotics Division of the New Bern Police Department. On 19 January 1976, he was stationed in a motel on Broad Street for purposes of surveillance. At about 3:30 p.m. he observed a confidential source make a purchase. Over objection he testified that this was an area of substantial drug traffic. On cross-examination he admitted that this was a weekday afternoon, that there was normal pedestrian traffic, and that stores in the area were open and doing business.

At about 4:00 p.m. he observed the defendant and an unidentified male meet. He did not know either man. He saw the defendant and the other man join hands. He did not see anything in the hand of either man. Defendant then put his left hand into his left coat pocket, withdrew it, crossed the street and entered the manager's office of the motel in which Sgt. Buck was located.

When defendant emerged, Sgt. Buck met him in the lobby. He identified himself as a police officer and asked defendant for identification. Defendant stated that he had none on him. Sgt. Buck testified that then,

" . . . I told him I had reason to believe he had drugs on him and to turn around and face the wall and put his hands on the wall and assume a position for frisking. I ordered him to turn around to face the wall for the purpose of searching him. . . . "

Defendant immediately ran outside but was caught by Sgt. Buck. Defendant was then told he was under arrest and was searched. A bag and an envelope containing marijuana were found.

The trial court found that defendant was arrested after the chase and that there was probable cause for the arrest.

In the hotel lobby before flight the significant evidence relating to probable cause was that the area was known for a high incidence of drug activity and that he saw the defendant and another man on a public sidewalk join hands and the defendant put his hand in his pocket. At this time the officer had no probable cause to make the arrest. At most the circumstances would support a reasonable suspicion of defendant's possession of a contraband drug which would have justified an approach and temporary detention of the defendant in an appropriate manner for purposes of investigating his possible criminal behavior. 6A C.J.S., Arrest, § 38 (1975). Had the officer done so, he may well have been able to determine that defendant was in possession of marijuana. Instead, the officer resorted to aggressive and unlawful behavior.

Nor did the circumstances involve elemental safety and precaution which would justify a "stop and frisk" of the defendant. The frisk incident to a field interrogation must be based upon circumstances from which it can reasonably be inferred that the individual was armed and dangerous. *Sibron v. New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 917 (1968); *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973). The "stop and frisk" doctrine is not an open invitation to conduct what amounts to an unlimited search incident to an arrest. 6A C.J.S., Arrest, § 42 (1975).

The conduct of the officer, as described in his own words, in ordering the defendant to put his hands on the wall and assume a frisking position for the purpose of searching him far exceeded his authority to approach and temporarily detain for investigation; it constituted an attempt to arrest the defend-

ant and was an unlawful interference with the defendant's fundamental right of personal liberty.

[2] A person has the right to resist an unlawful arrest. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954). And one may flee from an unlawful arrest. See *State v. Borland,* 21 N.C. App. 559, 205 S.E. 2d 340 (1974), (where it was held that the defendant could not be convicted for reckless driving and speeding when the offense was committed in fleeing to avoid an unlawful arrest).

In the case before us the defendant fled from the unlawful attempt to arrest him. At this time the arrest was not complete under G.S. 15A-401(c)(1) because the defendant did not "submit to the control" of the officer, nor had the officer taken him "into custody by the use of physical force." The defendant had the right to flee to avoid the unlawful arrest. Flight is a strong indicia of *mens rea,* and when coupled with other relevant facts or the specific knowledge on the part of the arresting officer relating the subject to the evidence of the crime, it may properly be considered in assessing probable cause. *United States v. Garcia,* 516 F. 2d 318 (9th Cir. 1975). But where the defendant exercises his right to flee from an unlawful arrest, the flight of the accused cannot be added to other relevant facts to give the officer probable cause for making a warrantless arrest. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). This situation is distingishable from that in *State v. Harrington,* 17 N.C. App. 221, 193 S.E. 2d 294 (1972), *aff'd,* 283 N.C. 527, 196 S.E. 2d 742 (1973), where the defendant fled prior to an attempted arrest. Here the unlawful arrest was the direct and proximate cause of the flight. At the time of defendant's arrest after the flight, there was no probable cause to make the arrest.

We cannot condone the use of evidence obtained by unlawful conduct as a means for making the conduct lawful. To do so in this case would seriously weaken the Fourth Amendment rights of the people to personal liberty and to be secure against unreasonable searches and seizures.

The denial of the defendant's motion to suppress is reversed, the judgment is vacated, and it is directed that defend-

ant be permitted to withdraw his guilty plea, and this cause is remanded for proceedings consistent with this opinion.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

LEWIS-BRADY BUILDERS SUPPLY, INC. v. OHAN A. BEDROS AND WIFE, ARTEMIS B. BEDROS; AND W. P. GRANT, INC.

No. 7616SC442

(Filed 19 January 1977)

Laborers' and Materialmen's Liens § 3— breach of contract by prime contractor — damages exceeding amount owed to contractor — subcontractor's claim against owner

Where the architect for a home under construction withheld a $15,284.66 progress payment to the prime contractor for reasons specified in the contract, the contractor breached the contract by discontinuing construction of the home, the lowest bid reasonably obtainable to complete the home according to the original plans and specifications was $2,141.77 in excess of the original contract price with the contractor, and the owner was required to expend all of the funds that might otherwise have become due to the contractor under the original contract as well as an additional $2,141.77, the damages to the owner from the contractor's breach were in excess of all amounts otherwise due to the contractor under the original contract, and there were therefore no funds owed by the owner to the contractor to which a first tier subcontractor's lien under G.S. 44A-18(1) could attach.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 30 January 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 October 1976.

On 10 April 1974 defendant Bedros, as owner, and defendant Grant, as contractor, entered into a contract totaling $87,000.00 for the construction of a residence for owner. Contractor purchased some materials and supplies for owner's residence from plaintiff Lewis-Brady, as first tier subcontractor.

Contractor billed and received monthly progress payments from owner under the contract for the months of April through October 1974 in the total sum of $42,822.77. On 1 December 1974 contractor submitted its billing for the month of Novem-

ber 1974 in the sum of $15,284.66. On 6 December 1974 owner's architect approved this billing for payment. However, because of contact with one or more first tier subcontractors suggesting that the contractor had not paid for materials and supplies furnished to owner's residence, owner's architect physically retrieved and withheld the approval of payment to contractor for the November billing. Owner did not pay contractor for the November billing. On 13 December 1974 plaintiff, as a first tier subcontractor, filed with owner a "Notice of Claim of Lien" conforming to G.S. 44A-19(b) for the sum of $13,366.98. Contractor did no work on owner's residence after 13 December 1974.

Between 13 December and 21 December 1974 owner and owner's architect negotiated with contractor in an effort to obtain completion of owner's residence in accordance with the contract. On or about 21 December 1974 contractor advised owner that it would not continue the construction of owner's residence. Thereafter owner sought bids for completion of the residence and entered into a contract on 3 February 1975 with the lowest bidder for completion of the residence in accordance with the original plans and specifications. The low bid for completion brought the total cost of owner's residence to $89,-141.77, $2,141.77 more than the original contract price.

The trial court rendered judgment for the plaintiff, first tier subcontractor, against original contractor for $13,366.98, but denied recovery by plaintiff against owner. Plaintiff appealed.

Page & Britt, by W. Earl Britt, for plaintiff, first tier subcontractor.

Lee and Lee, by Helen H. Madsen, Franklin V. Adams, and Woodberry L. Bowen, for defendants Bedros, owner.

BROCK, Chief Judge.

Many of the findings of fact and conclusions of law by the trial court and many of the arguments advanced by appellant are not germane to a determination of the pivotal issue presented by this appeal. We shall, therefore, discuss only the issue that we conclude is dispositive.

Plaintiff relies upon Part 2, Article 2, Chapter 44A of the General Statutes and, in particular, G.S. 44A-18(1) and (6)

and G.S. 44A-20(a) and (b) for his right to recover from owner.

General Statute 44A-18(1) provides: "A first tier subcontractor [plaintiff in this case] who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arose out of the improvement on which the first tier subcontractor worked or furnished materials."

General Statute 44A-18(6) provides: "The liens granted under this section are perfected upon the giving of notice in writing to the obligor [owner in this case] as hereinafter provided and shall be effective upon the receipt thereof by such obligor."

General Statute 44A-20(a) provides: "Upon receipt of the notice provided for in this Article the obligor shall be under a duty to retain any funds subject to the lien or liens under this Article up to the total amount of such liens as to which notice has been received."

General Statute 44A-20(b) provides: "If, after the receipt of the notice to the obligor, the obligor shall make further payments to a contractor or subcontractor against whose interest the lien or liens are claimed . . . and in addition the obligor shall be personally liable to the person or persons entitled to liens up to the amount of such wrongful payments. . . . "

The "Notice of Claim of Lien" given on 13 December 1974 by plaintiff to owner complied with the requirements of G.S. 44A-19(b). The central and dispositive issue is whether there were any funds held by owner on 13 December 1974 to which a lien in plaintiff's favor could attach. Under G.S. 44A-18(1), quoted above, a lien in favor of plaintiff could attach only to funds *owed* by owner to contractor. If there were no funds owed by owner to contractor, and none were thereafter to become due, G.S. 44A-20(a) would impose no duty upon owner, and it follows that G.S. 44A-20(b) would impose no personal liability upon owner.

On 6 December 1974 owner's architect approved a progress payment to contractor in the amount of $15,284.66. The architect physically retrieved and withheld the approval of the $15,284.66 progress payment under the express terms of the

Contract between owner and contractor. Subparagraph 9.5.1 of the contract provides, in pertinent part: "The Architect may also decline to approve any Applications for Payment or, because of subsequently discovered evidence or subsequent inspections, he may nullify the whole or any part of any Certificate for Payment previously issued, to such extent as may be necessary in his opinion to protect the Owner from loss because of:

. . .

".2 third party claims filed or reasonable evidence indicating probable filing of such claims,

".3 failure of the Contractor to make payment properly to Subcontractors or for labor, materials or equipment."

Subparagraph 9.5.2 of the contract provides: "When the above grounds in Subparagraph 9.5.1 are removed, payment shall be made for amounts withheld because of them."

Plaintiff seems to argue that the 6 December 1974 approval of payment to contractor constitutes irrebuttable evidence that owner owed contractor $15,284.66 which had not been paid on 13 December 1974 when plaintiff filed with owner his "Notice of Claim of Lien" for $13,366.98. We disagree.

The amount owed by owner to the contractor at any particular time must be determined in the light of existing circumstances and the contract between owner and contractor. The architect, as owner's agent under the contract, withheld the $15,284.66 progress payment for reasons specified in the contract. Therefore, contractor had no right to discontinue construction of owner's residence. When contractor did refuse to continue construction of owner's residence, he breached his contract with owner, and the amount due from owner to contractor had to be determined in the light of damages suffered by owner from contractor's breach. Owner had the duty to reasonably mitigate damages, which he did by completing the construction at the lowest bid reasonably attainable. Owner was entitled to set off any amount he may have owed contractor against the damages caused by contractor's breach of the contract. Only after these developments could it be determined what amount, if any, owner owed contractor over and above the $42,822.77 paid by owner to contractor through October 1974.

In this case the lowest bid reasonably obtainable to complete owner's residence according to the original plans and specifica-

tions was $2,141.77 in excess of the original contract price with contractor. Therefore, owner was required to expend all of the funds that may have otherwise become due under the original contract with contractor as well as an additional $2,141.77. The damages to owner from contractor's breach were in excess of all amounts that might otherwise have become due to the contractor. The trial court so found from competent evidence.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. PAUL EDWARD PEARSON

No. 7625SC621

(Filed 19 January 1977)

1. **Constitutional Law § 29; Criminal Law § 91— no blacks in jury pool — no systematic and arbitrary exclusion — continuance properly denied**

The trial court did not err in denying defendant's motion to continue the case based on the absence of blacks in the jury pool, since defendant did not contend or show that blacks were systematically and arbitrarily excluded from the jury pool.

2. **Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis**

The trial court properly concluded that an assault victim's in-court identification of defendant was based solely on her observation of him at the crime scene and was not tainted by an impermissibly suggestive pretrial photographic identification where the evidence on *voir dire* tended to show that the victim observed defendant at least three times before he stabbed her; the room was well lighted both naturally and artificially; the assault occurred during daylight hours while the sun was shining; the victim had ample opportunity to observe defendant; and the victim was able to recount a detailed description of defendant's physical appearance including his clothing.

3. **Criminal Law § 53— expert medical testimony — admission proper**

The trial court in a prosecution for assault properly allowed an expert medical witness who attended the victim when she was admitted to the emergency room of the hospital to express an opinion based on his own personal knowledge and observation.

State v. Pearson

APPEAL by defendant from *Ervin, Judge.* Judgment entered 5 February 1976 in Superior Court, CATAWBA County. Heard in the Court of Appeals 11 January 1977.

Defendant was indicted and tried for assault with a deadly weapon with intent to kill inflicting serious injury. The State offered evidence tending to show that on 24 September 1975 Glenda Sue Clark was employed by Reserve Life Insurance Company in Hickory. She testified that shortly after lunch that day the defendant wandered in and out of her office three or four times, pacing back and forth; that as she bent down to pick up something, defendant jumped on her, pulled her back by the hair, and stabbed her in the throat; that she struggled with him and he stabbed her again; and that she screamed that someone was coming, and defendant ran. Mrs. Clark was treated by Dr. James C. Fahl, who testifed that one of her wounds came within a fraction of an inch of the carotid artery; that if this artery had been cut extensively, Mrs. Clark would have bled to death; that as a result of the injuries, Mrs. Clark suffers from numbness of the chin and certain disorders of the eye; and that the numbness problem will be permanent.

Defendant offered evidence tending to show that on 24 September 1975 he went to the Old Professional Building to see a doctor; that as he walked down the hall, he heard someone moaning in one of the offices; that he opened the door of Mrs. Clark's office and found her lying behind a desk, bleeding; that he knelt beside her and lifted her head, and she grabbed him and screamed; and that defendant panicked and ran.

Before Mrs. Clark was allowed to identify defendant as the man who assaulted her, a *voir dire* hearing was held. The State offered evidence tending to show that after Mrs. Clark was assaulted, police officers showed her a group of photographs; that she identified one of them as a photograph of her attacker; and that the officers did not suggest that she select any one of the photographs in preference to the others. Other evidence was offered to show that on 24 September, O. A. McGuire, a Hickory policeman, received a telephone call and was given a description of the man who assaulted Mrs. Clark. He said that defendant fitted the description and that he and two other policemen went to look for defendant. They found defendant in a drug store, took him to the police station and photographed him, and this photograph was among those shown to Mrs.

Clark. The court then held Mrs. Clark's identification testimony admissible.

The jury found defendant guilty as charged, and a prison sentence of not less than 14 nor more than 17 years was imposed. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Huffman & Adams, by Robert W. Adams, for the defendant.

MARTIN, Judge.

[1] The defendant argues, in his first assignment of error, that the trial court erred in denying his motion to continue the case based on the absence of blacks in the jury pool. He contends that, by denying his motion, the court either abused its discretion or violated his constitutional right to a fair and impartial trial by a jury of his peers. We disagree.

It is well established, in both state and federal courts, that a defendant has a constitutional right to be tried by a jury from which members of his own race have not been *systematically and arbitrarily excluded. State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972). See also *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965). In the case at bar, however, the defendant makes no contention that blacks were systematically and arbitrarily excluded from the jury pool. In the absence of such a contention, we are bound by the North Carolina Supreme Court's decision that unless there is systematic and arbitrary exclusion, then a defendant " . . . has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury." *State v. Cornell, supra* at 32, 187 S.E. 2d at 775.

There still remains the issue as to whether the trial judge abused his discretion in denying defendant's motion for a continuance. We have reviewed the record, however, and can find no reason to except the defendant's motion from the general rule that a motion for a continuance is addressed to the sound discretion of the trial judge and can be subject to review only in cases where there is manifest abuse of that discretion. *State v. Hill,* 287 N.C. 207, 214 S.E. 2d 67 (1975). Under the facts

presented to us, we cannot find any such abuse of discretion by the trial judge.

The defendant's first assignment of error is therefore overruled.

[2] By defendant's third, fourth, fifth, and sixth assignments of error, he contends that the trial court committed reversible error by finding and concluding at the close of the *voir dire* hearing that the identification of the defendant by Glenda Sue Clark was based solely upon her observation of the defendant at the scene of the crime and that such identification was not tainted by any impermissible procedures employed by the police department. We disagree.

The record before us reveals that the trial court conducted a full and extensive examination prior to allowing the identification testimony of Mrs. Clark in evidence. The trial court's findings as to the validity of the eye witness's in-court identification were amply supported by competent evidence and, therefore, conclusive on this Court. See *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976). The evidence offered by the State shows that the prosecuting witness observed the defendant at least three times before he stabbed her in the neck; that the room was well lighted both naturally and artificially; that the assault occurred during daylight hours while the sun was shining; that the prosecuting witness had ample opportunity to observe the defendant; and that she was able to recount a detailed description of his physical appearance including his clothing. It is clear to this Court that Mrs. Clark based her in-court identification on what she observed immediately before, during, and after her attack. We, therefore, hold that the trial court did not err in finding and concluding at the close of the *voir dire* hearing that the identification of the defendant by Mrs. Clark was based solely upon her own observation of defendant at the scene of her assault.

We further conclude that there was nothing in the photographic viewing of the nine pictures by the prosecuting witness that was so impermissibly suggestive as to give rise to reversible error. All of the pictures shown to Mrs. Clark were of blacks and at least three of the photographs had an unusual eye similar to defendant's. We hold, therefore, that the trial judge committed no reversible error when he decided, after *voir dire,* that

the identification of the defendant was not tainted by any of the procedures used by the police.

The defendant's third, fourth, fifth, and sixth assignments of error are therefore overruled.

[3] By his tenth assignment of error, the defendant argues that the trial court committed reversible error by allowing the State's medical witness to answer a hypothetical question without requiring the district attorney to first lay a proper foundation. We disagree.

The State's medical witness, Dr. James C. Fahl, was qualified without objection as an expert in the field of general surgery. On direct examination, he testified that one of the wounds in the victim's neck was within a fraction of an inch of the carotid artery. He was then asked: "What would have happened if that [the carotid artery] had been cut?" Over objection, he answered that if the carotid artery "had been cut extensively, she would have bled to death." At the time the witness gave this testimony, he had already told the court that he personally attended the victim when she came to the emergency room; that he examined her; that he observed her condition; that he found the source of bleeding to be two lacerations of the neck; and that he was able to observe the carotid artery. It is therefore clear to this Court that the medical expert witness was giving his opinion based on his own personal knowledge and his own personal observations. It is clearly established in this State that "[e]xpert testimony may be presented to the jury through the testimony of an expert based on his own personal knowledge and observation. . . . " *State v. Taylor,* 290 N.C. 220, 229, 226 S.E. 2d 23, 28 (1976).

Defendant's tenth assignment of error is therefore overruled.

Defendant's remaining assignments of error have been reviewed. Examination thereof discloses no error of sufficient prejudicial effect to warrant a reversal.

The defendant had a fair trial free of prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. BARRY DEAN WALLS

No. 7627SC577

(Filed 19 January 1977)

1. **Constitutional Law § 21; Criminal Law § 60— defendant detained for fingerprinting — constitutional rights attach**

Detentions, whether termed arrests or investigatory, for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment and when fingerprints are obtained from an accused while he is illegally detained, then the taking of such fingerprints constitutes an unreasonable seizure of a person in violation of the Fourth Amendment.

2. **Constitutional Law § 21; Criminal Law § 60— fingerprint evidence — failure to hold voir dire — error**

In a prosecution for felonious breaking and entering and felonious larceny where defendant objected to evidence with respect to his fingerprints taken by police at a time when defendant was not under arrest and when there was no probable cause to arrest him, the trial court erred in failing to conduct a *voir dire* to determine if the constitutional rights of defendant were violated at the time his fingerprints were taken by police.

APPEAL by defendant from *Falls, Judge.* Judgment entered 17 March 1976 in Superior Court, GASTON County. Heard in the Court of Appeals 7 December 1976.

Defendant was indicted and tried for felonious breaking and entering and felonious larceny. The State presented evidence tending to show that early in the morning of 25 July 1975 Mr. and Mrs. Millard Hyleman locked the doors of their house and left for work. When they returned, they found that someone had broken into the house and had taken a TV, a stereo set, jewelry, and other items and that a wall clock had been taken off the wall and left on the couch. A policeman for the Gastonia Police Department testified that he dusted the house for fingerprints and lifted two latent prints from the clock. Another policeman testified that he took the defendant's fingerprints a few days after the alleged break-in. Defendant's fingerprints were then sent to the State Bureau of Investigation where they were compared with the latent fingerprints taken from the clock. An officer of the State Bureau of Investigation then testified that in his opinion one of the latent prints was that of defendant.

Defendant testified in his own behalf that he did not break into the Hyleman house and that on 25 July 1975 he spent the day at a public recreation area at Lower Crowder Creek Bridge in South Carolina with several friends.

The jury found defendant guilty as charged and a 20-year prison sentence was imposed. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Jack Cozart and Associate Attorney Joan H. Byers, for the State.

Jim R. Funderburk, Public Defender, for the defendant.

MARTIN, Judge.

The trial court allowed in evidence and permitted testimony about a card containing defendant's fingerprints which were taken at the Gastonia Police Station on 28 July 1975, three days after the alleged crime. The card was sent to the State Bureau of Investigation on 31 July 1975 along with two latent prints found at the Hyleman home. One of the two latent prints was determined to be identical to one of defendant's prints on the fingerprint card. Subsequently, on 25 August 1975, a warrant was issued for the defendant's arrest and he was then indicted on 1 December 1975. At trial, the defendant timely objected to the admission of the fingerprint evidence arguing that the fingerprints should be excluded since there was no evidence of a valid arrest at the time the prints were taken. The objection was overruled. Defendant contends that the trial court erred in allowing this evidence without first determining that his constitutional rights were not violated when his fingerprints were obtained by the police. We agree.

The controlling case on this point is *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676 (1969). In *Davis*, the police were investigating the rape of an 86-year-old woman by a young man. During a period of approximately ten days, the police, without warrants, took at least twenty-four youths, including Davis, to police headquarters where they were questioned briefly, fingerprinted, and then released without charge. For Davis, this occurred on 3 December at which time there was no probable cause for his arrest. A few days later, Davis was returned to the police station where he was once again fingerprinted without either probable cause or a warrant for his arrest. These prints, together with the fingerprints of the other twenty-three

youths, were then sent to the Federal Bureau of Investigation where it was reported that Davis' prints matched those taken from a window in the home of the woman who had been raped. Davis was subsequently indicted and tried for rape. At trial, the fingerprint evidence was admitted in evidence over his timely objection that the prints should be excluded. The State made no claim that Davis voluntarily accompanied the police officers to headquarters on 3 December and willingly submitted to fingerprinting.

[1] In *Davis,* the United States Supreme Court held that the proceedings employed by the police rendered the use of the fingerprints constitutionally inadmissible at trial. The Court determined that detentions, whether termed arrests or investigatory, for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment and when fingerprints are obtained from an accused while he is illegally detained, as Davis was, then the taking of such fingerprints constitutes an unreasonable seizure of a person in violation of the Fourth Amendment. The Court then concluded that, notwithstanding its relevancy and trustworthiness as an item of proof, such evidence seized in violation of a person's constitutional rights is not admissible, under the exclusionary rule, in either State or Federal Courts.

Mr. Justice Brennan, in delivering the opinion of the Court, stated:

> "The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes. Thus, in *Mapp v. Ohio,* 367 U.S. 643, 655, 6 L.Ed. 2d 1081, 1089, 81 S.Ct. 1684 (1961), we held that 'all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.' (Italics supplied.) *Fingerprint evidence is no exception to this comprehensive rule." Davis v. Mississippi, supra* at 724, 22 L.Ed. 2d at 679, 89 S.Ct. at 1396. (Emphasis added.)

In rejecting the State's argument that the detention occurred during the investigatory stage rather than the accusatory stage and thus did not require probable cause, the Court went on to say that

". . . to argue that the Fourth Amendment [probable cause requirement] does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. . . . Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'. . . . Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment." *Davis v. Mississippi, supra* at 726-727, 22 L.Ed. 2d at 680-681, 89 S.Ct. at 1397.

In *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970), a case very similar to the case at bar, the defendants were picked up, brought to the police station, and photographed without a warrant and without probable cause. The evidence at trial, as in the instant case, was silent as to the circumstances under which the defendants were picked up and there was no evidence that either defendant voluntarily accompanied the officers to the police station. The defendants were photographed before the issuance of the warrants for their arrest and there was no evidence sufficient to support a finding of probable cause of defendants' guilt of *any* crime at the time the photographs were taken. In addition, there was no evidence that one of the defendants ever consented to the taking of his photograph, and the evidence was insufficient to show that the other defendant had understandingly and voluntarily consented to the taking of his photograph.

Although *Accor* concerns photographs rather than fingerprints, the same principles apply. The North Carolina Supreme Court, in *Accor,* relied largely on *Davis v. Mississippi, supra,* in holding that the photographs by which the defendants were identified *and* the testimony surrounding the photographic identification were inadmissible on the ground that the photographs were taken in violation of the defendants' Fourth and Fourteenth Amendment rights.

While we agree with the dissenting opinion of Justice Black in *Davis v. Mississippi, supra,* we are bound by the majority opinion "expanding the reach of the judicially declared exclusionary rule" to include the taking of fingerprints.

[2] Consequently, we hold that when defendant objected to the evidence with respect to his fingerprints taken by police, the

trial judge erred in not conducting a *voir dire* in the absence of the jury to determine if the constitutional rights of defendant were violated at the time his fingerprints were taken by the police. Had the trial judge determined, upon sufficient evidence, that at the time defendant's fingerprints were taken by police that (1) he was being held under a valid warrant, or (2) that there was probable cause for his detention, or (3) that he knowingly and intelligently waived his constitutional rights and agreed to be fingerprinted, then we think the evidence with respect to his fingerprints would have been admissible.

Inasmuch as defendant is entitled to a new trial because of the error hereinabove pointed out, we deem it unnecessary to discuss the other assignments of error brought forward in defendant's brief.

New trial.

Judges BRITT and VAUGHN concur.

BOBBY STRICKLAND v. ANTHONY KING, HAYNES JONATHAN BLANTON AND RAMSEY CHEVROLET CO., INC.

— AND —

RONNIE DALE SELLERS v. ANTHONY KING, HAYNES JONATHAN BLANTON AND RAMSEY CHEVROLET CO., INC.

No. 7613SC568

(Filed 19 January 1977)

1. **Master and Servant § 62— workmen's compensation — injury while leaving work site**

Plaintiffs were injured by accident arising out of and in the course of their employment where they were injured in a collision between two automobiles driven by fellow employees while they were leaving work on a private road maintained by the employer to provide ingress to and egress from the employer's plant; therefore, plaintiffs had no right to sue their allegedly negligent fellow employees.

2. **Master and Servant § 87— workmen's compensation — no right to sue fellow employees**

The Workmen's Compensation Act will not be construed to give an employee injured in an automobile accident on the employer's premises an option to file under the Act or to sue a negligent fellow employee because of the existence of compulsory automobile liability

insurance since G.S. 97-9 has been held on numerous occasions to prohibit an employee from suing a negligent fellow employee.

3. Automobiles § 97— liability of joint owner

Joint ownership of an automobile does not render one joint owner liable for an injury caused by another joint owner who is using the vehicle for his or her own purpose and is unaccompanied by the other joint owner.

APPEAL by plaintiff from *Fountain, Judge.* Judgments entered 26 February 1976 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 18 November 1976.

Plaintiffs and defendants King and Blanton are employed by E. I. DuPont de Nemours and Company at its plant in Brunswick County. Plaintiffs and defendant Blanton regularly shared rides to work. On 20 May 1972 a car which was driven by defendant Blanton, allegedly jointly owned by Blanton and defendant Ramsey Chevrolet and in which plaintiffs were riding collided with a car driven by defendant King. The collision occurred about 4:10 p.m., shortly after the end of the day shift at the DuPont plant, as plaintiffs and defendants King and Blanton were leaving work. The collision occurred on a private two-lane paved road maintained and owned by DuPont, at a point about a mile and a half from the plant site. There were approximately one hundred cars exiting the plant on the road at that time.

Plaintiffs were injured as a result of the collision and brought suit, alleging that the injuries were proximately caused by the negligence of the defendants. In an amendment to their answers, defendants alleged that the claims were barred by the provisions of the North Carolina Workmen's Compensation Act. After a hearing on this plea, in addition to the facts set forth above, the court found the following: That this road was the only road for ingress and egress to the plant; that the road ran for a distance of about two miles from the private parking lot at the plant to a public highway; that the road was owned and maintained exclusively by DuPont; that at the entrance to the private road there were no signs saying "Keep Out" or "Private Property" but there was one that stated that the road was the private property of DuPont. The court concluded that the actions were barred because plaintiffs were injured as a result of an accident arising out of and in the course of their employment. From judgments of dismissal, plaintiffs appeal.

Williamson & Walton by Benton H. Walton III for plaintiff appellants.

Anderson, Broadfoot & Anderson by Henry L. Anderson, Jr., for Haynes Jonathan Blanton and Ramsey Chevrolet Co., Inc., defendant appellees; and McGougan and Wright by D. F. McGougan, Jr., for Anthony King, defendant appellee.

CLARK, Judge.

[1] The issue presented upon appeal is whether plaintiffs were injured as a result of an accident arising out of and in the course of their employment as those terms are defined in the Workmen's Compensation Act.

The term "in the course of" refers to time, place, and circumstance. *Taylor v. Shirt Co.*, 28 N.C. App. 61, 220 S.E. 2d 144 (1975). In *Robinson v. Highway Comm.* and *Roberts v. Highway Comm.*, 13 N.C. App. 208, 185 S.E. 2d 333 (1971), the court affirmed an award to employees who were injured as they were leaving work when the car in which they were riding ran off the road. The accident occurred at a point about 300 feet from a work site on a road maintained by the employer to provide ingress and egress to the work site.

The accident in the present case occurred shortly after the work shift had ended. It occurred on the employer's premises. It occurred on the only road for egress from the plant and in congested traffic conditions which existed because a large number of employees were leaving the plant on the same road at the same time.

The term "arising out of" refers to the origin or cause of the accident. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). Plaintiffs contend that this accident arose from ordinary traffic risks and not from risks related to their employment. There was evidence which tended to show that the road was built according to State specifications. However, the road was on the employer's property and was maintained by the employer. Plaintiffs alleged that two fellow employees were responsible for their injuries. The fact that the road on which the accident occurred resembled public roads in some respects is not sufficient to isolate from their employment the risks arising when employees use their employer's road incident to their work and are injured thereon by fellow employees. See Annot.,

82 A.L.R. 1046 (1933); Annot., 50 A.L.R. 2d 363 (1956). We cannot say that the trial court erred in finding that the accident arose out of and occurred in the course of plaintiffs' employment.

[2] Plaintiffs' more fundamental contention is that the terms "arising out of" and "in the course of" should be construed differently in negligence and compensation actions. They contend that with the advent of compulsory automobile liability insurance, the Workmen's Compensation Act should be liberally construed to give the employee injured in an automobile accident on the employer's premises an option to file under the Act or to sue a negligent fellow employee. G.S. 97-9 provides in part that:

> "Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified."

On numerous occasions it has been held that this provision prevents an employee from suing a negligent fellow employee. *Stanley v. Brown,* 261 N.C. 243, 134 S.E. 2d 321 (1964); *Burgess v. Gibbs,* 262 N.C. 462, 137 S.E. 2d 806 (1964); *Warner v. Leder,* 234 N.C. 727, 69 S.E. 2d 6 (1952). The intent of the legislature controls the interpretation of a statute. *Person v. Garrett, Comr. of Motor Vehicles,* 280 N.C. 163, 184 S.E. 2d 873 (1971). The legislature has amended other provisions of the Act several times subsequent to these decisions. Since it has not amended this provision, we presume that the courts have interpreted it in accordance with the legislature's intent. *Brown v. Brown,* 213 N.C. 347, 196 S.E. 333 (1938); 73 Am. Jur. 2d Statutes § 169 (1974). Irrespective of the merits of optional coverage, we think that a revision of such magnitude falls within the province of the legislature.

[3] The order purports to dismiss the claim against all defendants on the basis of the bar raised by the Workmen's Compensation Act. However, the Act would not bar a claim against defendant Ramsey Chevrolet Company since it was not a fellow employee of plaintiffs. *Altman v. Sanders,* 267 N.C. 158, 148 S.E. 2d 21 (1966). The basis for alleged liability of

this defendant was that it was a co-owner of the car with defendant Blanton, and that defendant Blanton was driving with its consent. It is the general rule, recognized in North Carolina, that joint ownership of an automobile does not render one joint owner liable for an injury caused by another joint owner who is using the vehicle for his or her own purpose and is unaccompanied by the co-owner. *Rushing v. Polk,* 258 N.C. 256, 128 S.E. 2d 675 (1962); *Gibbs v. Russ,* 223 N.C. 349, 26 S.E. 2d 909 (1943). These allegations do not state a claim on which relief can be granted.

The judgments of dismissal are

Affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. JERRY ELLIS, CHARLES ESTES, CLARENCE LAWSON, JR. AND CHARLES NOWELL

No. 7611SC586

(Filed 19 January 1977)

1. **Indictment and Warrant § 7— signature of grand jury foreman — failure to attest concurrence of twelve grand jurors — motion to dismiss not made in apt time**

A motion alleging that the signature of the grand jury foreman attesting that the bill of indictment was "A true bill" failed to comply with the requirement of G.S. 15A-644(a)(5) that the foreman sign the indictment attesting the concurrence of twelve or more grand jurors in the finding of a true bill, although denominated a "motion in arrest of judgment," was actually a motion to dismiss under G.S. 15A-955; therefore, the trial court properly denied the motion where it was not made at or before arraignment as required by G.S. 15A-952(b)(4) and (c).

2. **Larceny § 7— larceny of vending machine — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of four defendants for larceny of a vending machine where it tended to show that a blue and white Pepsi-Cola box was stolen from in front of a service station, a pickup truck was seen in front of the station with a long box in the truck bed, a deputy sheriff found a set of mudgrip tire tracks leading from the crime scene, a pickup truck with mudgrip tires was found stopped beside the road a few miles from the station, the stolen drink box was lying about 6 to 8 feet from

the truck, the drink box was beaten beyond repair, defendants were sitting in the truck, paint samples found in the truck bed and on a hammer in the truck bed matched paint on the drink box, and it was probable that the hammer found in the truck bed made the marks on the drink box.

APPEAL by defendants from *Clark, Judge.* Judgments entered 28 January 1976 in Superior Court, LEE County. Heard in the Court of Appeals 7 December 1976.

In separate indictments each of the four defendants was charged with larceny of a vending machine (drink box) with a value of $1,600.00. All defendants pled not guilty.

The State's evidence tended to show that Robert Cotten operated a service station in rural Lee County; that when he left the station about 7:00 p.m. on 25 September 1975, there were two drink boxes in front of it, one being a blue and white Pepsi-Cola box worth $450-500. William Dancey, who traded at the station and knew operator Cotten, drove past the station about 11:00 p.m. and saw that one of the drink boxes was gone; that there was a pickup truck there with a long box in the truck bed and two men nearby. He turned around and followed the pickup away from the station for about a mile toward Colon Road but could not overtake it. He notified Cotten, who reported the theft to the Sheriff. Deputy Sheriff Bell found a single set of mudgrip tire tracks at the scene leading toward Colon Road. He drove down Colon Road and found a pickup truck with mudgrip tires stopped beside the road a few miles from the station. He also found a blue and white Pepsi-Cola drink box lying about 6 to 8 feet from the truck. The box was beaten beyond repair. The four defendants were sitting in the pickup. It was raining and their feet were muddy. There were footprints around the pickup and the Pepsi-Cola box. Cotten identified the drink box as his. Blue, red and white paint and a hammer with traces of blue paint on its head were found in the truck bed. An S.B.I. chemist found the paint samples to be consistent with the paint on the drink box. An S.B.I. agent who was qualified to identify toolmarks testified that it was highly improbable that a tool other than the hammer found made the marks on the drink box.

Defendant Estes, truck owner, testified that defendants were riding around together and drinking, saw something beside the road and stopped to examine it, and had been there a

few minutes when Deputy Bell drove up. He further testified that he had hauled such a drink box in his truck a short time before, using it as a bait box.

All defendants were found guilty as charged. From judgments imposing imprisonment, all defendants appeal.

Attorney General Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

Love & Ward by Jimmy L. Love for defendant appellant, Charles Estes; Harrington & Shaw by Gerald E. Shaw for defendant appellants Jerry Ellis, Clarence Lawson, Jr., and Charles Nowell.

CLARK, Judge.

[1] After entry of the jury verdicts, all defendants made motions "in arrest of judgment" on the following ground: The foreman of the grand jury by his signature attested that each bill of indictment was "A true bill," which failed to comply with the requirement of G.S. 15A-644(a)(5) that the signature of the foreman must attest "the concurrence of 12 or more grand jurors in the finding of a true bill of indictment."

A motion in arrest of judgment is one made after verdict and to prevent entry of judgment and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). A motion in arrest of judgment for a defect appearing on the face of the record proper traditionally could be made at any time, even in the Supreme Court. *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770 (1968); *State v. McKeon,* 223 N.C. 404, 26 S.E. 2d 914 (1943).

The new Criminal Procedure Act, G.S. Ch. 15A, has changed some aspects of motions practice. Official Commentary, G.S. Ch. 15A, Art. 52. The alleged defect in the present case is on the face of the record proper and therefore, had it been a fatal defect at common law, could have been raised in a motion in arrest of judgment made at any time. However, under prior law there was no requirement that the foreman of a grand jury endorse the indictment. *State v. Avant,* 202 N.C.

680, 163 S.E. 806 (1932). The requirement that the foreman sign the indictment attesting the concurrence of twelve or more grand jurors in finding a true bill and therefore the potential for a facial defect relevant to this statement arose only with the enactment of G.S. Ch. 15A. G.S. 15A-955 provides:

> "The court on motion of the defendant may dismiss an indictment if it determines that:
>
> * * * *
>
> (2) The requisite number of qualified grand jurors did not concur in finding the indictment, . . ."

The challenge to the foreman's statement at issue herein is in essence a challenge to the number of jurors concurring in the indictment. The motions of the defendants, though denominated "motions in arrest of judgment," were motions to dismiss under G.S. 15A-955.

G.S. 15A-952(b)(4) and (c) provide, with exceptions not relevant herein, that a motion to dismiss under G.S. 15A-955 "must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock p.m. on the Wednesday prior to the session when trial of the case begins." The items constituting the record on appeal were not arranged "so far as practicable, in the order in which they occurred or were filed at the trial tribunal" as required by Rule 9(b)(4), Rules of Appellate Procedure. The record on appeal does not disclose when arraignments of defendants were held. However, since the motions were made after the verdicts had been returned, they clearly were not made at or before the times of arraignments as required under G.S. 15A-952(b)(4) and (c). The defendants' motions, not made in apt time, were properly denied. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973).

[2] The defendants also assign as error the denial of their motions for nonsuit. Upon motion for nonsuit, all the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. See cases cited in 4 Strong, N. C. Index, Criminal Law, § 104 (3d Ed. 1976). We find that the evidence, though circumstantial, was sufficient to

warrant its submission to the jury and to support the verdicts of guilty.

No error.

Judges MORRIS and ARNOLD concur.

ROOSEVELT WITHERS, JR. v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

No. 7626IC619

(Filed 19 January 1977)

Schools § 11— collision with school bus — one other than bus driver operating bus — Industrial Commission without jurisdiction

In an action to recover for damages to plaintiff's truck resulting from a collision with a school bus belonging to defendant, the Industrial Commission properly determined that G.S. 143-300.1, the statute giving the Commission jurisdiction over tort claims arising from the negligence of a school bus driver while operating his bus in the course of his employment, was inapplicable in this action and the Commission was without jurisdiction, since the evidence tended to show that the driver of the bus in question had given her keys to a 15-year-old boy so that he could warm up the bus; the boy was driving the bus at the time it collided with plaintiff's truck; and the driver was not even in the bus at the time of the collision.

APPEAL by plaintiff from order of the North Carolina Industrial Commission filed 26 April 1976. Heard in the Court of Appeals 11 January 1977.

Plaintiff instituted this action under the Tort Claims Act to recover for damages to his truck resulting from a collision with a school bus belonging to defendant.

Following a hearing, Chief Deputy Commissioner Shuford entered an Order finding facts summarized in pertinent part as follows:

On 6 May 1975, at approximately 7:15 a.m., Lynn Osborne was regularly employed as a school bus driver for defendant and was paid from the State Nine Months School Fund. As such driver she had custody of the keys to the bus which she drove in the regular course of her employment and had been instructed

never to allow anyone other than herself to drive the bus assigned to her.

On various occasions prior to said date, Miss Osborne had given Kent Tolliver, a 15-year-old boy, the keys to the bus and asked him to "warm up" the bus on certain mornings. She knew that Tolliver was only 15, that he had no driver's license and that on some occasions when she had given him the keys he had driven the bus from the place where she customarily parked it to her home.

On the day in question Miss Osborne gave Tolliver the keys and asked him to warm up the bus. He proceeded to drive the bus on Gunn Street in the City of Charlotte and while he was doing so the bus struck plaintiff's truck which was parked on the street.

Said driver, by giving the keys to a 15-year-old boy when she knew, or had reason to know, that he might attempt to drive the bus, "did other than and failed to do that which a reasonably prudent person would have done under the same or similar circumstances." Said conduct constituted negligence on her part and was the proximate cause of the accident and damages sustained by plaintiff. Plaintiff acted as a reasonably prudent person would have done under the same or similar circumstances, and there was no contributory negligence on his part.

As a result of said accident, plaintiff was damaged in the total amount of $7,500 which includes actual damages to plaintiff's vehicle and damage sustained by the loss of use of the truck.

The deputy commissioner concluded that there was negligence on the part of said school bus driver, that the negligence was the proximate cause of the accident and the damages sustained by plaintiff, there was no contributory negligence on the part of plaintiff, and that he is entitled to recover $7,500.

Defendant appealed to the full commission who affirmed and adopted as its own the findings of fact by the hearing commissioner, concluded that there was negligence on the part of Miss Osborne, that said negligence was the proximate cause of the accident resulting in damages to plaintiff's property and that there was no contributory negligence on the part of plaintiff. However, the full commission concluded that at the time

of the negligent act complained of, Miss Osborne was not operating the school bus in the course of her employment, therefore, G.S. 143-300.1 is inapplicable to this claim and the Industrial Commission has no jurisdiction.

From an order dismissing his claim, plaintiff appeals.

Mraz, Aycock, Casstevens & Davis, by Frank B. Aycock III and L. Hunter Meacham, Jr., for plaintiff appellant.

Attorney General Edmisten, by Sandra M. King, for defendant appellee.

BRITT, Judge.

Plaintiff assigns as error the commission's conclusion that it lacked jurisdiction over this action and the dismissal of his claim. The assignment is without merit.

This action is controlled by G.S. 143-300.1 which, at the time of the accident, provided in pertinent part that:

> "The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged negligent act or omission of the driver of a public school bus or school transportation service vehicle . . . and which driver was at the time of such alleged negligent act or omission *operating* a public school bus or school transportation service vehicle in the course of his employment by such administrative unit or such board. . . ." (Emphasis added.)

The commission concluded that the school bus driver "was not operating a public school bus in the course of her employment" at the time of the accident causing the damages suffered by plaintiff, therefore, it lacked jurisdiction under the statute.

Plaintiff contends that *operating* a school bus "includes directing or instructing another to drive or operate the vehicle." He asserts that the school bus driver was "constructively" operating the vehicle when she allowed the 15-year-old boy to start the bus and drive it to her home. We find this argument unpersuasive.

The applicable statute is in derogation of sovereign immunity, therefore, it must be strictly construed and its terms

must be strictly adhered to. *Etheridge v. Graham,* 14 N.C. App. 551, 188 S.E. 2d 551 (1972); *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247 (1965). We fail to perceive how defendant's employee can be considered to have been *operating* the school bus when she did not have physical control of the vehicle or the ability to direct its operation. The 15-year-old boy was alone in the bus and, in fact, was returning from a personal errand when the accident occurred. Allowing a 15-year-old boy to drive a school bus may well constitute a negligent act, but, for defendant to be held liable, the negligent act or omission must occur while the salaried employee is operating the school bus in the course of her employment.

There is competent evidence to support the commission's finding that the salaried school bus driver was not operating the vehicle in the course of her employment at the time of the collision, consequently, the findings are conclusive on appeal. G.S. 143-293; *Mitchell v. Board of Education,* 1 N.C. App. 373, 161 S.E. 2d 645 (1968). The order concluding that the commission lacked jurisdiction over the claim is therefore

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JANUARY 1977

BYRD v. BOOTH No. 7610DC613	Wake (76CVD977)	Affirmed
DANIELS v. APPLETON No. 7611SC606	Johnston (74CVS1446)	No Error
LATNEY v. REVIER No. 764SC575	Onslow (73CVS2185)	Reversed and Remanded for New Trial
PFAFF v. POWER CO. No. 7618SC448	Guilford (72CVS12926)	No Error
STATE v. BROWN No. 768SC607	Lenoir (75CR10369) (75CR10370)	No Error
STATE v. CARSON No. 7625SC540	Catawba (75CR15363) (75CR15364)	No Error
STATE v. GRISSON No. 7621SC592	Forsyth (75CR35468) (75CR35469)	No Error
STATE v. KENNEDY No. 7626SC567	Mecklenburg (75CR64349)	No Error
STATE v. SARVIS No. 7627SC473	Gaston (75CR21411)	Remanded for Resentencing
STATE v. WHITLEY No. 768SC555	Wayne (74CR15360)	No Error
THOMPSON v. CITY OF HENDERSONVILLE No. 7629SC579	Henderson (75CVS415)	Affirmed

FILED 19 JANUARY 1977

BASS v. CONSTRUCTION CO. No. 7611DC587	Harnett (75CVD337)	Affirmed
CONSTRUCTION CO. v. HOLLOMAN No. 7611SC603	Johnston (74CVS1289)	No Error
FUTCH v. PRESSLEY No. 7626DC608	Mecklenburg (75CVD821)	Affirmed
STATE v. FLOWERS No. 768SC615	Lenoir (75CR12781) (75CR12782) (76CR46) (76CR47)	No Error

LINDA BUTLER WILLIAMS (JENKS), WIDOW; AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA, GUARDIAN FOR TERRA FAYE WILLIAMS, MINOR DAUGHTER OF PAUL DANIEL WILLIAMS, JR., DECEASED, EMPLOYEE-PLAINTIFF v. INSURANCE REPAIR SPECIALISTS OF NORTH CAROLINA, INC., EMPLOYER-DEFENDANT AND RELIANCE INSURANCE COMPANY, CARRIER-DEFENDANT

* *

ESTES EXPRESS COMPANY, THIRD-PARTY TORT-FEASOR AND LIBERTY MUTUAL INSURANCE COMPANY, THIRD-PARTY CARRIER

No. 7620IC493

(Filed 2 February 1977)

1. **Master and Servant § 89— workmen's compensation — order for distribution of wrongful death settlement**

Where an employee's death in an automobile accident arose out of and in the course of his employment, the employer filed with the Industrial Commission a written admission of liability for workmen's compensation benefits, the compensation insurance carrier notified the third-party tort-feasor's liability insurance carrier that a compensation settlement was in process and that it would expect its lien upon any settlement of a wrongful death claim by the liability carrier, the liability carrier settled the wrongful death claim for $55,000 and paid that amount to the deceased employee's administrator, and the Industrial Commission later approved a workmen's compensation settlement awarding $28,500 to the widow, the Industrial Commission thereafter had authority under G.S. 97-10.2 to issue an order of distribution of the $55,000 wrongful death settlement, including a requirement that the liability carrier pay $28,500 to the compensation carrier in settlement of its subrogation interest, notwithstanding the widow may have spent her entire distributive share of the wrongful death settlement and all of the workmen's compensation benefits paid to her and the liability carrier may be unable to recoup any of the amount previously paid from the widow or the decedent's administrator.

2. **Master and Servant § 89— workmen's compensation — disapproval of compensation for death agreement — order for distribution of wrongful death settlement**

Where the Industrial Commission disapproved an agreement for compensation for death only because the employee's widow was a minor and the death benefits had been miscalculated, but the employer's admission of liability was not disapproved, the Commission had jurisdiction to issue an order for the distribution of a wrongful death settlement made before the Commission finally approved the compensation agreement.

APPEALS by Insurance Repair Specialists of North Carolina, Inc. (employer), and Reliance Insurance Company (compensation carrier); and by Estes Express Company (third-party tort-feasor) and Liberty Mutual Insurance Company (third-party

liability carrier) from an order of the North Carolina Industrial Commission entered 8 March 1976. Heard in the Court of Appeals 20 October 1976.

On 9 August 1973 Paul D. Williams, Jr., employee, was injured and killed in a vehicle accident, which injury and death arose out of and in the scope of his employment. Linda Butler Williams (Jenks) and Terra Faye Williams were the wife and daughter, respectively, of the deceased employee.

On 13 August 1973 the employer filed with the Industrial Commission a Commission Form 19—*Employer's Report of Injury to Employee,* reporting that employee was injured and had died as the result of a vehicle accident. On 18 September 1973 the employer, its compensation carrier (Reliance), and the widow of the deceased employee filed with the Industrial Commission a Commisison Form 20—*Agreement for Compensation for Death.* By this agreement the employer made a written admission of liability for benefits under the Workmen's Compensation Act and set out the agreed compensation to be paid to the widow. The agreement was not approved by the Industrial Commission for the reasons that the amount of compensation was in excess of statutory limits and that the widow was not yet eighteen years of age.

On 2 October 1973 the compensation carrier (Reliance) advised the third-party tort-feasor's liability carrier (Liberty Mutual) by telephone that Reliance was the compensation carrier in the case and that it would expect its lien upon any settlement of a wrongful death claim by Liberty Mutual as liability carrier. By letter dated 4 October 1973 the compensation carrier (Reliance) again advised the liability carrier (Liberty Mutual) that Reliance was the compensation carrier in the case and that settlement of the compensation award was in process.

At the request of a representative of Liberty Mutual on 23 November 1973, Southern National Bank of North Carolina (Southern National) qualified in Richmond County as administrator of the estate of Paul D. Williams, Jr. (the deceased employee). On 7 December 1973 the third-party tort-feasor's liability carrier (Liberty Mutual), without the knowledge or consent of the employer or its compensation carrier (Reliance), entered into an agreement with the administrator (Southern National) of the deceased employee for the payment of the

sum of $55,000.00 in full settlement of the wrongful death claim arising out of the accident causing the death of the deceased employee, and the said sum was paid by Liberty Mutual to Southern National.

On 7 February 1974 the widow of the deceased employee reached her eighteenth birthday. On 8 February 1974 a revised Commission Form 20—*Agreement for Compensation for Death* was executed by the employer, employer's compensation carrier (Reliance), and the widow for the payment to the widow of a total of $28,000.00 at the rate of $80.00 per week beginning 9 August 1973, plus $500.00 for funeral expenses. This agreement was approved by the North Carolina Industrial Commission.

After settlement of the compensation claim, Reliance learned of the December 1973 settlement of the wrongful death action by Liberty Mutual. Reliance contacted Liberty Mutual for distribution of $28,500.00 of the wrongful death settlement to Reliance as provided by G.S. 97-10.2. Liberty Mutual declined to honor the request, and Reliance requested the Industrial Commission to issue an order of distribution of the $55,000.00 settlement pursuant to the directives of G.S. 97-10.2. The Commission sent notice on 30 April 1975 setting a hearing for 2 June 1975. Evidence was presented by the parties before Deputy Commissioner Dandelake, and an appeal from his order was taken to the Full Commission.

Based upon the stipulations and the evidence, the Commission made findings of fact substantially as heretofore set out. It made conclusions of law and entered an order as follows:

"CONCLUSIONS OF LAW

"1. The compensation agreement of February 8, 1974 between Reliance Insurance Company and deceased's widow, Linda Butler Williams (Jenks) became a formal award of the Industrial Commission by virtue of the Notice of Death Award filed February 15, 1974. Under the Workmen's Compensation Act, such awards can be set aside only upon a showing of error due to fraud, misrepresentation, undue influence or mutual mistake. There being a complete absence of evidence of such conduct, said award is in full force and effect and is to be complied with. G.S. 97-82; G.S. 97-17.

"2. The sum of $55,000 in the hands of Liberty Mutual Insurance Company, representing the proceeds of the settlement between itself and Southern National Bank as Administrator of the Estate of Paul D. Williams, Jr., is payable by Liberty Mutual for the following purposes and in the following order: first, to the payment of actual court costs; second, to the payment of attorney's fees; third, to the reimbursement of the employer for any compensation benefits and medical treatment expenses paid, and fourth, the remainder to the personal representative of the deceased employee. G.S. 97-10.2.

* * * * *

"Based upon the foregoing findings of fact and conclusions of law, the Full Commission issues the following

ORDER

"1. It is hereupon ORDERED that any unpaid accrued benefits under the compensation Death Award approved on February 15, 1974 be paid at this time to Linda Butler Williams (Jenks) for herself and her minor child, share and share alike, and that such Award be complied with in its entirety from and after this date, until such time as its terms have been fully complied with.

"2. It is hereupon ORDERED that the $55,000 third party settlement between the personal representative of the deceased employee and Liberty Mutual Insurance Company be disbursed by Liberty Mutual Insurance Company as follows:

"a. The third party recovery herein having been the result of a settlement between the parties, there were no court costs involved, and therefore none are payable from the proceeds of such settlement. G.S. 97-10.2(f)(1)a.

"b. The plaintiffs having been unrepresented by counsel at the time of the settlement, no attorney's fee is payable from the proceeds of the third party recovery to counsel for the plaintiffs. G.S. 97-10.2(f)(1)b.

"c. The sum of $28,500 shall be paid by Liberty Mutual Insurance Company to Reliance Insurance Company in full settlement of its subrogation interest. G.S. 97-10.2(f)(1)c.

"d. The balance of $26,500 shall be paid by Liberty Mutual Insurance Company to the personal representative of the deceased employee, Paul D. Williams, Jr. G.S. 97-10.2(f)(1)d.

"3. The defendants shall pay all hearing costs."

The foregoing is the order from which the present appeal is taken.

H. Patrick Taylor, Jr., for Linda Butler Williams (Jenks).

McLean, Stacy, Henry & McLean, by James Dickson McLean, Jr., for Southern National Bank, Guardian for Terra Faye Williams.

Leath, Bynum, Kitchin & Neal, by Fred W. Bynum, Jr., for Insurance Repair Specialists (employer) and Reliance Insurance Company (compensation carrier).

Hedrick, Parham, Helms, Kellam & Feerick, by Edward L. Eatman, Jr., for Estes Express Company (third-party tortfeasor) and Liberty Mutual Insurance Company (third-party liability carrier).

BROCK, Chief Judge.

The following comment appended to the order of the Industrial Commission pretty well sums up the jurisdiction of the Commission to act in this case:

"COMMENT

"The Full Commission notes at the outset that this is not a case where the third party tort feasor was not aware of the subrogation claim of the compensation carrier. It is clear from the evidence that Estes Express Company, through its liability carrier, Liberty Mutual Insurance Company, was put on notice of the lien Reliance had on the settlement funds for any compensation benefits paid or to be paid by Reliance under a valid compensation award.

"A settlement having been reached between the representative of the deceased employee and the third party tort feasor, the correct procedure, under the statutes of our state, was for the parties thereto to petition the Industrial Commission for an Order distributing such funds. Though

somewhat belatedly, such a request was made by the compensation carrier, Reliance Insurance Company, on June 20, 1974. At such time the Industrial Commission acquired in this case the limited jurisdiction it has in third party recovery cases, pursuant to G.S. 97-10.2. Under the provisions of that statute, the Commission is directed to order distribution of the third party recovery for certain specified purposes, in a certain specified order of priorities, both clearly spelled out in the provisions of G.S. 97-10.2 (f) (1). This the Full Commission has done in this case by virtue of the above stated Order.

"The Full Commission can find nothing in G.S. 97-10.2, or in any other provision of the General Statutes of North Carolina, which would take away its authority, and its DUTY, under G.S. 97-10.2 to order distribution of third party recoveries as specified in that statute. The Full Commission is not blind to the fact that in the present case, Liberty Mutual took it upon itself to make a $55,000 payment to the estate of the deceased employee prior to the time of this Order. While it takes note of this payment, the Full Commission is unable to understand how the mere fact of such payment can in any way bear on its authority and duty to order the distribution noted in the above Order. It is the considered opinion of the undersigned that such payment in no way prejudices or otherwise affects the rights and duties of all the parties to this Order.

"The Full Commission is of the opinion that the parties hereto are legally bound to proceed as directed in the above Order. Certainly, this would in no way prejudice their rights, if any, to recoup, in ordinary civil actions elsewhere, payments erroneously made under what may have been a mistaken impression as to the proper distribution of this third party recovery. Be that as it may, the substantive merits of such matters are not properly before the Commission, and the fact of such payments is therefore irrelevant to the Commission's determination, under G.S. 97-10.2, of the proper distribution of the third party recovery now before this body. The parties to this action are bound by the provisions of G.S. 97-10.2, and are hereby ordered to proceed as directed above."

[1] It is strongly suggested by the evidence and argument of counsel that the widow has spent her entire distributive share

of the $55,000.00 wrongful death settlement and has spent the entire $3,060.00 paid to her to date under the Workmen's Compensation Act. It is urged that the widow is insolvent and none of the payments to her can be recouped. These may well be the facts, but they do not alter the proper resolution of this controversy under G.S. 97-10.2.

[2] Liberty Mutual argues that it should not be required to pay $28,500.00 to Reliance because that would cause Liberty Mutual to pay $83,500.00 for wrongful death instead of the $55,000.00 it negotiated with the estate of the deceased employee. Liberty Mutual negotiated the $55,000.00 wrongful death settlement with full knowledge of the fact that Reliance was negotiating a compensation award and with full knowledge of the following provisions of G.S. 97-10.2(f)(1):

> "If the employer has filed a written admission of liability for benefits under this Chapter with . . . the Industrial Commission, then any amount obtained by any person by settlement with . . . the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:"
>
> * * *
>
> "c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission."

A simple inquiry by Liberty Mutual would have disclosed that the employer filed written admission of liability with the Industrial Commission on 18 September 1973, some three months prior to Liberty's settlement agreement with the estate of the deceased employee. Even absent such a simple inquiry, because of the October 1973 telephone and letter notice from Reliance to Liberty Mutual, it seems that ordinary business precaution would have prompted Liberty Mutual to contact Reliance before consummating the December settlement. Liberty Mutual argues that the Industrial Commission was without jurisdiction to enter the distribution order. Its rationale for this argument is that no admission of liability for benefits was filed by the employer until 8 February 1974 because the 18 September 1973 filing was disapproved. This argument is not convincing. The 18 September 1973 filing was disapproved only to the extent

that the widow was a minor and to the extent that the death benefits had been miscalculated. The admission of liability was not disapproved. The Commission's jurisdiction under G.S. 97-10.2 is clear.

With the full knowledge of the law and the circumstances, Liberty Mutual consummated its settlement of the wrongful death claim in December 1973. It may be, as the widow argues, that the settlement offer by Liberty Mutual was substantially lowered because of Liberty's possible responsibility for additional disbursement under the Workmen's Compensation Act. In any event, the statute is unmistakably clear in mandating the distribution of the settlement in this case in the manner ordered by the Commission. Whether Liberty Mutual, after distributing the $28,500.00 to Reliance under the Commission's order, can then recoup from Southern National or from Southern National and the widow cannot be resolved in this proceeding. That is a matter for another forum.

It appears that the claim of the compensation carrier (Reliance) against the liability carrier (Liberty Mutual) must first be pursued under the Commission's distribution order and G.S. 97-87. Secondary relief is provided by the Workmen's Compensation Act. General Statute 97-10.2(h) provides:

> "In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. . . . "

The compensation carrier (Reliance) is a party to the claim for compensation. Its interest under subsection (f) is reimbursement for all benefits by way of compensation *paid or to be paid* under the award of the Industrial Commission. Whether the compensation carrier can successfully pursue its lien claim against Southern National or against Southern National and the widow is a matter of conjecture and beyond the jurisdiction of the Commission. Failing in the pursuit of its statutory lien, whether the compensation carrier could recover damages from Liberty Mutual or whether the compensation carrier could recover damages from Southern National are also matters of con-

jecture. In any event these matters are beyond the jurisdiction of the Industrial Commission.

There are no grounds upon which the Industrial Commission could vacate and set aside the award of compensation for the death of the employee. The award made was in compliance with G.S. 97-38 (where death results proximately from the accident), G.S. 97-17 (settlements allowed in accordance with article), and G.S. 97-82 (approval of settlement by the Commission). The order appealed from was entered in conformity with G.S. 97-10.2.

The order of the Industrial Commission is

Affirmed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES LEVONE McRAE, NATHEL JARONE HARLEY

No. 7616SC617

(Filed 2 February 1977)

1. **Criminal Law §§ 91, 102— defendants' failure to testify — statement by district attorney in prior case — denial of continuance proper**

Where the district attorney, in a case heard prior to defendants' case, stated that "when a defendant refuses to testify, he may have a criminal record to hide," and the remarks were made in the presence of the venire which was to try defendants' case, the trial court did not err in denying defendants' motion for a continuance, since the trial judge made sure that defendants' case was to be tried by one other than the district attorney who made the remarks; and the court polled the jury to determine whether they were influenced by the remarks, and all jurors replied that their verdicts were not affected thereby.

2. **Criminal Law § 75— oral statement reduced to writing — voluntariness**

Evidence on *voir dire* was sufficent to support the findings of the trial court that one defendant was advised of his constitutional rights before he made an oral statement; the statement was reduced to writing, but defendant refused to sign it; and the statement was made voluntarily and understandingly.

3. Criminal Law § 126— unanimity of verdict — instructions — surrender of conscientious convictions

When instructing the jury that the verdict must be unanimous, the trial court is not required to charge that no juror should surrender his conscientious convictions in order to reach a verdict.

4. Criminal Law § 163— jury instructions — objections — time for making

Generally, objections to the charge in reviewing the evidence and stating the parties' contentions must be made before the jury retires so that the trial judge has the opportunity to correct them; otherwise they are deemed waived and will not be considered on appeal.

5. Criminal Law §§ 29, 136— mental capacity to plead and receive sentence

Evidence was sufficient to support the trial court's finding that one defendant was mentally competent to stand trial and able to receive sentence.

APPEAL by defendants from *Braswell, Judge.* Judgment entered for defendant Harley on 9 April 1976 and for defendant McRae on 1 June 1976. Heard in the Court of Appeals 11 January 1977.

Both defendants were charged with armed robbery and defendant Harley was also indicted for carrying a concealed weapon, reckless driving and driving 85 miles per hour in a 35 mile-per-hour zone. The defendants pleaded not guilty to the charges and were convicted by a jury on all counts. Defendant McRae was sentenced to imprisonment for a term of 31 years, and defendant Harley was sentenced to imprisonment for 30 years on the armed robbery charge, 6 months on the concealed weapon charge and 30 days on the speeding charge.

The State introduced evidence which tended to show, *inter alia,* that on 29 December 1975, Myra McLaughlin was employed in Red Springs at a convenience food store known as the Short Stop No. 2. At approximately 9:30 p.m. that evening, two men, subsequently identified by McLaughlin as the defendants, entered the store. One was wearing a burgundy toboggan with yellow trim, a brown jacket and dark glasses. The other man wore a green jump suit with a parka hood and dark glasses. The man identified as defendant McRae pointed a gun at McLaughlin and ordered her to walk away from the cash register. Defendant Harley also carried a small gun. They then took money consisting of bills and rolls of coins from the cash drawer and the register, put it in a bank bag and fled the store.

Later that evening, Marshall McGee, a North Carolina Highway Patrolman, heard a police report of the incident and began searching for a green 1970 or 1971 Dodge or Plymouth. Shortly thereafter, he spotted a car fitting this general description and began pursuing it. The car increased its speed to 85 miles per hour, struck a guy wire and skidded to a stop. Two men, identified as defendants, got out of the car carrying a white bag and another object and ran into a dead-end alley where they were blocked off by McGee. McGee ordered the defendants to stop and placed them under arrest. In the alley, McGee found a money bag containing bills and coins, green coveralls, a cocked pistol, a hood, and other items. A .32 caliber pistol was subsequently discovered on defendant Harley's person.

Defendants' evidence tended to show, *inter alia,* that on 29 December 1975, they had gone to a little club in Red Springs where they remained until 8:30 or 9:00 p.m. They left to go to another club and were walking down the streets of Red Springs when they saw "fireworks." They ran in an alley in the direction of the "fireworks" where they were arrested by Patrolman McGee.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Joan H. Byers, for the State.

I. Murchison Biggs, P.A., by Fred A. Rogers III and J. Gates Harris, for defendant appellants.

MORRIS, Judge.

[1] In the course of a sentencing hearing in a case heard prior to defendants', the district attorney, referring to the defendant in that case, stated that "when a defendant refuses to testify, he may have a criminal record to hide." These remarks were made in the presence of the venire which was to try defendants' case. When their case was called, defendants moved for a continuance on the grounds that the district attorney's remarks were prejudicial. The court conducted a voir dire, determined that the district attorney would not be in charge of trying the present case, and denied the motions. After the jury returned their verdicts, the court inquired as to whether any of the jurors remembered the district attorney's statements and whether they

were influenced thereby. All jurors responded that the remarks had no effect whatsoever on their verdicts, and they were discharged. Defendants assign as error the trial judge's failure to grant their motions for a continuance.

Except where a motion for a continuance is based upon a right guaranteed by the United States or North Carolina Constitutions, such motion is addressed to the sound discretion of the trial court, whose ruling is not subject to review in the absence of an abuse of discretion. *State v. McCotter,* 288 N.C. 227, 217 S.E. 2d 525 (1975); *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973). Failure to grant a continuance will result in a new trial only where the defendant can show that the court erred in denying the motion and that he was prejudiced thereby. *State v. Robinson, supra; State v. Penley,* 6 N.C. App. 455, 170 S.E. 2d 632 (1969). Here, the remarks were made in the presence of the venire from which defendants' jury was selected. However, the statements concerned a defendant in an unrelated case. The trial judge made sure that defendants' case was to be tried not by the district attorney who made the remarks but by an assistant prosecutor. Further, the court polled the jury to determine whether they were influenced by the statement, and all jurors replied that their verdicts were not affected thereby. Under these circumstances, we fail to see how defendants were prejudiced by the denial of their motion. While it is true, as defendant correctly points out, that the prosecutor may not comment upon the failure of a criminal defendant to testify, *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975), this rule has no application to the present case, where the comments were made by a different prosecutor regarding different criminal defendants and where no prejudice has resulted. Suffice it to say that we find no abuse of discretion by the trial judge. Accordingly, these assignments of error are overruled.

[2] Defendants' next assignment of error relates to an unsigned statement allegedly made by defendant Harley which was admitted over objection at trial. State's evidence on voir dire tended to show that Harley, after being advised of his rights, made certain incriminating statements in the presence of Red Springs Police Chief Haggins and Officer Parnell; that these remarks were reduced to writing by Chief Haggins and presented to Harley for his signature; and that Harley refused to sign the statement. Harley testified that he did not sign the statement because " . . . it wasn't what happened at all." De-

fendants point out discrepanies between the testimony of Chief Haggins, who transcribed the statement, and the statement itself. They contend that these "inaccuracies" in the unsigned writing indicate that it was not a correct summary of Harley's statements and should not have been allowed into evidence. Though the evidence regarding the statement's accuracy was conflicting, the trial court found as a fact that Harley was fully advised before questioning of all his constitutional rights and thereafter gave an oral statement which was reduced to writing by Chief Haggins. The court then concluded as a matter of law that Harley, with a full understanding of his rights " . . . did then purposely, freely, knowingly and voluntarily waive each of these rights and thereupon made a voluntary statement to the officers as disclosed of (sic) this voir dire." It is well settled that findings of fact made by the trial judge and conclusions drawn therefrom on voir dire are binding on appeal if they are supported by competent evidence. *State v. Curry,* 288 N.C. 660, 220 S.E. 2d 545 (1975) ; *State v. West,* 17 N.C. App. 5, 193 S.E. 2d 381 (1972), *cert. den.*, 282 N.C. 675, 194 S.E. 2d 155 (1973). Having reviewed the evidence on voir dire, we conclude, and so hold, that there was competent evidence to support the rulings of the trial court. This assignment of error is overruled.

[3] At the conclusion of the charge to the jury, the trial judge instructed:

> "In a moment as you retire to your jury room, there select one from your number who will be your foreman, who will guide your deliberations for you and who will announce your verdict for you in open Court when it has been unanimously agreed upon. Thus, you will readily see that it is a requirement of our North Carolina law that in order to be a jury verdict, all twelve minds must agree and concur on the same verdict."

Defendants assign as error this portion of the charge, contending that the judge should have also instructed the jurors that they "not do violence to their conscience in reaching this verdict." We disagree.

It is true that when a judge gives additional instructions urging a verdict, the better rule is that he also state that he is not expressing an opinion as to what the verdict should be and that no juror should surrender his conscientious convictions

or free will in order to agree on a verdict. See: *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767 (1966); *In re Henderson,* 4 N.C. App. 56, 165 S.E. 2d 784 (1969). These additional admonitions were not given in this case. However, as defendants correctly note in their briefs, this rule applies when the jury has been unable to reach a unanimous verdict and the possibility arises that they may be coerced into a decision solely for the sake of unanimity. This certainly was not the case here. The portion of the charge to which defendants now object was given during the course of the other instructions to the jury. There was no evidence that the jury could not agree on a verdict or that they were coerced in any way. It is clear that the judge was simply informing the jury that they could not return a majority verdict. Since this portion of the charge could not have had a coercive effect on the jurors, there was no need for the additional instructions urged by the defendant. This assignment is without merit and is overruled.

[4] In summarizing the State's evidence to the jury, the judge began "Briefly, the Court will recapitulate the evidence. There is evidence which tends to show that . . . " Defendants contend that the court erred in failing to note that it was beginning its summation by discussing the State's evidence. However, the record reveals that neither defendant objected to the summarization at trial. It is the general rule in North Carolina that objections to the charge in reviewing the evidence and stating the parties' contentions must be made before the jury retires so that the trial judge has the opportunity to correct them. Otherwise they are deemed waived and will not be considered on appeal. *State v. Hunt,* 289 N.C. 403, 222 S.E. 2d 234 (1976); *State v. Littlejohn,* 19 N.C. App. 73, 198 S.E. 2d 11, *cert. den.,* 284 N.C. 123, 199 S.E. 2d 661 (1973). Nonetheless, we have carefully reviewed the judge's charge and find no prejudicial error therein. This assignment is, therefore, overruled.

[5] Defendants' final assignment of error concerns the trial court's finding that defendant McRae was competent to stand trial and receive sentence. At various points throughout the trial proceedings, McRae asked that he be sentenced to death. Sentencing was postponed so that he might undergo a presentence diagnostic study by the Department of Correction. Sentencing was again postponed, and the court ordered that he be committed to Dorothea Dix Hospital for a full mental examination. The Director of Forensic Services at Dorothea Dix Hos-

pital reported that McRae was sane and should be sentenced to prison. At a subsequent hearing, he was sentenced.

G.S. 15A-1001 states:

> "(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. . . . "

Defendant McRae maintains that he did not " . . . comprehend his own situation in references to the proceedings . . . " and that, therefore, he should not have been allowed to stand trial and receive sentence. We disagree.

The trial judge specifically found that defendant McRae was competent to stand trial and able to receive sentence. Although the evidence on defendant's capacity was conflicting, this determination was properly for the trial judge. So long as the findings were supported by competent evidence in the record, they must be upheld on appeal. *State v. Curry, supra; State v. West, supra.* Accordingly, we find no error.

No error.

Chief Judge BROCK and Judge BRITT concur.

TOWN OF MARS HILL v. CLINDON HONEYCUTT

No. 7624SC648

(Filed 2 February 1977)

1. Municipal Corporations § 20— water main in unstable ground — sufficiency of evidence of negligence

In an action to obtain an injunction allowing plaintiff to enter upon the property of defendant for the purpose of repairing its water main which had ruptured where defendant counterclaimed for damages resulting from plaintiff's alleged negligence in failing to maintain the main in proper condition so as to prevent its rupture, evidence was sufficient to permit the jury to find that the water line belonging to plaintiff at the point immediately adjacent to defendant's fish ponds was unstable because it was in an area in which the ground was

shifting; the line broke because of its instability in the shifting ground; the plaintiff knew of the dangerous condition but took no action to remedy it; and the flow of water from the broken main caused defendant's fish pond to overflow resulting in the loss of his rainbow trout.

2. **Municipal Corporations § 20— burst water main — maintenance of pond by defendant — no contributory negligence**

The trial court did not err in failing to submit an issue as to defendant's contributory negligence in maintaining the water level of his pond at a height above a water main and in continuing to keep fish in the pond, since there was no evidence that defendant knew or should have known that the earth was unstable or that the water main was not anchored in such a manner as to withstand the pressure put upon it by the shifting earth.

3. **Damages § 16— damages for loss of fish — improper instruction on measure of damages**

In a trial upon defendant's counterclaim for damages sustained by him when plaintiff's water main ruptured and overflowed his pond resulting in the loss of rainbow trout therein, the trial court failed to declare and explain the law with respect to damages arising on the evidence where the court's instructions gave no consideration to the cost and expense to mature, care for and market the fish which were lost.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 19 March 1976 in Superior Court, MADISON County. Heard in Court of Appeals 13 January 1977.

Plaintiff, the Town of Mars Hill, brought this action on 8 April 1975 to obtain an injunction allowing it to enter upon the property of defendant, Clindon Honeycutt, for the purpose of repairing its water main which had ruptured. In his answer and counterclaim defendant alleged that he had been damaged as a result of plaintiff's negligence in failing to maintain the main in proper condition so as to prevent its rupture. In its reply plaintiff denied negligence on its part and alleged contributory negligence on the part of the defendant. Defendant's counterclaim against the town for the loss of fish from one of his ponds was tried before the jury.

Defendant offered evidence tending to show the following:

On 8 April 1975 he owned property adjacent to the water main that broke upon which he had built two fish ponds in 1970 and 1971. The main ruptured in 1971 when he was constructing the ponds and again in November 1974. When the main broke for a third time on 8 April 1975 at a point near the previous breaks, defendant's lower pond overflowed and many of his rainbow

trout escaped into the Upper Laurel Creek. Defendant had stocked the lower pond with 2,700 fish and had removed 67 before 8 April 1975. After the pond overflowed, he estimated that only 75 fish remained. Defendant estimated that the lost fish weighed an average of two pounds each. With respect to his damages for the loss of his fish, defendant testified as follows:

> "I have an opinion as to the fair and reasonable market value of the fish that were washed from the lower pond on about April 8 — it is $5,000. It is based on what they charge by the pound. I was selling the fish at $1 per pound. I sold them at a cafe and other places and charged $1 a pound."

Plaintiff offered evidence tending to show the following:

In the area in which it ruptured the water main is laid in the fill of a rural unpaved road. Defendant's lower pond is located adjacent to the road with the fill serving as one of its banks. From the time the main was installed in 1927 or 1928 it had never broken until defendant began constructing his ponds. Since the construction of the ponds, the soil around the water main has become wet and soggy because the water level in the lower pond is higher than the location of the water main in the adjacent road bank. The water main is not anchored in such a manner to withstand the pressure of the shifting earth. This condition caused the main to rupture in November 1974 and again on 8 April 1975. Gordon Randolph, a member of the Board of Alderman of the Town of Mars Hill, testified:

> "It was a clean snap break done with pressure. It was broken in two. It would have been hard to cut it any smoother. The break in 1974 was the same kind of break. I had made the break in 1974 known to the Town of Mars Hill. There was discussion about it. We came to the conclusion that from the looks of the bank, the lower toe of the road is weak and the whole area is shifting. Yes, we had come to this conclusion before April 8, 1975. We had discussed that there was some danger in that area that the pipe might break. As to what we discussed doing about it, we discussed it and the alternatives weren't that readily available, being the fact that we did repair it in a manner that would hold. It was a surprise to me when it happened again."

The jury found that Honeycutt's fish were lost as a result of the Town's negligence, and that he was damaged in the amount of $2,000. From a judgment entered on the verdict, plaintiff appealed.

Joseph B. Huff for plaintiff appellant.

Ronald W. Howell and Carolyn Lewellen for defendant appellee.

HEDRICK, Judge.

[1] The Town of Mars Hill contends the court erred in denying its motions for a directed verdict. It argues that the evidence is not sufficient to support a finding by the jury that any negligence on its part was the proximate cause of the loss of Honeycutt's fish. We do not agree.

The Supreme Court stated in *Mosseller v. Asheville,* 267 N.C. 104, 107, 147 S.E. 2d 558, 561, 20 A.L.R. 3d 1286, 1290 (1966):

> "When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage resulting from such operation to the same extent and upon the same basis as a privately owned water company would be. *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14; *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d 470; *Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924; McQuillin, Municipal Corporations, 3rd Ed., § 53.104; 56 Am. Jur., Waterworks, § 38. It is not an insurer against injury or damage by water leaking from such system. It is liable only if the escape of the water was due to its negligence either as to the initial break in the water line or in its failure to repair or cut off the line so as to stop the flow. 94 C.J.S., Waters, § 309. The reasonable care which is required of the city when engaged in such operation, like that required of a privately owned water company, includes the exercise of ordinary diligence to discover breaks in the lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection."

When the evidence in the present case is considered in the light most favorable to the defendant, as must be done, *Summey*

v. Cauthen, 283 N.C. 640, 197 S.E. 2d 549 (1973), it will permit a finding by the jury that the water line belonging to the Town at the point immediately adjacent to defendant's fish ponds was unstable because it was in an area in which the ground was shifting, and that it broke in 1974 because of its instability in the shifting ground. The evidence will permit a finding by the jury that the Town knew of the dangerous condition and that the main might break again near the same point, but that it took no action to remedy the dangerous situation. The evidence is also sufficient to permit a finding by the jury that the main broke in the area immediately adjacent to Honeycutt's fish ponds as a result of the dangerous condition of which the Town had notice, and that the flow of water from the broken main caused defendant's fish pond to overflow resulting in the loss of his rainbow trout. Under *Mosseller v. Asheville, supra*, such findings support the jury's verdict that the defendant lost his fish as a proximate result of the negligence of the Town of Mars Hill. This assignment of error has no merit.

[2] By its second assignment of error the Town contends the court erred in not submitting to the jury an issue of contributory negligence. It argues in its brief, "If appellant was negligent in failing to foresee a second break in the water line, then certainly appellee being in equal possession of the facts, was negligent in continuing to maintain the water level of the lower pond at a height above the pipeline, and in continuing to carry fish in said pond. He was in as good a position or even in a better position that appellant, to observe the entire situation and deliberately chose to maintain the status quo."

> " 'As a general rule, the proprietor of a dam which has been lawfully constructed and maintained is not an insurer of the safety thereof, but is required to exercise ordinary care, in the maintenance and operation thereof, to avoid injury to others.' 56 Am. Jur., Waters, Sec. 162, p. 629 . . . . But the owner of a dam is not responsible for injuries occasioned by causes which could not reasonably be anticipated or guarded against. 56 Am. Jur., Waters, Sec. 31, p. 560, *Cline v. Baker*, 118 N.C. 780, 24 S.E. 516." *Letterman v. Mica Co.*, 249 N.C. 769, 772, 107 S.E. 2d 753, 756 (1959).

While there is evidence in the record that the Town knew the earth around the main adjacent to defendant's ponds was

unstable, that such instability caused the break in 1974 and that another break was likely to occur, there is no evidence in the record that Honeycutt knew or should have known that the earth was unstable or that the main was not anchored in such a manner as to withstand the pressure put upon it by the shifting earth. We hold that Honeycutt could not have "reasonably anticipated" that the maintenance of his ponds at a water level higher than the location of the water main in the bank would cause the main to snap in two. This assignment of error has no merit.

[3] The Town contends the court erred in that in its charge it failed to declare and explain the law with respect to damages arising on the evidence in the case as provided by G.S. 1A-1, Rule 51(a).

On the issue of damages the court charged the jury as follows:

> "I instruct you, Members of the Jury, damage to personal property is involved, and fish are personal property. The rule is, if a claimant is entitled to recover at all, he is entitled to recover what you find to be the difference between the fair market value of the personal property immediately before it was lost or damaged and its fair market value immediately after it was damaged. You will recall the evidence on that point. The fair market value of any property is the amount which has been agreed upon as a fair price by an owner who wishes to sell but is not compelled to do so and a buyer who wishes to buy but is not compelled to do so."

Although the accepted rule for the measure of damage for the destruction of a growing crop is the diminution in the value of the crop in the field, crops often have no ascertainable market value in the field, and damages are ascertained in such cases by awarding the claimant the market value of the lost portion of his crop, as measured as a matured and harvested crop, less any expenses saved in not having to care for and harvest the crop. *Whitaker v. Earnhardt,* 289 N.C. 260, 221 S.E. 2d 316 (1976).

Professor Dobbs states the rule as follows:

> "Absent specific testimony as to the value of the crop in the field, courts generaly make no practical use of the stated measure of damage. Instead they usually award the

> plaintiff the market value of the lost portion of his crop, as measured at maturity of the crop, less the cost he would have had in harvesting and marketing the lost portion. Under this formula, the plaintiff must prove not only how much was destroyed and its market value at maturity, but also what his probable costs of harvesting and marketing would have been as to the destroyed or damaged portion." (Footnotes omitted.) Dobbs, Law of Remedies § 5.2, at 325 (1973).

See also 21 Am. Jur. 2d, Crops § 76 (1965); Annot. 175 A.L.R. 159 (1948).

While there are obvious differences between growing crops in a field and growing fish in a pond, we perceive as much, if not more, difficulty in ascertaining the market value of fish lost or destroyed in a pond as the destruction of a crop growing in a field. We recognize, however, that some growing products, such as timber on the stump or cattle or swine on the hoof, have a readily ascertainable market value. In the present case there is no evidence as to the market value of the rainbow trout *in the pond.* Honeycutt testified that in his opinion the value of the fish lost was $5,000; however, he based his opinion upon the fact that he could sell the fish at one dollar per pound to restaurants *after he had harvested and delivered the fish.*

Thus the Town of Mars Hill is correct in its contention that the trial court in its instructions to the jury on the issue of damages erred by not declaring and explaining the law arising on the evidence in this case because the court's instructions give no consideration to the cost and expense to mature, care for, and market the fish which were lost as a proximate result of the Town's negligence. For error in the charge on the issue of damages the Town is entitled to a new trial on that issue.

In *Robertson v. Stanley,* 285 N.C. 561, 568, 206 S.E. 2d 190, 195 (1974), the Supreme Court stated:

> " 'It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication.' *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164 (1911).

Accord, *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131 (1967); *Jenkins v. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1 (1965). Before a partial new trial is ordered, 'it should clearly appear that no possible injustice can be done to either party.' *Jarrett v. Trunk Co.*, 144 N.C. 299, 56 S.E. 937 (1907)."

Since, in our opinion, the issue of damages in this case is wholly separate and distinct from the issue of liability and no injustice will result from a trial on the issue of damages alone, the judgment is vacated and the cause is remanded to the superior court for a trial on the single issue of damages.

Affirmed in part, vacated and remanded in part.

Judges VAUGHN and CLARK concur.

GEORGE WHEATLEY ARMENTO, ON BEHALF OF HIMSELF AND ALL OTHER RESIDENTS AND PROPERTY OWNERS IN THE HILLENDALE SUBDIVISION, COUNTY OF CUMBERLAND, STATE OF NORTH CAROLINA, SIMILARLY SITUATED AND WALLACE THOMAS PORTER, ON BEHALF OF HIMSELF AND ALL OTHER RESIDENTS AND PROPERTY OWNERS IN THE MORGANTON ROAD AREA, COUNTY OF CUMBERLAND, STATE OF NORTH CAROLINA, SIMILARLY SITUATED v. CITY OF FAYETTEVILLE, NORTH CAROLINA, AND THE CITY COUNCIL OF SAID CITY, SAID COUNCIL CONSISTING OF JACKSON F. LEE, MAYOR AND BETH D. FINCH, HARRY F. SHAW, VARDELL C. GODWIN, MARION C. GEORGE, JR., GLENN W. KELLY, AND MARIE W. BEARD, COUNCIL MEMBERS

No. 7612SC492

(Filed 2 February 1977)

1. Municipal Corporations § 2— annexation — petition for referendum — petition in opposition to annexation

Petitions for referendums on annexation were not petitions "stating that the signers are opposed to annexation" within the meaning of an act prohibiting the annexation of an area in Cumberland County upon such a petition signed by a majority of the registered voters of the area sought to be annexed.

2. Municipal Corporations § 2— annexation ordinance — passage before end of time for filing petition in opposition

Passage of an annexation ordinance before expiration of a 30 day period provided by statute for filing a petition by a majority of the registered voters of the area to be annexed which would prohibit the

annexation did not invalidate the annexation since a proper petition filed within the 30 day period would have nullified the action taken by the city council to annex the area.

APPEAL by plaintiffs from *Bailey, Judge.* Judgment entered 14 January 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 October 1976.

On 24 November 1975 plaintiffs filed separate class actions pursuant to the Declaratory Judgment Act, challenging the proposed annexation of two land areas by defendant city. The action filed by plaintiff Armento sought a declaration that annexation ordinance number 162, which referred to the Hillendale Area where plaintiff Armento is a resident and landowner, was null and void and sought an injunction restraining its operation. The action filed by plaintiff Porter sought the same relief in regard to annexation ordinance number 161, which referred to the Morganton Road Area where plaintiff Porter is a resident and landowner. By consent of the parties with the concurrence of the court, the cases were consolidated for a nonjury trial.

In August 1975 the City of Fayetteville, acting through its city council, began annexation proceedings pursuant to Part 3 of Article 4A of G.S. Ch. 160A to bring the two areas of land within its city limits. The parties stipulated that defendant city is a municipal corporation existing under the laws of the State with a population in excess of 5,000 persons and that the annexation proceedings met the statutory requirements of G.S. 160A-47, 160A-48, and 160A-49. Until 1969, defendant city had no authority to proceed under these statutes. In that year the General Assembly enacted Ch. 1058 of the 1969 Session Laws, applicable only to Cumberland County, which removed this disability. In so doing, the General Assembly added, for Cumberland County only, the following proviso to the annexation authority enunciated by G.S. 160-453.14 (now codified as G.S. 160A-46):

> "Provided, that the municipality shall not annex an area if, within 30 days after publication of the notice of intent has been completed, a petition signed by a majority of the registered voters residing in the area to be annexed is filed with the governing body stating that the signers are opposed to annexation. If a petition opposing the intended annexation is not filed within the 30-day period,

then the municipality may proceed with the annexation procedure." Session Laws 1969, c. 1058, s. 2.

The parties further stipulated the following:

The final date of publication of the notice of intent to annex the two areas here in question was 10 October 1975. On 13 October 1975 the respective plaintiffs filed two petitions with the Fayetteville City Council. One petition, entitled "Petition for Referendum" and signed by a majority of the registered voters in the Hillendale area, stated that the undersigned residents " . . . do hereby specifically make seasonal request to the City of Fayetteville for a referendum on the proposed annexation of Hillendale under provisions of Gen. Stats. of North Carolina § 160-446." (By Sec. 74 of Ch. 426 of the 1973 Session Laws, which became effective 10 May 1973, G.S. 160-446 was recodified as G.S. 160A-25.) The other petition, entitled "Annexation Petition" and signed by a majority of registered voters in the Morganton Road area, stated that the undersigned residents " . . . do hereby petition the Council for a referendum on annexation among the residents of the area to be annexed." A spokesman for each area appeared before the City Council at a public hearing conducted by the Fayetteville City Council on 13 October 1975 and voiced strong opposition to the proposed annexations. Spokesmen for the two areas, while making oral statements before the City Council at the 13 October 1975 public hearing, stated that it was their intention for the petitions to be filed in opposition to the annexations.

On 27 October 1975 the Fayetteville City Council passed the annexation ordinances here under attack. The expiration date for filing petitions of objection in the two annexations, pursuant to Sec. 2 of Ch. 1058 of the 1969 Session Laws, was 10 November 1975.

In open court at the trial, the parties stipulated that the signatories to the two petitions, "if present, and permitted to testify, would testify that when they signed the petitions, they believed that their signatures expressed opposition to the annexation of the Hillendale area and the annexation of the Morganton Road area."

The court entered judgment making findings of fact in accord with the above stipulations. On these findings the court concluded as matters of law that the petitions filed by the

plaintiffs "were not petitions of objection in compliance with the provisions of Sec. 2 of Chapter 1058 of the 1969 Session Laws," that a petition of objection under that section would have nullified the action of the City Council, and that the annexation of the two areas prior to the expiration of the 30 day period set forth in that section did not prohibit the plaintiffs from filing a valid petition of objection within the 30 day period. On these findings and conclusions, the court ordered the petitions of the respective plaintiffs dismissed.

Bradley K. Jones for plaintiff appellants.

William E. Clark for defendant appellees.

PARKER, Judge.

But for the proviso enacted by Sec. 2 of Ch. 1058 of the 1969 Session Laws, defendant City could extend its boundaries without regard to the wishes of the residents in the areas to be annexed. It could accomplish this by following the procedures and complying with the requirements of Part 3 of Article 4A of G.S. Ch. 160A, particularly G.S. 160A-47, 160A-48, and 160A-49. *See In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795 (1961). The parties have stipulated that the annexation proceedings here involved complied with the requirements of those statutes.

[1] The proviso enacted by Sec. 2, Ch. 1058, 1969 Session Laws, applicable only to Cumberland County, gave the residents in each of the areas to be annexed under the proceedings involved in this case power to prevent defendant City from annexing the areas simply by filing a timely petition signed by a majority of the registered voters residing in each area, *"stating that the signers are opposed to annexation."* (Emphasis added.) No such petition was filed. The petitions which were filed asked only for referendums. They contained no statement that the signers were opposed to annexation. The two are not equivalent. To join in a request for a referendum is not to say how one intends to vote, and persons holding divergent views on a public issue may well join together in asking that the matter be submitted to the voters for determination. Moreover, the petitions filed in the present case did not become converted into something which they were not merely because those signing "believed that their signatures expressed opposition." Whatever the signers believed, they failed to sign any petition "stating that

the signers are opposed to annexation." Absent such petition, defendant City could proceed with the annexation and the trial court was correct in so ruling.

In passing, we note that the petitions for referendums which were filed in the present case would have been appropriate under the alternative annexation procedure set forth in what is now codified as G.S. 160A-25 (formerly G.S. 160-446), which statute is included in Part 1, Art. 4A, G.S. Ch. 160A. However, defendants here, as they had a right to do, had already begun proceedings under Part 3, Art. 4A, G.S. Ch. 160A, and they were not required to follow the alternative procedure provided in Part 1. *See Plemmer v. Matthewson,* 281 N.C. 722, 190 S.E. 2d 204 (1972).

[2] The annexation ordinances were passed on 27 October 1975, which was 14 days prior to the expiration date, 10 November 1975, for filing of petitions "stating that the signers are opposed to annexation." Plaintiffs contend that this action by defendants constituted such an irregularity in the annexation proceedings as to materially prejudice their substantive rights, and they challenge the following conclusion of the trial court:

> "3. The annexation by the defendants of the two areas prior to the expiration of the 30 day period set forth in Sec. 2 of Chapter 1058 did not prohibit the plaintiffs from filing a valid petition of objection within the 30 day period."

Passage of the annexation ordinances before expiration of the 30 day period provided by the statute could not result in shortening that period, and the trial court was correct in so concluding. When the ordinances were passed, plaintiffs still had 14 days remaining in which to file proper petitions stating their opposition. This, if done, would have had the effect of nullifying the city council's action. The burden is on the plaintiffs to prove that they were prejudiced by the early passage of the ordinances. *Dunn and Brown and DeGroot v. City of Charlotte,* 284 N.C. 542, 201 S.E. 2d 873 (1974). Plaintiffs have failed to carry this burden. The ordinances did not become effective in any event until 1 January 1976.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. EDWARD HILL

No. 767SC679

(Filed 2 February 1977)

1. **Criminal Law § 51— failure to find witness expert — finding presumed from testimony**

It is not necessary for the court to make a specific finding that a witness is qualified as an expert when the defendant objects to the witness's qualification; however, if the evidence indicates that the witness is qualified, the court's admission of his testimony is presumed to be such a finding.

2. **Homicide § 21— death by shooting — sufficiency of evidence**

Evidence in a homicide case was sufficient to be submitted to the jury where it tended to show that both defendant and deceased had been out drinking; they were arguing; defendant asked deceased to go to bed with him but she refused; witnesses heard a shot; defendant told them to "come see what I did to [deceased]"; and deceased died as a result of a gunshot wound.

3. **Criminal Law § 112— instructions on circumstantial evidence — request required**

Absent a request for special instructions, the court was not required to instruct the jury as to how it should view circumstantial evidence in a homicide case.

4. **Homicide § 26— second degree murder — instruction proper**

The trial court's instruction in a homicide case that "the law implies that the killing was unlawful and that it was done with malice and if nothing else appears, the defendant would be guilty of second degree murder" did not fail to require the State to prove each and every element of the offense as required by *Mullaney v. Wilbur*, 421 U.S. 684.

5. **Homicide § 21— death by shooting — involuntary manslaughter — sufficiency of evidence**

There was sufficient evidence showing a wanton or reckless use of a firearm for the trial judge to charge the jury on involuntary manslaughter where the evidence tended to show that defendant had been drinking; he knew the gun was "funny and dangerous"; he knew the safety was broken; and he admitted firing the shot that mortally wounded deceased.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 19 March 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 19 January 1977.

Defendant was charged in an indictment with the first degree murder of Christine Manning on 18 December 1975. He

was placed on trial for second degree murder or any lesser included offense. The defendant pleaded not guilty.

State's evidence tended to show that Christine Manning, Corneleus Turner, Josephine Manning, George Sanders, and the defendant all lived together in a house; that defendant and Christine had been drinking and were arguing on the night of 14 December 1975; that several of the others heard a shot from the room occupied by defendant and Christine; that defendant came out and told the others to see what he had done; that the others entered the room and found Christine bleeding and a rifle lying on the floor; that a .22 rifle was subsequently seized from the room; and that Christine died on 18 December from a gunshot wound to her neck.

Defendant testified that there had been no argument between him and Christine and that the gun went off accidentally while he was cleaning it.

In rebuttal, State presented evidence tending to show that defendant had told the police three different versions of his story: that the rifle discharged when it fell to the floor; that the rifle discharged when he threw it into the corner of the room; and that the rifle discharged while he was cleaning it.

The jury returned a verdict finding the defendant guilty of involuntary manslaughter whereupon the defendant was sentenced to not less than three nor more than five years in the Department of Correction.

The defendant appealed.

Attorney General Edmisten, by Association Attorney Ben G. Irons, for the State.

Farris, Thomas and Farris, by Robert A. Farris, for the defendant.

MARTIN, Judge.

Defendant first contends the court erred in permitting the county medical examiner to testify concerning the cause of the decedent's death. He argues that the doctor presented by the State was not qualified to state his opinion as to the cause of death because he was not found to be an expert, he did not

personally perform the autopsy on the victim in order to obtain personal knowledge, and he was not asked a proper hypothetical question.

[1] The qualification of an expert is normally addressed to the sound discretion of the trial judge and

> " '[t]he court's findings that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies.' " (Citations omitted.) *State v. Carey,* 288 N.C. 254, 265, 218 S.E. 2d 387, 394 (1975).

Moreover, it is not necessary for the court to make a specific finding when the defendant objects to the witness's qualification. If the evidence indicates that the witness is qualified, the court's admission of his testimony is presumed to be such a finding. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Carey, supra.* In the case at bar, there was ample evidence to support such a finding. This assignment of error is therefore overruled.

Defendant next contends the court erred in failing to adequately define the term "corroborative evidence." He contends the jury was unduly misled and confused as a result. In *State v. Hardee,* 6 N.C. App. 147, 150, 169 S.E. 2d 533, 536 (1969) this Court said:

> "Defendant's mere assertion that the jury probably did not know the meaning of the word [corroborative] is clearly insufficient to show prejudicial error."

Although the court's instruction in defining the term "corroborative" was incomplete, we think it was not prejudicial.

[2] Defendant's contention that the court erred in denying the defendant's motion for nonsuit cannot be sustained.

> "Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied." (Citations omit-

ted.) *State v. Vestal,* 278 N.C. 561, 567, 180 S.E. 2d 755, 759 (1971).

In the instant case the evidence shows that both defendant and deceased had been out drinking; that they were arguing; that defendant asked deceased to go to bed with him and she replied that "she won't never going to bed with him no more"; that witnesses heard a shot; that defendant told them "come see what I did to Chris"; and that Christine died as a result of the gunshot wound. This evidence, when viewed in the light most favorable to the State, was amply sufficient to require submission of the case to the jury, and defendant's motion for nonsuit was properly denied. See *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971).

[3] In defendant's final assignment of error, he contends the court erred in its charge to the jury in several respects. He first contends the court should have defined the term "circumstantial evidence." We feel, however, that the court correctly instructed the jury as to the burden and quantum of proof required for conviction, and, absent a request for special instructions, the court was not required to instruct the jury as to how it should view circumstantial evidence. *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207 (1947); *State v. Candler,* 25 N.C. App. 318, 212 S.E. 2d 901 (1975).

[4] The defendant next contends the court erred in making the following charge:

> " . . . [T]he law implies that the killing was unlawful and that it was done with malice and if nothing else appears, the defendant would be guilty of second degree murder."

Defendant argues that such instruction fails to require the State to prove each and every element of the offense as required by *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). In its interpretation of *Mullaney, supra,* our Court in *State v. Hankerson,* 288 N.C. 632, 651, 220 S.E. 2d 575, 589 (1975), said:

> "[T]he State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof be-

yond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree. . . . "

We think the instruction in the case at bar was adequate. However, even if we assume, *arguendo*, that the instruction was erroneous, it was harmless, as the defendant was not found guilty of second degree murder.

[5] Finally, defendant argues that the judge erred by instructing the jury on involuntary manslaughter since there was no evidence to support such a conviction. He contends that the State's evidence showed second degree murder and that his evidence showed accidental shooting. We have reviewed the evidence, however, and find that there was evidence the defendant had been drinking; that he knew the gun was "funny and dangerous"; that he knew the safety was broken; and that he admitted firing the shot that mortally wounded the deceased. We therefore conclude that there was sufficient evidence showing a wanton or reckless use of a firearm for the trial judge to charge the jury on involuntary manslaughter.

We have carefully examined defendant's remaining assignments of error and find no prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

HUGH ROGER HELMS v. EDWARD L. POWELL, COMMISSIONER OF MOTOR VEHICLES, DIVISION OF MOTOR VEHICLES, OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY

No. 7620SC652

(Filed 2 February 1977)

1. **Automobiles § 2— limited driving privilege — first conviction — driving under influence — driving with alcohol content of .10 or more**

In the provision of G.S. 20-138(b) making a person eligible for consideration for limited driving privileges upon a "first conviction under this section," the word "section" refers to G.S. 20-138 in its entirety; thus, a "first conviction under this section" is a conviction either of driving while under the influence of intoxicating liquor in violation of G.S. 20-138(a) or driving with a blood alcohol content of .10 percent or more by weight in violation of G.S. 20-138(b), and a person previously convicted of driving while under the influence was not eligible for limited driving privileges upon his conviction of driving with a blood alcohol content of .10 percent or more by weight.

2. **Automobiles § 2— revocation of limited driving privilege — guilty plea in reliance on erroneous advice by hearing officer — estoppel**

The Commissioner of Motor Vehicles was not estopped to revoke a limited driving privilege granted to petitioner when he pled guilty to driving with a blood alcohol content of .10 percent or more by weight by the fact that defendant's guilty plea was entered after he was erroneously advised by a hearing officer of the Division of Motor Vehicles that he would be eligible for a limited driving privilege upon a first conviction of such offense notwithstanding his prior conviction for driving under the influence.

APPEAL by petitioner from *Lupton, Judge.* Judgment entered 21 July 1976 in Superior Court, STANLY County. Heard in the Court of Appeals 18 January 1977.

This is an action by petitioner seeking judicial review of an order of respondent Commissioner of Motor Vehicles (commissioner) which seeks to revoke a limited driving privilege granted to petitioner. The facts are not in dispute and are summarized in pertinent part as follows:

On 21 February 1976 petitioner was arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of G.S. 20-138(a), second offense. His previous conviction for driving under the influence was on 8 April 1974.

Before trial petitioner was advised by the assistant chief hearing officer of the Division of Motor Vehicles that he would be eligible for a limited driving privilege pursuant to G.S. 20-179(b), notwithstanding his prior conviction for driving under the influence, if this was his first conviction for operating a motor vehicle when the amount of alcohol in his blood was 0.10 percent or more by weight. On 3 May 1976 petitioner tendered a plea of guilty to a violation of G.S. 20-138(b) which plea was accepted by the court. The district court granted petitioner a limited driving privilege effective from 3 May 1976 to 3 May 1977, after finding as a fact that he had not previously been convicted of a violation of G.S. 20-138(b).

On 20 May 1976 petitioner was advised by the assistant chief hearing officer of the Division of Motor Vehicles that his earlier opinion was erroneous and that petitioner was not eligible for a limited driving privilege because of his previous conviction for driving while under the influence of intoxicating liquors in violation of G.S. 20-138(a). Petitioner sought and obtained a temporary restraining order which restrained the commissioner from revoking the limited driving privilege pending a determination on the merits.

The cause was heard upon a stipulation of the facts, and the trial court concluded that petitioner, because of his previous conviction of driving while under the influence of intoxicating liquor, was not entitled to or eligible for a limited driving privilege under the provisions of G.S. 20-138(b) and G.S. 20-179(b). From this determination, petitioner appealed.

Chandler & Burris, by Gerald R. Chandler, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for respondent appellee.

BRITT, Judge.

Did the trial court err in concluding that petitioner is not eligible for a limited driving privilege? We answer in the negative.

G.S. 20-138 provides that:

"(a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxi-

cating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State.

"(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight and upon conviction if such conviction is a first conviction under this section, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b); provided that second and subsequent convictions under this section shall be punishable as provided in G.S. 20-179(a)(2) and (3). An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence."

The language crucial to this appeal is that which states that upon conviction for operating a vehicle upon any highway when the amount of alcohol in a person's blood is 0.10 percent or more by weight and "if such conviction is a first conviction under *this* section (emphasis added), he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b) . . . . "

Petitioner contends that a "first conviction under this section" specifically refers to a first conviction of operating a motor vehicle on a public highway when the amount of alcohol in that person's blood is 0.10 percent or more by weight. Therefore, since this is petitioner's first conviction for a violation of G.S. 20-138(b), he urges that he is eligible for a limited driving privilege as granted by the district court.

[1] The commissioner argues that a defendant is eligible for a limited driving privilege only upon his first conviction of either offense under the quoted statute. He contends that a "first conviction under this section" means a conviction under either (a) or (b). Upon a second conviction under the statute, a defendant would be ineligible for a limited driving privilege. We agree with this argument.

In construing the quoted statute, we find it necessary to determine the intent of the General Assembly as the legislative intent is controlling in the construction of a statute. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22 (1967).

The last sentence of G.S. 20-138(b) states that "An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence." We think the use of the word "subsection" is a strong indication that the General Assembly intended (a) and (b) as separate subsections. Moreover, G.S. 20-138 was amended in 1974 by Chapter 1081, Session Laws of 1973 (Second Session 1974). Chapter 1081 provides that:

> "G.S. 20-138 as same appears in the 1973 Cumulative Supplement to Volume 1C of the General Statutes is hereby amended by designating the existing section as subsection '(a)' and by adding a new subsection to be designated subsection '(b)' and to read as follows . . . . "

In G.S. 20-138 the word "section" is used twice while "subsection" is used once. We think it is apparent from the distinctive use of the words "section" and "subsection" that the Assembly intended them to have different applications in the enforcement of this statute. We think the Assembly intended the term "section" to refer to G.S. 20-138 in its entirety while the term "subsection" refers to either G.S. 20-138(a) or (b) individually. Thus, a "first conviction under this section" is a conviction of either offense provided by the statute.

Under petitioner's contentions, an individual would be eligible for a limited driving privilege upon his first conviction of driving with a blood alcohol content of 0.10 percent or more by weight regardless of the number of convictions he might have for driving under the influence during the previous ten years. Under the normal rules of statutory construction, the language of a statute will be interpreted to avoid absurd or illogical consequences. *Person v. Garrett,* 280 N.C. 163, 184 S.E. 2d 873 (1971); *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1 (1966). We think petitioner's interpretation of the statute would produce illogical results that were not intended by the Assembly.

[2] Petitioner also contends that his plea of guilty was tendered in good faith and in reliance upon the advice received from the assistant chief hearing officer of the Division of Motor Vehicles, therefore, the commissioner should be estopped from revoking the limited driving privilege. Although we recognize that the advice might have been given and received in good faith, we do not think that the circumstances dictate any relief

to petitioner. The interpretation given a statute by an administrative agency or official is to be given due consideration, but will not prevail when it conflicts with an interpretation given by the courts. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961). Reliance upon the advice of a hearing officer of the Division of Motor Vehicles, even in good faith, is not sufficient legal authority to give rise to any equitable relief in this case.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. WENDELL L. HANSLEY

No. 765SC636

(Filed 2 February 1977)

1. **Criminal Law § 66— in-court identification — no taint from pretrial photographic identification**

Evidence in an armed robbery prosecution was sufficient to support the trial court's conclusion that an in-court identification of defendant by each of three witnesses was based on observation of him at the crime scene and was not tainted by a pretrial photographic identification where the evidence tended to show that the witnesses observed defendant for several minutes in a well lighted food store; they gave complete and accurate descriptions of him; and they stated that they could identify the robber if they saw him again.

2. **Criminal Law § 88— limitation of cross-examination — no error**

Defendant was not prejudiced where the trial court limited his cross-examination of a witness as to statements made to her concerning the robbery.

3. **Criminal Law § 86— cross-examination of defendant for impeachment — no error**

The trial court in an armed robbery prosecution did not abuse its discretion in allowing defendant to be cross-examined for impeachment purposes concerning the discovery of marijuana in his apartment.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 2 March 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 January 1977.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the armed robbery of Jo Ann Scarborough on 21 January 1976. The State's evidence, in pertinent part, tended to show:

On the night in question Jo Ann Scarborough, Linda Melton and Jackie Williams were all working at Parker's Food Store. A man, later identified as defendant, entered the store wearing a hooded gray shirt and sunglasses. He went to the service desk or counter where Linda Melton and Jo Ann Scarborough were and with a gun robbed them of a substantial amount of cash. From her cash register Jackie Williams witnessed the robbery and recognized defendant as someone she had known in high school. The robber left the store with the money and police were called.

Defendant presented testimony, including his own, tending to show that at the time in question he was at his grandfather's home watching television and that he did not own a gun or a hooded gray shirt.

The jury found defendant guilty as charged and from judgment imposing prison sentence of not less than 18 nor more than 25 years, he appealed.

Attorney General Edmisten, by Associate Attorney Rebecca R. Bevacqua, for the State.

James J. Wall for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends the court erred in failing to exclude his in-court identification by the witnesses Linda Melton, Jo Ann Scarborough and Jackie Williams. We find no merit in this assignment.

During the testimony of each of said witnesses, the trial court conducted a voir dire in the absence of the jury to determine if her identification of defendant was of independent origin. In each instance the court found, among other things, on sufficient evidence that on the night of the robbery and at the police station the witness examined more than one hundred photographs, none of which was a photograph of defendant, and failed to select one as being that of the robber; that in early February the witness was shown six photographs of young

black males with light skin and of about the same age and general appearance of defendant; that the six photographs included one of defendant; and without hesitation she selected the photograph of defendant as being a photograph of the robber. In her testimony on voir dire, Jackie Williams testified, and the court found as a fact, that she had been acquainted with defendant casually since about 1967 or 1968; that she went to school with him during those years and had heard that he was distantly related to her husband; that she had seen defendant in the store several days before the robbery and spoke to him; and that she knew his first name but was not sure of his last name.

The court found and concluded that the identification of defendant by each witness was based upon her seeing him at the time of the robbery, and her identification of defendant's photograph did not result from any prompting or suggestion by the police or any other person.

Convictions based upon eyewitness identification at trial following a pretrial identification by photograph will be set aside only when the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968). Defendant argues that the procedures used were impermissibly suggestive in that the identification process amounted to a one-man lineup since five of the six photographs seen by the three women on 2 and 3 February had been included in the group of pictures previously reviewed by the women. We reject this contention.

The fact that five photographs had been included in the group of over one hundred seen by the women more than ten days earlier cannot be said to be impermissibly suggestive. It is highly improbable that a witness can recall each individual photograph seen in a group of one hundred photographs almost two weeks earlier. We do not think that any recollection of the previous photographs shown to these witnesses could be sufficient to give rise to a substantial likelihood of irreparable misidentification. The photographs selected for the second photographic identification were those that most resembled the defendant's description and there is nothing to indicate that

their exhibition was unduly suggestive or contributed impermissibly to the selection of his photograph.

The evidence was sufficient to support the trial court's conclusion that the in-court identifications were not tainted by any pretrial photographic identification and that the in-court identifications were based upon the witnesses' observation of defendant at the time of the alleged robbery. The evidence tends to show that the witnesses observed defendant for several minutes in a well lighted food store; that they gave a complete and accurate description of him; and that they stated that they could identify the robber if they saw him again. The evidence further indicates that the identification of defendant by the witness Williams was based not only on her observations at the time of the robbery but also on her previous acquaintance with him. This assignment is overruled.

[2] Defendant contends that the trial court erred in sustaining the prosecution's objections and refusing to allow the cross-examination of one of the State's witnesses concerning statements made to her by her husband and the store manager about the robbery. This contention is without merit.

Defendant argues that cross-examination of this witness about statements made to her concerning the robbery was material and relevant in showing whether other persons had influenced her testimony. It is well settled that the trial judge, who sees and hears the witnesses and knows the background of the case, has wide discretion in controlling the scope of cross-examination. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970). We perceive no abuse of discretion under the facts in this case. Moreover, we do not think the exclusion of the testimony was prejudicial to defendant. The witness was allowed to answer the questions for the record and we perceive no way the answers would have benefited the defendant. The assignment is overruled.

[3] Defendant next contends that the trial court erred in permitting him to be cross-examined concerning the discovery of marijuana in his apartment. This assignment lacks merit.

Defendant concedes that cross-examination as to whether he had committed a crime was proper but he contends that his cross-examination exceeded the proper scope and thereby prej-

udiced him before the jury. Although a district attorney may not needlessly badger or humiliate a defendant or witness, he may ask a defendant or witness questions tending to discredit his testimony, no matter how disparaging the question may be. *State v. Daye, supra.* "The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. Edwards,* 228 N.C. 153, 154, 44 S.E. 2d 725, 726 (1947).

The questions asked by the district attorney were intended to impeach the credibility of defendant as a witness. We fail to perceive any abuse of discretion by the trial court in allowing the questions to be answered. The assignment is overruled.

We have reviewed the remaining assignments of error argued in defendant's brief and conclude that they too are without merit. We hold that defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. CECIL VAN ROGERS

No. 763SC616

(Filed 2 February 1977)

1. Criminal Law § 91— motion for continuance — time to review record of prior trial

The trial court did not err in the denial of defendant's motion for continuance of his second trial so that his counsel might have adequate time to review the record of his first trial and prepare for trial where defendant was represented by appointed counsel at his first trial but retained private counsel for his second trial, on the day of trial, defense counsel was given a record of the prior trial at the instance of trial judge, and the judge called a two-hour recess to enable counsel to review the record.

2. Narcotics § 4— possession of heroin found in car

The State's evidence was sufficient for the jury on the issue of defendant's guilt of possession of heroin where it tended to show that defendant was the driver in control of a car and that heroin was

found on the floorboard of the car under both the driver's and front passenger's seats and on the ground beside the car on the passenger's side, notwithstanding defendant's contention that the evidence indicated the heroin had been moved after defendant left the car at an officer's request before the heroin was discovered.

3. Narcotics § 4.5— knowing possession — constructive possession instructions

Where, in a prosecution for felonious possession of heroin, the court charged on the law of constructive possession and instructed that the jury could return a guilty verdict only if it found beyond a reasonable doubt that defendant "knowingly" possessed the heroin, the court did not err in giving an additional instruction on constructive possession at the request of the jury without again instructing on knowing possession.

4. Criminal Law §§ 112, 116— necessity for timely written request for instructions

The trial court did not abuse its discretion in the denial of defendant's request for special instructions on the law concerning reasonable doubt and defendant's right not to testify or offer evidence where the request was not submitted to the trial judge in writing before the jury charge was begun. G.S. 1-181(b).

APPEAL by defendant from *Rouse, Judge.* Judgment entered 19 March 1976 in Superior Court, PITT County. Heard in the Court of Appeals 11 January 1977.

Defendant Rogers was indicted and tried on a charge of felonious possession of heroin. The State's evidence tended to show that on the evening of 15 July 1974 Pitt County deputy sheriffs received information concerning a disturbance which had occurred at a club and involved four men. One of the men was reported to have had a hand gun. They left the club in a Chevrolet station wagon. Shortly after receiving the report, the deputies stopped a vehicle answering the description and containing four passengers. An officer asked the driver, the defendant, to produce his license. The defendant could not, whereupon the officer requested that the defendant step out of the car. Rogers was then informed that the car had been stopped to investigate the complaint. The officer then went around to the passenger side of the car and asked the front-seat passenger to step out. At this time the officer noticed a small tinfoil packet on the floorboard of the passenger side. The packet contained white powder. He then discovered four more such packets, two on the ground beside the vehicle on the passenger's side, one more on the floorboard on the passenger's side, and one on the

floorboard of the driver's side. The defendant and front-seat passenger were arrested for possession of heroin. Lab tests subsequently verified the contents of the packets as heroin.

The defendant did not put on evidence and was found guilty of felonious possession of a controlled substance. From judgment imposing a term of imprisonment in the county jail, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Underwood & Manning, by Samuel J. Manning, for the defendant.

BROCK, Chief Judge.

[1] The defendant raises four arguments for consideration. In the first he argues that the trial court erred in denying defense counsel's motion for a continuance so that counsel might have adequate time to prepare. The trial from which this appeal was taken was the second trial in this matter. At the first trial defendant was represented by appointed counsel. For the second trial defendant retained private counsel. On the day of trial, defense counsel was given a record of the prior proceeding at the instance of the trial judge, who also called a two-hour recess to enable counsel to review the record. Upon reconvening, defendant moved for a continuance; motion was denied.

Defendant's counsel argues that he did not have adequate time to review the record and prepare for trial. We find no merit in this argument. Defendant must not only allege that the denial of a continuance undercut preparation, but must also show that he was prejudiced thereby. *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964). Defendant has failed to show any prejudice.

[2] Defendant, in his second argument, contends that the trial court erred in denying his motion to dismiss at the close of the State's evidence on the grounds that the evidence was insufficient to be submitted to the jury. We find no error. As stated by this Court on the appeal from the first trial in this matter, all that is required for the case to reach the jury is evidence placing the defendant in such close juxtaposition to the drugs as to justify the jury in concluding that such drugs were in his possession. *State v. Rogers,* 28 N.C. App. 110, 200

S.E. 2d 398 (1975). Where the driver is in control of the car (as here) and the controlled substance is found in the car (on the floorboard under both driver's and passenger's seats in this case), such evidence is sufficient to withstand motion for dismissal. *State v. Wolfe,* 26 N.C. App. 464, 216 S.E. 2d 470 (1975), *cert. denied* 288 N.C. 252, 217 S.E. 2d 677 (1975).

Defendant argues that there was testimony at the second trial that was not present in the first trial of the case to the effect that there was a time gap of a "couple or three minutes" from when the officer asked the defendant to step out of the car until the officer went around to the passenger's side. Defendant contends that the time gap, coupled with the evidence concerning where the heroin was found, indicates that the drugs were moved after the defendant had gotten out of the car. The conclusion defendant would have drawn from this evidence is that he was not in such close proximity to the drugs so as to enable a jury to conclude he possessed them. This evidence does not contradict his control of the vehicle or the place where the heroin was discovered, which, as stated above, are sufficient to overcome motion for dismissal. The evidence of the time gap is but one of the circumstances for the jury's consideration.

[3] In his third argument the defendant contends that the trial court improperly charged the jury on the law of constructive possession. The judge first instructed the jury late in the afternoon and then dismissed them, ordering them back for deliberation the next morning. In his first charge, which the defendant agrees is correct, the judge explained the offense of felonious possession, telling the jury " . . . that for you to find the defendant guilty of possessing heroin, a controlled substance, the State must prove beyond a reasonable doubt that the defendant knowingly possessed heroin." The judge then explained the law of constructive possession, to wit: "A person has constructive possession of heroin if he does not have it on his person but has either by himself or together with others both the power and intent to control its disposition or use." He concluded the charge by reiterating that the jury could return a guilty verdict only if it believed beyond a reasonable doubt that defendant "knowingly possessed" the heroin.

The next morning, after some deliberation, the jury requested again the instruction concerning the law regarding possession as it related to the driver—the defendant. The judge reinstructed the jurors on constructive possession to the effect

that if they found beyond a reasonable doubt that the heroin was found in a place controlled by the defendant or in close physical proximity to defendant, that "you [jurors] may infer that the defendant had either by himself or together with others both the power and intent to control its disposition or use, but you are not required to do so."

Defendant argues that this second instruction improperly and prejudicially explained the law of constructive possession in that there was no mention of "knowing possession," thus allowing the jury to find defendant guilty by finding only that he possessed the heroin, not that he knowingly possessed the heroin. We disagree. Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be "knowingly" possessed. The jury asked and the judge answered what circumstances constitute constructive possession. The judge's explanation was totally consistent with his instruction concerning the element of constructive possession given the previous day. Nor did his explanation in any way contradict his mandate that guilt depended on a finding of knowing possession beyond a reasonable doubt.

Defendant raises in support of his argument this Court's holding in *State v. Hamlet,* 15 N.C. App. 272, 189 S.E. 2d 811 (1972). There the judge instructed the jury that constructive possession could occur if the heroin was discovered in a place over which the defendant in fact exercised control. From that control the jury could infer that defendant had the power and intent to control the disposition and use of the heroin. The judge then went on to charge that if the jury found that the defendant rented the house and that the heroin was found therein, then there is sufficient evidence "to find beyond a reasonable doubt that she possessed the heroin."

The error in this charge was that the jury could have been led to believe that a finding that defendant controlled the premises wherein narcotics were found was the equivalent to a finding that defendant knowingly possessed the narcotics, or equivalent to a finding that defendant had, either by himself or together with others, both the power and intent to control its disposition or use. This was error not easily amenable to correction by a later instruction charging knowing possession. From evidence that a defendant controls premises in which narcotics are found, the jury may, but is not required to, infer the power

and intent to control its disposition and use, but the jury may draw the inference only after considering all the evidence. *State v. Hamlet, supra.*

The present case is clearly distinguishable. The trial judge correctly charged the jury on both days that a finding of constructive possession would allow the jury to infer the power and intent to control and dispose but that the jury was not required to so find. The trial court's charge in this case did not mislead the jury to the prejudice of the defendant.

[4] In his fourth argument defendant contends that the trial court committed error in denying his request for special instructions on the law concerning reasonable doubt and the defendant's right not to testify or offer evidence. Defendant concedes that his requests were not submitted to the trial judge in writing before the judge's charge to the jury was begun. In such a case G.S. 1-181(b) gives the trial judge discretion to consider such requests or not. We find no abuse of discretion in the denial of defendant's request for special instructions.

The remaining assignment of error concerns denial of defendant's post-trial motions to set aside the jury verdict, to arrest judgment, and for mistrial. Careful examination of the record reveals no error.

We find no prejudical error in the trial.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. RANDALL K. WAITE

No. 764SC627

(Filed 2 February 1977)

1. Homicide § 21— infant son — involuntary manslaughter — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter of defendant's infant son where the evidence tended to show that defendant hit the child on the head twice; the child died from blunt head injury; the child had numerous

other bruises about his body; and defendant was walking around cursing and punching things after he hit the child.

2. Homicide § 15— involuntary manslaughter — violence at crime scene — competency of evidence

In a prosecution of defendant for involuntary manslaughter of his infant son, the trial court did not err in allowing a neighbor to testify that, when she arrived at defendant's apartment shortly after he struck the child, there was broken glass in the apartment, since evidence of violence at the scene of the crime was competent.

3. Homicide § 15— involuntary manslaughter of infant — condition of child's body — relevancy

In a prosecution for involuntary manslaughter of defendant's infant son, the trial court did not err in allowing into evidence testimony concerning bruises on the child's body other than the one causing death, since the condition of the child's body was relevant to the question of cause of death.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 5 March 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 12 January 1977.

Defendant was convicted of involuntary manslaughter in connection with the death of his young son, Randall K. Waite, Jr.

Attorney General Edmisten, by Assistant Attorney General H. A. Cole, Jr., for the State.

Billy G. Sandlin, for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the court erred in failing to grant his motions for nonsuit. Involuntary manslaughter is the unintentional killing of a person without malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence. *State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407.

The evidence may be summarized as follows:

Shortly after 9:00 a.m. on 29 November 1975, defendant's wife had gone to a grocery store and defendant was alone in their apartment with deceased and another child who was less than one month old. Defendant later told an investigator that he had told the deceased child to stay on the couch but that the

child got off the couch and entered the kitchen. Defendant said he then hit the child but did not knock him down. He said that he then picked the child up and hit him on the head once more. After he struck the last blow the child's eyes rolled back in his head and the child began moaning. He placed the child on the couch and went to get his wife. The wife went to a neighbor's house and told her that "her baby wouldn't wake up." The neighbor went to defendant's apartment and saw the baby on the couch. She saw that the child was having difficulty in breathing and that his eyes were rolled back in his head. The child had turned "bluish-gray" and there was a bruise on the right side of his face that was "bluish-red." The baby was dressed in a diaper, rubber pants and a pajama top. The neighbor attempted to administer mouth-to-mouth resuscitation. The neighbor testified that windows in the storm door were broken and that she saw broken pictures and glass in the apartment. Defendant's hand was bloody and he was walking around the apartment cursing and punching things, including the walls. Another neighbor drove the child to the Air Station Hospital from which he was rushed by ambulance to the hospital at Camp Lejeune and later to a hospital in Portsmouth, Virginia.

The child was examined at the Camp Lejeune hospital by Dr. Kessler who testified, in substance, as follows:

The child, when first seen, was unresponsive to stimulation and appeared to be dying. He saw a bruise on the child's right forehead. There were extensive, but older, bruises over the lower part of his back and buttocks. There was bleeding into the nerve part of the eye indicating severe pressure inside the skull. Dr. Kessler decided that the child should be transferred to Portsmouth Naval Hospital and accompanied the child to that hospital.

The State then offered the testimony of Dr. Springate, a deputy medical examiner for the Town of Norfolk, Virginia who testified that he performed an autopsy on the body of the child. We will quote, in pertinent part, his testimony as it is set out in the record:

> "Dr. Springate then testified that there was a faint blue hemorrhage on the left forehead near the midline, one-fourth inch in diameter and a faint irregular hemorrhage on the right side of the forehead just about the right eyebrow. Dr. Springate then explained what a hemorrhage

is. He further stated that he found a hemorrhage in the upper right buttocks about one-half inch in diameter and another hemorrhage which was reddish brown also on the right buttock about one inch in diameter and also on the back inner aspect of the right forearm around the elbow or just below the elbow three-fourths inch in diameter with slight to moderate swelling of the right elbow itself.

He further observed a scalp hemorrhage beneath the regions of the two hemorrhages which were visible on the forehead. There were no skull fractures. A thin layer of blood in the subdural space over the surface of the brain on each side existed. The brain was massively swollen and a few contusions or bruises of the brain in what we call the right orbital lobe and a hemorrhage beneath another very thin membrane on the surface of the brain.

He testified that in his opinion the cause of death was a blunt head injury."

In response to a hypothetical question, Dr. Springate also testified, in effect, that if the jury found defendant struck the child on the head, that the blow could have caused the blunt trauma that was the cause of death.

Defendant did not testify. His only witness was his wife. She testified that on 26 November 1975, the child fell and struck his head on a table. Thereafter, she saw a bruise on the child's forehead and noticed that the child did not seem to be very alert and seemed to want to lie down all the time. The only bruise she saw on the child on the morning of 29 November 1975 was the one that had been there earlier. Although he was reluctant to do so because he thought she would leave him, her husband did admit that he slapped the child on the head. Her husband also admitted slapping the child on 27 November 1975, because he had spilled some cereal. Her husband was not angry when she left for the store on the morning of 29 November 1975 and that he became upset because of the delay in getting an ambulance.

When considering defendant's motions for nonsuit, the evidence must be considered in the light most favorable to the State. When so considered, it is clear to us that the evidence was sufficient to require that the case be submitted to the jury.

[2] In another assignment of error defendant argues that it was error to allow the neighbor to testify that when she arrived at defendant's apartment there was broken glass in defendant's apartment. The objection is without merit. The State's evidence tends to show a senseless assault by defendant on a helpless infant. Certainly evidence of violence at the scene of the crime is competent. We also note that defendant offered no objection when the same witness testified as to defendant striking the wall and cursing after she arrived on the scene.

[3] Defendant's second assignment of error is that the "court should have sustained the Defendant's objection to introduction of evidence of other bruises other than the one causing death." The objection was lodged when the doctors were testifying as to the condition of victim when seen by them. Defendant cites no authority for his argument and it appears to be baseless. The cause of the child's death was one of the questions that the jury had to resolve. The condition of the child's entire body was relevant on that question, among others.

The third assignment of error is directed to the form of some of the hypothetical questions asked of the doctors. The questions appear to have been inartfully phrased but defendant's specific exceptions to the questions fail to raise the possibility of prejudicial error. Moreover, the charge of the court was not brought forward. We assume, therefore, that the court properly instructed the jury as to what evidence they could consider and the purposes for which it could be considered.

We have considered all of the assignments of error brought forward by defendant. No prejudicial error has been shown.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. QUINTON MEDLEY

No. 7618SC650

(Filed 2 February 1977)

Criminal Law § 75— absence of Miranda warnings — volunteered statements — substantive evidence

Although the trial court originally ruled that defendant's in-custody statements were inadmissible during the State's case in chief because defendant had not been given the *Miranda* warnings, the court properly allowed the State to present the statements on rebuttal as substantive evidence where the court conducted a second *voir dire* and determined upon supporting evidence that the statements were not the result of custodial interrogation but were volunteered and thus admissible under *Miranda*.

APPEAL by defendant from *Seay, Judge*. Judgment entered 11 March 1976 in Superior Court, GUILFORD County. Heard in Court of Appeals 13 January 1977.

Defendant, Quinton Medley, was charged in a bill of indictment, proper in form, with the first degree murder of Cynthia Little. Upon the defendant's plea of not guilty the State offered evidence tending to show the following:

While at a party on the night of 19 February 1975 defendant entered into a fight with his girl friend, Barbara Little, during which defendant hit Barbara with a broom and she in turn threatened him with a butcher knife. Cynthia Little, Barbara's half-sister, verbally supported Barbara during the fight. Defendant pulled out his pocketknife, threatened to kill Cynthia, and then fatally stabbed her with the knife. Cynthia had no weapon.

Defendant offered evidence tending to show that he pulled out his knife when Barbara threatened him with the butcher knife, that Cynthia then attacked him with a razor, and that she was accidentally stabbed in the ensuing tussle.

Defendant was convicted of second degree murder, and from a judgment imposing a prison sentence of 40 to 50 years, he appealed.

Attorney General Edmisten by Associate Attorney Nonnie F. Midgette for the State.

Frederick G. Lind, Assistant Public Defender for the 18th Judicial District, for the defendant appellant.

HEDRICK, Judge.

After the defendant was arrested, he was taken to the High Point Police Station where he allegedly stated several times that he killed Cynthia Little and that he meant to do it. In the presentation of its case in chief, the State offered these statements into evidence. The court conducted a voir dire and held that the statements were inadmissible.

After defendant testified that he had accidentally stabbed the deceased, the State on rebuttal again offered the statements into evidence. The court conducted another voir dire to determine the "voluntariness" of the statements. After the voir dire the court made the following findings and conclusions:

> "That on the evening of February 19, 1975, following the arrest of the defendant, he was taken to the Criminal Investigation room in the basement of the Municipal Building, which at that time was used as the police headquarters; that in the presence of three High Point Police Officers: Officer Cranford, Officer Collins, and Officer Helmstetler, the handcuffs were removed from the defendant; that in an adjoining room Police Officer Taylor was present with Barbara Little; that the defendant was not questioned; that no threats were made to the defendant, nor were any promises of hope or reward made to the defendant; that the defendant was talking in a loud voice, cursing; that he was looking around the room and was directing some of his remarks to Barbara Little who was about fifteen feet away; that the defendant stated, 'Yes, I stabbed the bitch, I meant to kill the whore;' that he was not worried about anything as he was on the Rockefeller drug program and he was cool and wore fine clothes and silk underwear;
>
> That thereafter, a key was removed from the mouth of the defendant following his refusal to spit out the key; and that the defendant's statements were made in a loud voice using curse words directed at the police officers.
>
> The court finds and determines and concludes from these facts that the statements of the defendant made in the Criminal Investigation Division of the High Point Police Department in the later hours of February 19th, 1975, were *spontaneous and voluntarily made and not pursuant to any questions,* and not as a result of any threats;

that no threats were made to the defendant; that no offer of reward, and no hope of reward or promise of leniency was made to the defendant; and that there is no evidence that can be believed that the defendant was physically abused or threatened in any fashion." (Emphasis added.)

The court then allowed the statements into evidence.

In its charge the court instructed the jury concerning the statements as follows:

"There is some evidence which tends to show that the defendant has made certain statements relating to the crime charged in this case; that is, the statements made in the Criminal Investigation Division room on February 19th; that if you find that the defendant did make these statements then you should consider all the circumstances under which these statements were made in determining whether it was a truthful statement or admission and the weight that you will give to it."

Citing *Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971), and *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972), defendant contends that the court erred in instructing the jury that the alleged statements made by defendant could be considered as substantive evidence because the statements were admissible only for the purposes of impeaching defendant's testimony. We do not agree with defendant's assertion that the alleged statements were admissible only for the purposes of impeachment.

Harris v. New York, supra, and *State v. Bryant, supra,* dealt with the admissibility of a statement made by a defendant for impeachment purposes "under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966) . . . . " *Harris v. New York, supra,* at 222, 28 L.Ed. 2d at 3. In our opinion, in the present case *Miranda* does not render the statements made by defendant inadmissible in the State's case in chief.

In *Miranda* the Supreme Court was concerned with the admissibility of statements made to the police during "custodial interrogation." The Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived

of his freedom of action in any significant way." *Id.* at 444, 16 L.Ed. 2d at 706. The Supreme Court stated further:

> "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (Footnote omitted.) *Id.* at 478, 16 L.Ed. 2d at 726.

Our Supreme Court quoted the foregoing with approval in *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972), in which it held that the defendant's "volunteered" statements were admissible as substantive evidence. See also Annot., 31 A.L.R. 3d 565, 686-691 (1970).

In the present case the court found and concluded that the statements made by defendant "were spontaneous and voluntarily made and not pursuant to any questions. . . ."

Although the trial court originally excluded defendant's statements in the State's case in chief, its unchallenged findings and conclusions made after the subsequent voir dire clearly establish that the statements were not the result of custodial interrogation but were "volunteered," and thus admissible under *Miranda.* We hold the trial court did not err in instructing the jury that the statements could be considered as substantive evidence.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

BOBBY R. ROLAND v. W & L MOTOR LINES, INC.

No. 7629DC626

(Filed 2 February 1977)

1. **Judgments § 14; Rules of Civil Procedure § 55— default judgment after appearance by defendant**

When a party or his representative has appeared in an action and later defaults, G.S. 1A-1, Rule 55(b) requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given.

2. **Appearance § 1; Judgments § 14— letter from officer of defendant — appearance — default judgment**

A letter sent by defendant's vice-president to plaintiff's attorney and an assistant clerk of court which referred to plaintiff's complaint and its file number, and which responded to the allegations of the complaint and gave reasons for the denial of plaintiff's claim, constituted an "appearance" by defendant in the case; therefore, only the judge could enter default judgment against defendant, and default judgment entered by the clerk was void.

APPEAL by defendant from *Hart, Judge.* Judgment entered 5 May 1976 in District Court, MCDOWELL County. Heard in the Court of Appeals 11 January 1977.

Plaintiff, formerly an employee of defendant, filed a complaint alleging that he had worked as a long-distance hauler for defendant from 22 February 1973 until 6 September 1973 and that defendant owed him $1,985.02 for pay and $500 for a bond which defendant had refused to refund. The summons showed that service was made on defendant by serving defendant's vice-president, Allen E. Bowman, on 14 June 1975. On 11 July 1975 Vice-President Bowman wrote a letter to plaintiff's attorney and sent a copy of the letter to the assistant clerk of court. In this letter, defendant pointed out that it was entitled under its contract with plaintiff to deduct from plaintiff's pay for losses caused by plaintiff's negligence; that because of plaintiff's negligence, a separate claim for $2,335.02 had been filed; that defendant had withheld $1,985.02 from plaintiff's pay and $350 from plaintiff's bond to offset this claim; and that plaintiff had never "refused" to refund anything. On 17 July 1975 plaintiff moved for entry of default, and default was entered by the assistant clerk on that day. Plaintiff also moved for default judgment on 21 July 1975 and a default judgment for $2,485.02 and $500 attorney's fee was allowed by the clerk of court on

that day and execution was issued. Defendant then moved to set aside the entry of default, alleging that its letter of 11 July 1975 should be treated as an answer. A hearing was held at which defendant was allowed to amend its motion to also seek to have the default judgment set aside. An order was then entered finding facts, concluding that the 11 July letter did not constitute an answer, and denying defendant's motion to vacate entry of default and default judgment. Defendant appealed.

Dameron & Burgin, by Charles E. Burgin for the plaintiff.

Lefler, Gordon & Waddell, by Lewis E. Waddell, Jr. and John F. Cutchin, for the defendant.

MARTIN, Judge.

The defendant's principal contention on appeal is that the 11 July letter should be treated as an answer. Defendant argues that, in writing this letter to the plaintiff's attorney, its vice-president was doing exactly what the civil summons had instructed. In addition, the defendant argues that the letter satisfies all the requirements for an answer in that it puts plaintiff on notice as to what defense would be asserted; that it sets up a defense in bar to plaintiff's claim; that it is responsive to the plaintiff's allegations; that it refers to the complaint and the file number; and that it is signed by the defendant.

Without deciding whether the defendant's 11 July letter constitutes an answer, we have concluded that the case at bar should be decided on other grounds.

As a general rule, an "appearance" in an action involves some presentation or submission to the court. See *Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F. 2d 1195 (3d Cir. 1971). However, it has been stated that a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance. Wright & Miller, Federal Practice and Procedure: *Civil* § 2686 (1973). In fact, an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff. 6 C.J.S. *Appearances* § 18. See also *Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E. 2d 649 (1974); *Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974); Wright & Miller, *supra*.

In the case of *Dalminter, Inc. v. Jessie Edwards, Inc.*, 27 F.R.D. 491 (D.C. Tex. 1961), an action was commenced and a summons was served upon defendant requiring defendant to serve an answer upon plaintiff's attorney. The defendant then sent a letter to the plaintiff's attorney claiming that the wrong person had been served. The court, however, granted defendant's motion to set aside the default judgment later entered by the clerk because "[t]he letter of defendant served on plaintiff's counsel was an appearance, and it became the duty of Plaintiff's counsel, when seeking a judgment by default, to apprise the Court of said letter and to give the notice contemplated under Rule 55(b) (2)." *Dalminter, Inc. v. Jessie Edwards, Inc., supra* at 493.

[2] In the case at bar, an examination of the record reveals that the summons indicated service upon defendant on 14 June 1975. On 11 July 1975, which was within 30 days from the date of the service of the complaint, one Allen E. Bowman, vice-president of W & L Motor Lines, Inc., the defendant, sent a letter to the plaintiff's attorney and a copy to the clerk of court acknowledging the complaint and its file number. This letter also referred to the lease agreement between plaintiff and defendant, outlined the agreement by plaintiff to allow deductions from his pay for any negligence, alleged a claim of negligence on plaintiff's part, and set forth the amounts deducted and the balance due. It is our conclusion that, in light of the aforementioned cases, this letter constitutes an "appearance" by the defendant and we so hold.

[1, 2] Having concluded that the defendant has "appeared" in the case at bar, our next consideration is whether this appearance has any bearing on the validity of the default judgment, entered by the clerk, under G.S. 1A-1, Rule 55(b) (1). The pertinent statutory language on this particular question is as follows:

> "(b) Judgment. — Judgment by default may be entered as follows:
>
> (1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the

> defendant, *if he has been defaulted for failure to appear* and if he is not an infant or incompetent person. . . . " G.S. 1A-1, Rule 55(b)(1) (emphasis added).

Upon examination of this statute, we have concluded that there are thus two basic requirements that must be fulfilled before a clerk can enter a default judgment. These requirements are: (1) the plaintiff's claim must be for a sum certain or for a sum that can by computation be made certain, and (2) *the defendant must have been defaulted for failure to appear* and he must not have been an infant or incompetent person. We therefore hold that this statute is clearly intended to allow a clerk to enter default judgment against a defendant only if he has never made an appearance. *Radack v. Norwegian America Line Agency, Inc.*, 318 F. 2d 538 (2d Cir. 1963). See also Wright & Miller, *supra.* Moreover, when a party, or his representative, has appeared in an action and later defaults, then G.S. 1A-1, Rule 55(b) requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given. *Radack v. Norwegian America Line Agency, Inc., supra.* See also Wright & Miller, *supra.* Since the defendant appeared in the case at bar, then the judge rather than the clerk should have entered the default judgment.

We therefore hold that the default judgment filed by the clerk on 21 July 1975 is void and that the trial court erred in failing to set aside the entry of default and the default judgment under G.S. 1A-1, Rule 60(b).

The default judgment is vacated and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

Error and remanded.

Judges PARKER and ARNOLD concur.

EDWARD L. POWELL, COMMISSIONER OF MOTOR VEHICLES
v. MAX H. BOST

No. 7627SC684

(Filed 2 February 1977)

Automobiles § 2— refusal to take breathalyzer test — suspension of license — trial de novo in superior court — insufficiency of court's findings

In a trial *de novo* in superior court from an order of the Division of Motor Vehicles suspending the driver's license of petitioner for his refusal to take a breathalyzer test, the court's conclusion that the Commissioner had no authority to suspend petitioner's license was not supported by appropriate findings of fact where the court merely narrated the testimony of two police officers and failed to make findings determinative of issues as to whether (1) the arresting officer had reasonable grounds to believe petitioner had been operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicants; (2) petitioner was placed under arrest for driving under the influence of intoxicating liquor; and (3) petitioner wilfully refused to submit to the breathalyzer test after being informed of his rights. G.S. 20-16.2(d).

APPEAL by Edward L. Powell, Commissioner of the Division of Motor Vehicles of the Department of Transportation, from *Friday, Judge.* Judgment entered 28 May 1976 in Superior Court, GASTON County. Heard in Court of Appeals 20 January 1977.

In this proceeding Max H. Bost filed a petition in the superior court pursuant to the provisions of G.S. 20-16.2(e) for a trial *de novo* from the order of the Division of Motor Vehicles suspending his driver's license for six months pursuant to G.S. 20-16.2(d). In his petition Bost alleged:

> "3. That on the 1st day of November, 1975, the petitioner was arrested by Officer C. L. Lowe, Gastonia Police Department, charged with operating an automobile under the influence of alcoholic beverages in violation of G.S. 20-138. . . . That at the time of the arrest, the officer did not observe the petitioner operating an automobile. That at 9:00 P.M., according to the arresting officer, the petitioner refused to take the Chemical Breath Test.
>
> 4. . . . That due to a lack of evidence, on January 6, 1976, the charge was dismissed against the petitioner.
>
> 5. Subsequent to that time the petitioner requested and had a hearing before the Deputy Hearing Commission

of the State of North Carolina, Department of Motor Vehicles to show cause why his license should not be suspended for failure to take the Chemical Breath Test. That petitioner's request to have the suspension abated was denied by the hearing officer and the department subsequently issued an order ordering the petitioner to surrender his driving license for six months effective January 19, 1976.

6. That the petitioner was not afforded Chemical Breath Tests until more than two hours after the alleged offense occurred. That the action of the respondent in attempting to suspend the petitioner's operating license was contrary to the laws of the State of North Carolina under the circumstances."

The Division of Motor Vehicles filed an answer admitting that Bost was arrrested and charged with driving under the influence and that he refused to take the breathalyzer test, but denying all the allegations as to the circumstances under which Bost was requested to take the breathalyzer test. The Division also denied that its actions in suspending Bost's driving privileges was contrary to the law.

After a hearing the superior court judge entered the following order:

"(1) That the prior Orders of the respondent Commissioner of Motor Vehicles revoking the petitioner's privilege to operate an automobile under the provisions of G.S. 20-16.2 be reversed;

(2) That the respondent Commissioner of Motor Vehicles for the State of North Carolina be permanently enjoined from attempting to revoke the privilege of the petitioner from operating an automobile under the provisions of G.S. 20-16.2 for allegedly refusing to submit to a chemical test on the 1st day of November, 1975."

The Division of Motor Vehicles appealed.

Robert H. Forbes for petitioner appellee.

Attorney General Edmisten by Deputy Attorney General Jean A. Benoy for respondent appellant.

HEDRICK, Judge.

Respondent contends the trial court failed to make sufficient findings of fact to support its conclusion that the Commissioner was not authorized under the circumstances of this case to suspend Bost's driving privileges for six months pursuant to the provisions of G.S. 20-16.2.

In an action tried without a jury it is the duty of the trial judge to find the facts specially, state separately its conclusions of law, and enter the appropriate judgment. G.S. 1A-1, Rule 52(a)(1). The judge must make findings of fact determinative of the issues raised by the pleadings and the evidence. *Conrad v. Jones,* 31 N.C. App. 75, 228 S.E. 2d 618 (1976).

In *Joyner v. Garrett, Comr. of Motor Vehicles,* 279 N.C. 226, 182 S.E. 2d 553 (1971), Justice (now Chief Justice) Sharp set forth the provisions of G.S. 20-16.2 and 20-25 and then wrote:

> "From the foregoing statutes it is clear that any person whose driver's license has been suspended by the Department of Motor Vehicles under the provisions of G.S. 20-16.2(d) has the right to a 'full *de novo* review by a Superior Court judge.' . . . This means the Court must hear the matter 'on its merits from beginning to end as if no trial or hearing had been held' by the Department and without any presumption in favor of its decision. . . No discretionary power is conferred upon the court in matters pertaining to the revocation of licenses. If, under the facts found by the judge, the statute requires the suspension or revocation of petitioner's license 'the order of the department entered in conformity with the facts found must be affirmed.'" (Citations omitted.) *Id.* at 232, 182 S.E. 2d at 558.

In the present case in the trial *de novo* in the superior court, it was the duty of the judge to make findings of fact determinative of the following issues: whether the officer had reasonable grounds to believe Bost had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor; whether Bost was placed under arrest for driving under the influence of intoxicating liquor; and whether Bost willfully refused to submit to the breathalyzer test after being informed of his rights. G.S. 20-16.2(d).

Under that portion of the judgment labeled "Findings of Fact" the court merely narrated the testimony of Officers Lowe and Deaton. The court made no findings of fact determinative of the critical issues enumerated in G.S. 20-16.2(d). The conclusions drawn by the trial judge are not supported by appropriate findings of fact.

For the reasons stated the order appealed from is vacated and the proceedings is remanded to the superior court for a new trial.

Reversed and remanded.

Judges VAUGHN and CLARK concur.

IN THE MATTER OF: MICHAEL JAMES FEWELL

No. 7626DC618

(Filed 2 February 1977)

Infants § 10— finding of crime committed by infant — adjudication of delinquency

Where the trial judge heard evidence and found that respondent had broken and entered a residence and had committed larceny and received stolen goods, but the judge postponed "adjudication and disposition" pending receipt of a social summary, such proceedings constituted a valid adjudicatory hearing, despite the inadvertent wording of the order postponing "adjudication and disposition."

APPEAL by respondent from *Lanning, Judge.* Order entered 23 March 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 11 January 1977.

Respondent was brought before the Mecklenburg County Juvenile Court on three petitions alleging delinquency. Two of them alleged felonious breaking and entering of a residence and larceny therefrom, while the third alleged felonious receiving of stolen goods. The juvenile hearing was held before Judge Black on 24 February 1976. Respondent was represented by counsel.

Judge Black heard evidence from both sides and entered an order in the matter, the pertinent parts of which are as follows:

"Based on the evidence presented in Court, THE COURT FINDS that the juvenile did in fact and beyond a reasonable

doubt commit the breaking and entering into the residence of Lynn Gail Lewis as alleged in the Petition dated December 18, 1975. . . . THE COURT FINDS that the juvenile did in fact and beyond a reasonable doubt receive stolen goods. . . .

"The Court defers adjudication and disposition in this matter until March 16, 1976 . . . pending receipt of a social summary."

The matter came up on 16 March 1976 before Judge Lanning. He ordered "disposition" of the case continued until 23 March 1976. On that day Judge Lanning entered an order which stated:

"THIS MATTER COMING ON TO BE HEARD this the 23rd day of March, 1976 for disposition. . . .

"THE COURT RECEIVED the social summary as previously requested.

"THE COURT FINDS that it would be in the best interest of the juvenile that he be placed on probation for a period of one year.

"THEREFORE, THE COURT ORDERS that the juvenile be placed on probation for period of one year. . . ."

From the order of disposition by Judge Lanning and adjudication and finding of facts by Judge Black, respondent appeals.

Attorney General Edmisten, by Special Deputy Attorney General John M. Silverstein, for the State.

Mecklenburg County Public Defender Michael S. Scofield, by Assistant Public Defender James Fitzgerald, for the respondent.

BROCK, Chief Judge.

The only question presented to this Court for determination is whether the juvenile court committed error by placing the respondent on probation without an adjudication or finding that he was delinquent. The respondent argues the initial proceeding terminated in an order that postponed "adjudication and disposition" until a social summary could be filed. At the

subsequent hearing, disposition of the matter occurred with imposition of probation, but in neither hearing was there an adjudication or finding of delinquency upon which to base the disposition order. We disagree.

General Statute 7A-285 governing juvenile hearings states:

> "The juvenile hearing shall be a simple judicial process designed to adjudicate the existence or nonexistence of any of the conditions defined by G.S. 7A-278(2) through (5) which have been alleged to exist, and to make an appropriate disposition to achieve the purposes of this Article. In the adjudication part of the hearing, the judge shall find the facts and shall protect the rights of the child. . . .
>
> "The court may continue any case from time to time to allow additional factual evidence, social information or other information needed in the best interest of the child. If the court finds that the conditions alleged do not exist, or that the child is not in need of the care, protection or discipline of the State, the petition shall be dismissed.
>
> "At the conclusion of the adjudicatory part of the hearing, the court may proceed to the disposition part of the hearing, or the court may continue the case for disposition after the juvenile probation officer or family counselor or other personnel available to the court has secured such social, medical, psychiatric, psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State. The disposition part of the hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the child."

Under G.S. 7A-278(2) a "delinquent child" is defined as "any child who has committed any criminal offense under State law or under an ordinance of local government. . . "

The statute clearly contemplates two phases in a juvenile hearing—adjudication and disposition. In the present case the proceedings before Judge Black constituted a valid adjudicatory hearing, despite the inadvertent wording of the order postponing "adjudication and disposition."

As stated in G.S. 7A-285, the purpose of the adjudicatory part of the hearing is to find "the existence or nonexistence of

any of the conditions defined by G.S. 7A-278(2) through (5)." In his order Judge Black found as fact and beyond reasonable doubt that respondent had committed the offense of breaking and entering, and had received stolen property. Thus, the function of the adjudicatory part of the hearing was accomplished in that the conditions defined in G.S. 7A-278(2) were found to exist. While a specific finding adjudicating the child to be "delinquent" would have made for clarity, such terminology is not required by the statute. The court found the conditions of delinquency—the commission of a criminal offense—to exist. That finding constitutes a sufficient adjudication of delinquency.

Examination of the record shows that the postponement of final action in the case by Judge Black was solely to allow social summaries to be prepared and submitted. General Statute 7A-285 provides for such continuances so that the court can obtain pertinent information and assistance to aid it in the disposition phase of the hearing. Judge Lanning's order imposing probation was made after examination of the social summaries. The disposition was based on findings, supported by evidence, of the commission of acts that constituted delinquency. And a disposition imposing probation in cases of delinquency is authorized under G.S. 7A-286.

The order of the juvenile court is

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOE ERNAL LEWIS, JR.

No. 763SC660

(Filed 2 February 1977)

1. Criminal Law § 22— plea bargaining — limitation on evidence

G.S. 15A-1025 prohibiting the introduction of any evidence of plea bargaining between defendant or his counsel and the solicitor was not applicable in this case to exclude evidence of plea negotiation between defendant and the arresting officer.

2. Criminal Law § 26; Narcotics § 1— possession and delivery of same controlled substance — two offenses — no double jeopardy

Imposition of separate sentences for defendant's convictions of (1) possession with intent to deliver a controlled substance and (2) delivery of the same controlled substance did not violate the prohibitions against former jeopardy, since two separate and distinct crimes were established, though they both arose from the same transaction.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 3 March 1976 in Superior Court, CARTERET County. Heard in the Court of Appeals 18 January 1977.

Upon pleas of not guilty, defendant was tried on separate indictments charging him with (1) possession with intent to deliver a controlled substance and (2) delivery of a controlled substance to Oral Graham Mizzell. The State's evidence tends to show:

On the night of 12 May 1975 L. C. Swain of the Carteret County Sheriff's Department approached defendant outside a bar in Atlantic Beach. Swain saw defendant hand a plastic package to Oral Graham Mizzell. Mizzell turned towards the officer and threw the package on the ground. Mizzell and defendant were taken into custody and the package, which contained nine purple tablets, was seized. Analysis of one of the tablets revealed it to be lysergic acid diethylamide (LSD).

Defendant's evidence tends to show that when Mizzell observed the officers he attempted to pass the package to defendant; that defendant pushed Mizzell's hand away; that defendant did not have a plastic bag in his possession and he did not hand a package to Mizzell.

The jury found defendant guilty as charged. From judgments imposing a seven-year prison sentence and a consecutive five-year suspended sentence, defendant appealed.

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

McNeill, Graham, Darden and Coyne, P.A., by H. Buckmaster Coyne, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant contends that the trial court erred in admitting evidence indicating that he had entered into plea negotiations with the arresting officer. This contention is without merit.

During the cross-examination of defendant, the district attorney asked defendant if he had told Officer Swain that he sold LSD in the past. Defendant denied making the statement but admitted going to Swain's office the week before trial. The district attorney then asked, "Why did you go there?" Defendant's objection was overruled and defendant answered, "Well, Mr. Swain was going to make a plea bargain with me, he told me . . . . "

We note first that defendant failed to make an objection or a motion to strike following this allegedly inadmissible evidence. Nevertheless, he argues that G.S. 15A-1025 prohibits the introduction of any evidence of plea bargaining, thereby rendering this evidence inadmissible. That statute provides in pertinent part that:

> ". . . The fact that the defendant or his counsel and *the solicitor* engaged in plea discussion or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings." (Emphasis added.)

Defendant concedes that the challenged evidence pertained to plea negotiations between defendant and the arresting officer rather than the solicitor, but argues that the policy behind the statute should render this evidence also inadmissible. We disagree.

The statute expressly forbids the introduction of evidence concerning a plea discussion between defendant or his counsel and *the solicitor*. The statute is not applicable in the present situation where the only evidence of plea negotiation concerns a discussion between defendant and an arresting officer. The statute is explicit and will not be expanded to apply in this case.

[2] Defendant next contends that the imposition of separate sentences for his convictions of (1) possession with intent to deliver a controlled substance and (2) delivery of a controlled substance violates the prohibitions against former jeopardy. We disagree.

The recent case of *State v. Lankford*, 31 N.C. App. 13, 228 S.E. 2d 641 (1976), is dispositive of this issue. The court there stated:

> "The sale of a controlled substance is a specific act and occurs only at one specific time. However, the possession

of that controlled substance with the intent to sell it is a continuing offense from the time it was unlawfully obtained until the time the possessor divests himself of the possession." 31 N.C. App. at 18, 228 S.E. 2d at 645.

This same rationale applies to the separate and distinct offenses of delivery of a controlled substance and possession with the intent to deliver the controlled substance. Also analagous is the Supreme Court holding in *State v. Moschoures,* 214 N.C. 321, 199 S.E. 92 (1938), that the unlawful possession of intoxicating liquor for the purpose of sale and the unlawful sale of intoxicating liquor constitute distinct and separate offenses supporting separate sentences. In *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973), it was decided that the imposition of two consecutive sentences for the possession of heroin and for the sale of heroin did not constitute double jeopardy.

For the plea of former jeopardy to be good, the plea must be grounded on the "same offense" both in law and in fact. It is not sufficient that the two offenses arise out of the same transaction. *State v. Cameron, supra.* 2 Strong, N. C. Index 2d, Criminal Law § 26. In the instant case we think that two separate and distinct crimes were established and that the court did not err in imposing consecutive sentences.

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. THEODORE FOUST

No. 7615SC674

(Filed 2 February 1977)

Homicide § 21— voluntary manslaughter of child — sufficiency of evidence

The State's evidence was sufficient to support a verdict finding defendant guilty of voluntary manslaughter of his illegitimate nine month old son where it tended to show that defendant and the child's mother quarreled; the child was crying and defendant took the child from his bed and began to butt his head against the child's head,

saying he was "trying to make a man out of him and make him tough"; defendant then began to chop the child on the head with the side of his hand; the child stopped crying and was trying to catch his breath; defendant began to throw the child on the bed to see if he could catch his breath; defendant and the child's mother then took the child to a hospital but the child's heart stopped beating before they arrived there; there were fourteen bruises on the child's head; death was caused by a blunt force to the head with resulting hemorrhage and brain injury; and the injuries that resulted in death could not have been caused by a fall but could have been caused by blows to the head with the side of a hand.

APPEAL by defendant from *Preston, Judge.* Judgment entered 24 March 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 January 1977.

Defendant was tried for murder in the second degree and was convicted of voluntary manslaughter in connection with the death of his illegitimate son, Victor Bolden, who was then nine months old. Judgment was entered imposing a twelve-year prison sentence.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward, for the State.

R. Chase Raiford, P.A., for defendant appellant.

VAUGHN, Judge.

Defendant, in his first argument, contends that the State's evidence was insufficient to take the case to the jury. Defendant offered no evidence. Voluntary manslaughter is the unlawful killing of a person without malice and without premeditation. *State v. Kea,* 256 N.C. 492, 124 S.E. 2d 174. The State's evidence tends to show the following:

Defendant lived with Belinda Bolden and their two illegitimate children, one of whom was Victor. Victor was born on 21 January 1975, and was described as an anemic child. Late in the afternoon of 19 November 1975, defendant and Bolden began to quarrel. Defendant had been drinking and Victor was crying. Defendant took the baby from his bed and began to butt his own head against the baby's head. Bolden told defendant to stop but he refused and said that he was "trying to make a man out of him and make him tough." The quarrel continued and defendant began to hit Bolden in the face with his fist. De-

fendant then began to "chop the baby on the head with his hand. It was with the palm of his hand. The side part of his hand." Bolden could not get the baby away from defendant. The baby stopped crying and was trying to catch his breath. Defendant began to throw the baby on the bed to see if he could catch his breath. Bolden tried to give the baby oxygen and saw a bruise in the center of his forehead. Bolden then went to the car so that she could take the baby to a hospital. Defendant attempted to pull the coil wire off the car but finally drove Bolden and the child to a hospital. The baby's heart had stopped beating before they arrived at the hospital.

On 20 November 1975, the Chief Medical Examiner of the State of North Carolina performed an autopsy on the child's body. His testimony, in pertinent part, is quoted from the record:

> "There were 13 bruises present over the forehead and upper portion of the head and both cheeks. . . . Bruises were present over the forehead area with the exception of 2 that were on the sides of the cheek, approximately to the point which I point on my own head. There was a 14th bruise at the back of the scalp back of the head. The bruises that were apparent about the face and forehead I could see on the inner surface of the scalp. There was recent fresh hemorrhage over the surface of the brain. There was also an area of old hemorrhage in the brain and there was a small area of hemorrhage adjacent to one kidney. The brain hemorrhage was that associated with the bruises to the head. Other than the head and small bruises—small hemorrhage adjacent to one kidney there were no other internal damages found. These injuries were very recent.
>
> Q. And could you pinpoint that within a matter of hours?
>
> A. Only not beyond saying that the hemorrhage of the head, that is, on the brain, could have been as long as several hours, but not longer than that. There was in addition to the fresh hemorrhage I have just been talking about an area representing old hemorrhage that I would date approximately a month, 2 months in age. In my opinion, the cause of death was from a blunt force to the head with resulting hemorrhage and brain injury. I do not believe the older injury in the head described had any part in the

death of the child. The kidney injury did not contribute to his death."

There was no objection to any of the foregoing testimony by the doctor. Over defendant's objection the doctor was allowed to testify that, in his opinion, a fall could not have caused the injuries that resulted in death and that the injuries could have been caused by blows to the head with the side of a hand.

In support of his argument on the nonsuit question, defendant appears to argue that the dead child's mother should not be believed because of the possibility of her own involvement, her earlier inconsistent statements and her concern over custody of the surviving child. Defendant further contends that the evidence is inconclusive, because it does not rule out whether the child's death was caused by an accumulation of forceful blows from other persons. He contends that the State failed to show that death resulted from the blows inflicted by defendant. The argument is without merit. On a motion for nonsuit the evidence is, of course, considered in the light most favorable to the State. The State is allowed the benefit of every reasonable inference that arises on the evidence. When so considered, the State's evidence in this case was sufficient to take the case to the jury on the murder and manslaughter charges and fully supports the verdict of guilty of voluntary manslaughter.

Defendant brings forward eight assignments of error in which he contends the court allowed the medical expert to give an opinion without a proper hypothetical question. These assignments of error fail to disclose prejudicial error. A medical expert may give his opinion on facts which he has observed during the course of his examination of the body of the deceased.

The assignments of error brought forward fail to disclose any prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

PAUL R. WATERS AND WIFE, ALMA M. WATERS, AND WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE UNDER THE WILL OF JAMES A. TINGLE, DECEASED v. NORTH CAROLINA PHOSPHATE CORPORATION, DAVID B. ALLEMAN AND WIFE, RUTH G. ALLEMAN, AND ELIZABETH KEYS ALLEMAN WHEELER (DIVORCED)

No. 763SC647

(Filed 2 February 1977)

Deeds § 12— inconsistent clauses in deed — conveyance in granting clause governs

Language in a deed which was found only in the same paragraph as the description was ineffectual and did not create a valid right of reentry on breach of the stated conditions, since the conditions and right of reentry were not referred to anywhere else in the deed; an unqualified fee was conveyed by the granting clause; and the habendum clause contained no limitation on the fee conveyed by the granting clause.

APPEAL by defendants David B. Alleman, Ruth G. Alleman and Elizabeth Keys Alleman Wheeler from *Rouse, Judge.* Judgment entered 9 April 1976 in Superior Court, PAMLICO County. Heard in the Court of Appeals 13 January 1977.

A recital of the factual and procedural background of the case is unnecessary to an understanding of the question presented on appeal, which involves the construction of a deed.

The deed in question was prepared on a commercially printed form. The granting clause is as follows: " . . . [Grantors] do hereby grant and release unto the parties of the second part, their heirs and assigns forever . . . . " Following the printed granting clause the lands being conveyed are described. Following the description, in the same paragraph with the description, the following language appears:

> "Subject to the following covenants and restrictions which will run with and bind the land and will be considered as conditions subsequent with right of reentry on breach; that no timber shall be cut from any of these premises; that no irrigation indebtedness shall be imposed upon this land; that no building shall be removed from the premises without written permission of the parties of the first part hereto."

Following the description and in a separate paragraph the *habendum* clause is printed on the form and is as follows: "TO HAVE AND TO HOLD the premises herein granted unto the parties of the second part, their heirs and assigns forever."

The judge concluded that the language we have quoted from the paragraph containing the description was ineffectual. Summary judgment was granted in favor of plaintiffs against the appealing defendants.

Gaylord, Singleton & McNally, by Phillip R. Dixon and Louis W. Gaylord, Jr., for plaintiff appellees.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant appellants.

VAUGHN, Judge.

The sole question is whether the language in the deed that we have heretofore quoted, and which is found only in the same paragraph with the description, creates a valid right of reentry on breach of the stated conditions. The conditions and the right of reentry are not referred to anywhere else in the deed. The trial judge concluded that the language was ineffectual and we must agree.

We have duly considered the strong arguments in defendants' brief and the astute analysis of the cases discussed therein. We conclude, nevertheless, that our decision must be guided by that of the Supreme Court in *Whetsell v. Jernigan,* 291 N.C. 128, 229 S.E. 2d 183, which affirmed the decision of this Court in *Whetsell v. Jernigan,* 29 N.C. App. 136, 223 S.E. 2d 397. *Whetsell* involved a reverter clause that appeared only at the end of the description and was not referred to elsewhere in the deed. The Court held that the clause was ineffective. We see no significance in any differences between the deed in *Whetsell* and the one in the case at bar insofar as the relevant propositions of law are concerned. There, as here, the conveyance was executed prior to the effective date of G.S. 39-1.1. That statute, in effect, requires the Court to determine the effect of instruments of conveyance containing inconsistent clauses (executed after 1 January 1968) on the basis of the intent of the parties as it appears from *all* of the provisions of the instrument. In *Whetsell,* the Court considered its decisions in *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *Oxendine v. Lewis,* 252 N.C.

669, 114 S.E. 2d 706, and similar cases as having established the proposition that words appearing only in the description of a deed are not sufficient to limit the unqualified fee conveyed by the granting clause when the *habendum* clause contains no limitations on the fee therein conveyed and a fee simple title was warranted in the covenants of title. The Court then reasoned that, since the General Assembly provided that its provision should apply to all conveyances executed *after* 1 January 1968, the Court should not change the proposition voiced in *Artis, Oxendine* and other earlier cases in interpreting conveyances executed prior to that date.

For the reasons stated, the judgment is affirmed.

Affirmed.

Judges HEDRICK and CLARK concur.

HOMER F. SEAWELL v. FRANKIE N. YOW, JR.

No. 7620DC657

(Filed 2 February 1977)

Torts § 7— ratification of insurance carrier's settlement — plea in bar — insufficiency of evidence

The trial court erred in dismissing plaintiff's claim against defendant for property damages resulting from an automobile accident on the ground that plaintiff had ratified his insurance carrier's settlement of defendant's claim against plaintiff for personal injury and property damage where there was nothing in the record to support the conclusion that plaintiff had ratified the settlement.

APPEAL by plaintiff from *Webb, Judge.* Order entered 16 March 1976 in District Court, MOORE County. Heard in Court of Appeals 18 January 1977.

This is a civil action wherein the plaintiff, Homer F. Seawell, seeks to recover from the defendant, Frankie N. Yow, Jr., damages to personal property allegedly resulting from an automobile accident on 24 February 1972. Defendant filed an answer denying negligence, alleging contributory negligence, and alleging that plaintiff's liability insurance carrier had settled defendant's claim against plaintiff for personal injury and

property damage arising out of the same automobile accident, and that the defendant in consideration of the payment of $1275.00 had released the plaintiff from all claims arising out of the automobile accident. Defendant further alleged that plaintiff had ratified the settlement. Defendant also filed a counterclaim for personal injury and property damage.

After making findings and conclusions the trial court entered an order dismissing plaintiff's claim. Plaintiff appealed.

Evans and Shelton by John B. Evans for the plaintiff appellant.

William D. Sabiston, Jr., and Hurley E. Thompson, Jr., by William D. Sabiston, Jr., for defendant appellee.

HEDRICK, Judge.

When the cause came on for trial, the record indicates that defendant's counsel made the following statement, "I think we can get in some stipulations prior to the motions." The record on appeal indicates that thereafter a general discussion was had between the plaintiff's attorney, the defendant's attorney, the plaintiff, and the judge as to certain stipulations with respect to the settlement of defendant's claim against the plaintiff for personal injury and property damage. At the conclusion of this discussion defendant's counsel stated, "Now I move that the plea in bar be sustained and that the action be dismissed." After hearing arguments on the motion, Judge Webb announced, "I'll allow your motion for a plea in bar." In the order appealed from Judge Webb found and concluded among other things that plaintiff had ratified his insurance carrier's settlement of defendant's claim for personal injury and property damage and entered the order dismissing plaintiff's claim.

Because the defendant's motion does not contain the rule number under which the defendant was proceeding as required by Rule 6 of the General Rules of Practice for the Superior and District Courts, we are unable to determine under what procedure the court purported to dismiss plaintiff's claim. While the record on appeal indicates that the parties undertook to enter into some stipulations and that the court even considered such stipulations in making certain findings of fact, there is absolutely no evidence in this record to support the findings of fact made by Judge Webb. Furthermore, there is nothing in the

record before us, even if we consider the findings of fact made by the trial judge, to support the conclusion that plaintiff ratified his insurance carrier's settlement of defendant's claim against the plaintiff. Thus the record does not support the order dismissing plaintiff's claim.

For the reasons stated the order appealed from is vacated and the cause is remanded to the district court for further proceedings.

Vacated and remanded.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. RICK VAN MATRE

No. 7621SC625

(Filed 2 February 1977)

Criminal Law § 134— youthful offender — finding required prior to sentencing

The trial court erred in sentencing the youthful offender defendant as one other than a "committed youthful offender" without first finding that defendant would derive no benefit from treatment and supervision as a committed youthful offender. G.S. 148-49.4.

ON *writ of certiorari* to review proceedings before *Graham, Judge.* Judgment entered 25 May 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 January 1977.

Defendant, then 16 years old, pled guilty to two charges of armed robbery. The court consolidated the two charges for judgment and imposed sentence of imprsonment "for the term of twenty (20) years in the custody of the State Dept. of Correction." Defendant's petition for certiorari was allowed.

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

W. Joseph Burns for defendant appellant.

CLARK, Judge.

A "youthful offender" is defined in G.S. 148-49.2 as a person under the age of 21 at the time of conviction. There is a

marked distinction between a "youthful offender" and a "committed youthful offender."

G.S. 148-49.2, a part of Article 3A, Chapter 148, General Statutes of North Carolina, defines a "committed youthful offender" as "one committed to the custody of the Secretary of Correction under the provisions of this Article." Article 3A provides for an extensive program of treatment, study and release for the "committed youthful offender," a program which is not available to a regular "youthful offender." The purposes of Article 3A "are to improve the chances of correction, rehabilitation and successful return to the community of youthful offenders . . . . " G.S. 148-49.1.

This Court first considered the role of the trial court in sentencing a person under the age of 21 at the time of a conviction in *State v. Mitchell,* 24 N.C. App. 484, 211 S.E. 2d 645 (1975), holding that G.S. 148-49.4 required that the sentencing judge could not sentence a "youthful offender" under any other applicable penalty provision unless the court finds that the youthful offender will "not derive benefit from treatment and supervision" as a committed youthful offender pursuant to Article 3A, Chapter 148. See also *State v. Worthington,* 27 N.C. App. 167, 218 S.E. 2d 233 (1975).

We reject the contention of the State that any sentence of imprisonment upon a "youthful offender" without a finding that he would not derive benefit from a committed youthful offender sentence automatically constitutes a committed youthful offender sentence under G.S. Chapter 148, Article 3A. The judgment of the trial court, which is the basis of the defendant's commitment to the Department of Corrections, must conform to the sentencing statutes so as to accurately reflect the intended sentence.

Since the trial court did not sentence the youthful offender defendant as a "committed youthful offender" and did not find that defendant *will not derive benefit from treatment and supervision as a committed youthful offender,* the judgment is vacated and this cause is remanded for proceedings and resentencing consistent with this opinion.

Judgment vacated and remanded.

Judges VAUGHN and HEDRICK concur.

GRACE TAYLOR McRORIE AND HUSBAND, HOWARD S. McRORIE AND ELIZABETH TAYLOR BURGESS, WIDOW PLAINTIFFS AND KENNETH B. CRUSE, ADDITIONAL PLAINTIFF v. J. CLAY QUERY AND WIFE, OLLIE M. QUERY DEFENDANTS AND HARRY A. MARTIN AND WIFE, ALTON ERWIN MARTIN ADDITIONAL DEFENDANTS

No. 7619SC644

(Filed 16 February 1977)

1. **Equity § 2— ejectment action — plea of laches proper**

Plaintiffs' contention that the defense of laches was inapplicable in an ejectment action is without merit.

2. **Equity § 2— action brought within statutory period of limitations — laches nevertheless existent**

Plaintiffs could be guilty of laches, even though their action for ejectment was brought within any applicable period of limitation, if their delay in bringing the action was mere neglect to seek a known remedy, the delay was without reasonable excuse, and injury would otherwise be done to defendant by reason of the delay.

3. **Equity § 2— laches — lapse of time — inequity resulting from delay — notice of claims**

Lapse of time is not the controlling or most important element to be considered in determining whether laches is available as a defense; rather, the question is primarily whether the delay in acting results in an inequity to the one against whom the claim is asserted based upon some change in the condition or relations of the property or the parties. Also to be considered is whether the one against whom the claim is made had knowledge of the claimant's claim and whether the one asserting the claim had knowledge or notice of the defendant's claim and had been afforded the opportunity of instituting an action.

4. **Equity § 2— ejectment action — sufficiency of evidence of laches**

In an action for ejectment evidence was sufficient for submission to the jury on the question of laches where such evidence tended to show that defendant occupied property claimed by plaintiffs; plaintiffs did not make their claim known to defendant until institution of this action; plaintiffs knew that a house was located on the property and that defendant lived in it; defendant made considerable improvements to the house; and plaintiffs delayed bringing this action for three years, the only reason given by them being that they wanted to try another action against another person first.

APPEAL by plaintiffs and additional plaintiff from *Albright, Judge.* Judgment entered 8 March 1976, Superior Court, CABARRUS County. Heard in the Court of Appeals 12 January 1977.

This action in ejectment was instituted by plaintiffs on 10 June 1968. Plaintiffs were then represented by Kenneth B.

Cruse, who prepared and filed their verified complaint. On 3 August 1968, Harry A. Martin and wife, Alton Erwin Martin, petitioned the court that an order issue making them parties defendant, and this was done on the same date. In their verified answer to plaintiffs' complaint, defendants Query and Martin, prayed that an order issue making Kenneth B. Cruse an additional party plaintiff to the action, and the order prayed for was entered on 12 September 1968.

Original plaintiffs alleged in their complaint that they are the owners of a parcel of land described therein by metes and bounds and " . . . being the North half of Lot No. 1 in the George M. Misenheimer Estate" and " . . . entitled to the possession, use and enjoyment of said land, and to the rents and profits therefrom . . . " , but that " . . . the defendants J. Clay Query and wife Ollie M. Query are in possession of said land and claiming to own the fee in same under and by virtue of a deed from Harry A. Martin and wife, Alton Erwin Martin, dated March 12, 1947, recorded in Book 201, page 198, in the Register's office of Cabarrus County, N. C., to J. Clay Query and wife, Ollie M. Query . . . "

By their answer and amendments thereto defendants plead ownership of the fee, adverse possession for more than 20 years, adverse possession for more than 7 years under color of title, laches, and entitlement to $15,000 for permanent improvements placed on the property should plaintiffs prevail.

Plaintiffs and additional plaintiff filed a joint reply denying the material averments of the further defenses.

Plaintiffs and defendants filed motions for summary judgment, both of which were denied, the court finding that the defense of laches raised by defendants was a proper matter for resolution and a trial on the merits.

By way of pretrial order, the parties stipulated, *inter alia,* to the following undisputed facts:

"(a) Counsel for the defendants acknowledged to the Court that the counsel for the plaintiffs will request the Court to take judicial notice of the following reported cases:

(1) TAYLOR v HONEYCUTT, 240 NC 105, 81 SE 2d 203 (1954);

(2) McRorie v Cresswell, 273 NC 615, 160 SE 2d 681 (1968);

(3) McRorie v Shinn, 11 NC App. 475, 181 SE 2d 773 (1971) certiorari denied, 279 NC 395 (1971);

(4) Fisher and Query v Misenheimer and McRorie, 23 NC App. 595, 209 SE 2d 848 (1974), certiorari denied, 286 NC 413 (1975);

(5) McRorie v Query, 23 NC App. 601, 209 SE 2d 819 (1974).

(b) Summons in a special proceeding, entitled Chas. A Fisher, Executor of George M. Misenheimer, deceased, petitioner v. Chas. W. Misenheimer, Rosanna Misenheimer and Sarah Misenheimer, respondents was issued by the Clerk of the Superior Court for Cabarrus County on June 26, 1907.

(c) Chas. A. Fisher, Executor of George M. Misenheimer, deceased, filed a petition in said proceeding commenced on June 26, 1907, to sell certain lands belonging to George M. Misenheimer at the time of his death in order to pay the debts of the decedent's estate.

(d) The subject of this controversy is title to and ownership of a certain parcel of real property owned by George M. Misenheimer on the date of his death, which parcel of real estate is identified as the northern half of 'First Lot' or 'Lot No. 1.'

(e) In addition to the 1907 special proceeding, an additional special proceeding was instituted by Chas. A. Fisher, executor, in 1908.

(f) George M. Misenheimer died testate on the 17th day of January 1907, a resident of Cabarrus County, North Carolina.

(g) The will of George M. Misenheimer was admitted to probate in the office of the Clerk of the Superior Court of Cabarrus County on February 1, 1907, and is of record in said office in Will Book 5, at page 60.

(h) Chas. A. Fisher qualified as executor of the estate of George M. Misenheimer and letters testamentary were

issued to him on or about February 2, 1907 by the Clerk of the Superior Court for Cabarrus County.

(i) At the time of his death, George M. Misenheimer was the owner of certain real property in Cabarrus County, North Carolina, referred to as follows:

(1) 41½ acre tract;

(2) 109-acre tract;

(3) 38-acre tract;

(4) First Lot or Lot No. 1 (containing 192 square poles);

(5) Lot No. 2 (containing 221 square poles);

(6) Misenheimer graveyard tract.

(j) The subject of this controversy is that parcel identified in the preceding paragraph as 'First Lot' or 'Lot No. 1.'

(k) George M. Misenheimer was survived by his widow, Sarah Misenheimer, a son, Chas. W. Misenheimer and a daughter, Rosanna Misenheimer, all of whom were more than twenty-one (21) years of age; that Sarah Misenheimer died in 1918 or 1919.

(l) Rosanna Misenheimer was married to one George G. Taylor on or about the 29th day of April 1914, who predeceased her.

(m) Rosanna Misenheimer Taylor died intestate on December 26, 1965, and was survived by two children, Elizabeth Taylor Burgess, born August 8, 1917, and Grace Taylor McRorie, born July 12, 1920, who were her sole heirs at law and who were the original plaintiffs in this action instituted by Kenneth B. Cruse, Attorney at Law, who was subsequently made an additional plaintiff upon motion of the defendants.

(n) Tracts (1), (2), (4), and (5) constituted the real estate embraced by the special proceeding instituted on June 26, 1907, to make assets to pay the debts and charges of administration of the estate of George M. Misenheimer, deceased.

(o) With reference to the 1907 special proceeding, the full purchase price was paid for tracts (1), (2), and (5), as

identified in paragraph (i) above. The Misenheimer graveyard tract (6) is not involved in this controversy nor was it involved in the 1907 special proceeding. Deeds were executed and delivered to the purchasers of tracts (1), (2) and (5) by the commissioner. C. W. Misenheimer, brother of Rosanna Misenheimer, was the highest bidder for tract (4) identified as the 'First Lot' or 'Lot No. 1' and said bid was confirmed by the Court, as reflected in the special proceeding documents. C. W. Misenheimer and his sister, Rosanna Misenheimer, thereafter executed deeds of conveyance for Lot No. 1 (tract 4) and George M. Misenheimer's executor's Final Settlement of the estate reflects and reads as follows: '2 lots bid off by C. W. Misenheimer, never paid for and still belongs to the estate.' No deed executed by the commissioner for the First Lot or Lot No. 1 was ever recorded in the office of the Register of Deeds for Cabarrus County.

(p) The 38-acre tract referred to as tract (3) in paragraph (i) was sold in the special proceeding instituted on June 9, 1908 by Chas. A. Fisher, executor, to make additional assets to pay the debts and charges of administration of the estate of George M. Misenheimer, deceased, and the bid price was paid by the purchaser to the commissioner.

(q) Chas. A. Fisher, executor of George M. Misenheimer, and commissioner appointed by the Court to sell land to make assets to pay the debts of the decedent, George M. Misenheimer, is now deceased.

(r) Chas. W. Misenheimer, uncle of the feme plaintiffs and brother of their mother, Rosanna Misenheimer Taylor, is now dead.

(s) Rosanna Misenheimer Taylor, mother of the feme plaintiffs, is now deceased, having died on December 26, 1965.

(t) The Final Settlement filed by Chas. A. Fisher as executor of the estate of George M. Misenheimer of record in the office of the Clerk of the Superior Court for Cabarrus County is authentic and speaks for itself.

(u) Rosa Misenheimer and Rosanna Misenheimer (Taylor) were one and the same person.

(v) C. W. Misenheimer and Rosanna Misenheimer were brother and sister and the only children of George M. Misenheimer, deceased.

(w) The public records in Cabarrus County do indicate that both C. W. Misenheimer and his sister, Rosanna Misenheimer, executed deeds for the First Lot or Lot No. 1 in the defendants' chain of title.

(x) The defendants, J. Clay Query and wife, Ollie M. Query, claim title to one-half (½) of Lot No. 1 described in the 1907 special proceeding, and on other bases, by the following mesne conveyances recorded in the Register of Deeds office for Cabarrus County, North Carolina, to wit:

(1) Deed dated November 21, 1924 (for one-half interest) from Rosanna Taylor and husband, George Taylor, to Chas. W. Misenheimer, recorded in Deed Book 104, at page 238.

(2) Deed dated February ___, 1925 (for one-half interest) from Chas. W. Misenhemer and wife, Mae Misenheimer, to Rosanna Taylor, recorded in Deed Book 105, at page 137.

(3) Deed of trust from Rosanna Misenheimer Taylor and husband, G. G. Taylor, to J. L. Crowell, Trustee, for a one-half undivided interest, dated April 28, 1928, recorded in Mortgage Book 62, at page 172, which was foreclosed on August 31, 1935, and deeded November 22, 1935, by J. L. Crowell, Trustee, to Oza Mae Creswell by deed in Deed Book 116, at page 402.

(4) Deed dated January 29, 1936, for a one-half undivided interest from Chas. W. Misenheimer and wife, May V. Misenheimer, and Rosanna Misenheimer Taylor and husband, George Taylor, to Harry A. Martin, recorded in Deed Book 136, at page 217.

(5) Deed dated February ___, 1936, for a one-half undivided interest from Chas. W. Misenheimer and wife, May Misenheimer, and Rosanna Taylor and husband, George Taylor, to Oza Mae Creswell, recorded in Deed Book 134, at page 414.

(6) Deed dated March 28, 1936, by Oza Mae Creswell and husband, William L. Creswell, to Harry A. Martin

for all of their right, title and interest in one-half of said tract described as 'First Lot,' recorded in Deed Book 134, at page 464.

(7) Deed dated March 12, 1947, by Harry A. Martin and wife, Alton Erwin Martin, to J. Clay Query and wife, Ollie M. Query, recorded in Deed Book 201, at page 198.

(y) That C. W. Misenheimer and Rosanna Misenheimer Taylor and those claiming title by mesne conveyances set forth in Paragraph (x) above have had continous and uninterrupted possession of said property since June 1907.

(z) That the plaintiff, Kenneth B. Cruse, appeared as attorney of record for the defendant in the case entitled 'Rosanna M. Taylor and Husband George G. Taylor v. J. J. Huneycutt,' instituted in the Superior Court of Cabarrus County on the 19th day of December, 1953, which was a controversy without action on an agreed statement of facts.

(aa) That by instrument under date of March 31, 1954, recorded on March 31, 1954, in Deed Book 250, at page 618, in the Cabarrus County Registry, Elizabeth Taylor Burgess and husband Paul B. Burgess remised, released and quitclaimed unto Kenneth B. Cruse 'an undivided one-half of all such right, title and interest as we, the said Elizabeth T. Burgess and husband Paul B. Burgess have or ought to have in or to all that piece, parcel, tract or lot of land lying in No. 4 Township, Cabarrus County, State of North Carolina, and described as follows: Being any and all lands to which we are or may be entitled under and by virtue of the terms of the will of George M. Misenheimer, admitted to probate in 1907 in Cabarrus County, State of North Carolina, but excepting that property on which Rosanna Misenheimer Taylor now resides, bounded on all sides by the lands of the Cabarrus Country Club, Inc.,' which deed is incorporated herein by reference.

(bb) That by instrument under date of April 5, 1954, recorded on April 6, 1954, in Deed Book 250, at page 635, in the Cabarrus County Registry, Grace Taylor McRorie and husband Howard McRorie remised, released and quitclaimed unto Kenneth B. Cruse 'an undivided one-half of all such right, title and interest as we, the said Grace T.

McRorie and husband Howard McRorie have or ought to have in or to all that piece, parcel, tract or lot of land lying in No. 4 Township, Cabarrus County, State of North Carolina, and described as follows: Being any and all lands to which we are or may be entitled under and by virtue of the terms of the will of the late George M. Misenheimer, admitted to probate in 1907 in Cabarrus County, State of North Carolina, but excepting that property on which Rosanna Misenheimer Taylor now resides, bounded on all sides by the lands of the Cabarrus Country Club, Inc.,' which deed is incorporated herein by reference.

(cc) That the lands excepted in the instruments referred to in Paragraphs (aa) and (bb) is the parcel of land referred to in Paragraph (i) above as Tract (6)."

The court ordered a separate trial upon all issues and claims relating to betterments and improvements and rents.

After plaintiffs introduced their evidence consisting of the pertinent documents filed in the 1907 and 1908 special proceedings, the final settlement of the Misenheimer estate, and deed of trust of defendants Query securing a loan from Citizens Building and Loan Association, defendants moved for directed verdict which was denied. At the close of all the evidence, all parties moved for directed verdict. Defendants' motion was denied. As to plaintiffs' motion, it was also denied except as to those portions directed to defendants' affirmative defenses based on the statutes of limitation and adverse possession.

All parties tendered issues which were refused by the court and the parties excepted. Plaintiffs moved that defendants be required to make an election of remedies and this motion was denied. The court submitted two issues:

"1. Is plaintiffs' claim for relief barred by plaintiffs' laches as alleged in the Answer?

ANSWER:

2. Are the plaintiffs the owners in fee simple of the northern half of Lot Number 1, and have they been since December 26, 1965, as alleged in the Complaint?

ANSWER:"

The jury answered the first issue "Yes" and, under instructions from the court, did not answer the second issue.

Plaintiffs moved for a judgment n.o.v. and for a new trial. Each was denied and plaintiffs appealed.

Cole and Chesson, by James L. Cole, for plaintiff appellants.

Hartsell, Hartsell and Mills, P.A., by William L. Mills, Jr., for defendant appellees J. Clay Query and wife, Ollie M. Query.

Williams, Willeford, Boger and Grady, by John Hugh Williams, for additional defendant appellees Harry A. Martin and wife, Alton Erwin Martin.

MORRIS, Judge.

This is the sixth time matters involving properties owned by George Misenheimer at the time of his death in 1907 have been before the Appellate Division of the General Court of Justice for review. In *Taylor v. Honeycutt,* 240 N.C. 105, 81 S.E. 2d 203 (1954), the Court was called upon to determine the interest of testator's daughter, Rosanna, (mother of the feme plaintiffs here) in certain lands devised by George Misenheimer. Rosanna had entered into a contract to convey the lands, had tendered a deed therefor, and defendant had refused to accept the deed and make payment for the land on the ground that Rosanna could convey only a life estate and not a fee. Action was instituted by Rosanna under G.S. 1-250 on an agreed statement of facts for a determination of her interest in the land. The will provided:

> "I bequeath and give the balance of my land and other property except my mill property to my beloved wife Sarah and daughter Rosanna Misenheimer their lifetime. Provided Rosanna has no heirs. Then it shall go to C. W. Misenheimer, my son, his lifetime and then to go to his heirs at his death.
>
> My interest in the mill property with what he owes me goes to C. W. Misenheimer."

Plaintiff contended that the rule in *Shelley's case* was applicable and resulted in Rosanna's taking a fee defeasible only by her death without children. The court disagreed and held that Rosanna took only a life estate but refrained from further interpretation of the will because none of the parties living or unborn who would or could be affected by further interpretation was a party either personally or by representation.

In 1968, in *McRorie v. Creswell,* 273 N.C. 615, 160 S.E. 2d 681 (1968), the Court was called upon to determine the

interests of Grace Taylor McRorie and Elizabeth Taylor Burgess, daughters of Rosanna, the life tenant, and the same persons who are plaintiffs in the action now before us, in and to the southern half of Lot 1 of the George Misenheimer estate. (The action before us concerns the northern half of Lot 1.) There the defendants, purchasers by mesne conveyances from Rosanna, offered the same contention as Rosanna in *Taylor v. Honeycutt, supra.* Citing *Taylor v. Honeycutt, supra,* and holding that the principles enunciated there controlled, the Court again held that Rosanna took only a life estate. Further interpreting the will, the Court held that when she (Rosanna) died, her two children (plaintiffs therein) took the remainder in fee by clear implication upon the authority of *Hauser v. Craft,* 134 N.C. 319, 46 S.E. 756 (1904), and *West v. Murphy,* 197 N.C. 488, 149 S.E. 731 (1929). "Upon the death of Rosanna on 25 December 1965, plaintiffs' estate vested and defendant's terminated." 273 N.C. at 617, 160 S.E. 2d at 682. The Court affirmed the trial court's judgment that piaintiffs had the superior title and right to possession of the southern half of Lot 1. This action was brought on 8 September 1966, and the question of laches was not before the court.

Again in 1971, the questions involving the Misenheimer land were before the Court. In *McRorie v. Shinn,* 11 N.C. App. 475, 181 S.E. 2d 773, *cert. den.,* 279 N.C. 395, 183 S.E. 2d 242 (1971), the same plaintiffs sought to have the court declare them the owners of and entitled to possession to lands of George Misenheimer sold by Fisher, executor, to make assets. In this action they attacked the validity of special proceedings brought in 1907 and 1908. The several defendants offered 5 defenses, the first of which was the validity of the special proceedings and deeds of the commissioner—executor from which their chain of title derived. This Court held that the special proceedings were valid and affirmed the trial court's judgment in favor of defendants. That action was heard by the court without a jury on an agreed statement of facts. Although the opinion of the court was based upon the first defense, the defendants had, as their fifth defense, interposed a plea that the plaintiff were guilty of laches barring their recovery. As to that defense, Judge Britt, writing for the Court, said:

> "At most the 1907 and 1908 special proceedings were irregular or voidable. It is well settled in this jurisdiction that the proper procedure for attacking an irregular or void-

able judgment is by motion in the cause, 5 Strong, N. C. Index 2d, Judgments, Section 19, Page 38, and that such motion must be made within a reasonable time. *Menzel v. Menzel,* 254 N.C. 353, 119 S.E. 2d 147 (1961). It is admitted that plaintiff McRorie became 21 in 1941 and that plaintiff Burgess became 21 in 1938; the femme plaintiffs admit that they have lived in Cabarrus County in the general vicinity of the subject property during their entire lifetimes. Mrs. Burgess resided within sight of the property from the time of her birth until 1969, and they both had general knowledge of the improvements (valued at more than one million dollars) made from time to time upon the parcels of land deeded to the defendants. Plaintiffs' contention that they had no right to bring any type of action to attack the 1907 and 1908 proceedings until Rosanna died in 1965 is not supported by decisions of our Supreme Court. In *Menzel v. Menzel, supra,* the court said: 'It is true that the statute of limitations in an ejectment action does not begin to run against the remainderman until the death of the life tenant. "This does not mean, however, that such remainderman may not move to vacate a void or voidable judgment until after the expiration of the life estate. This he may do at any time if the action is taken seasonably and laches cannot be imputed to him." ' (Citations.) We think the femme plaintiffs waited an unreasonable time to attack the validity of the 1907 and 1908 proceedings, and the male plaintiff is bound by their unreasonable delay." 11 N.C. App. at 482, 181 S.E. 2d at 777.

Action involving the identical lot of land involved in the case *sub judice* was before us in *Fisher v. Misenheimer,* 23 N.C. App. 595, 209 S.E. 2d 848 (1974), *cert. den.,* 286 N.C. 413, 211 S.E. 2d 217 (1975). The action now before this Court was instituted on 10 June 1968, wherein plaintiffs base their claim upon the fact that Lot 1 of the Misenheimer estate was never sold by the commissioner in the special proceedings and remained a part of the estate. It is undisputed that the land was in the special proceedings, was bid in by C. W. Misenheimer but that the amount bid was never paid and no deed ever given therefor by the commissioner. While the action *sub judice* was pending, and on 18 November 1971, defendants Query filed a motion in the 1907 special proceedings requesting that an executor, c.t.a., d.b.n., and commissioner be appointed by the court

to complete the administration of the George Misenheimer estate and the special proceedings and that the commissioner be directed to execute a deed to the Querys, who tendered payment of the amount of the bid plus interest. The plaintiffs here (Mrs. McRorie, Mrs. Burgess and Cruse) were allowed to intervene and respond to the motion. Upon appeal by the intervenors from the Clerk's order appointing a commissioner, the Superior Court affirmed, and intervenors appealed to this Court. We held that C. W. Misenheimer, by his actions, abandoned his contract and could not have forced a consummation of the sale and movants Query had no greater right to consummate the 1907 contract than C. W. would have had if he were living. *See also McRorie v. Query,* 23 N.C. App. 601, 209 S.E. 2d 819 (1974), reversing the Superior Court's summary judgment dismissing the action and remanding the matter for hearing.

It is from that trial on the merits that the present appeal comes.

Plaintiffs first argue their seventh assignment of error, and since we are of the opinion that resolution of this question is dispositive of the appeal, we shall also discuss this question first. Plaintiffs contend that the court committed prejudicial error in submitting to the jury the issue submitted by defendants with respect to the feme plaintiffs' laches.

[1, 2] They first contend that the defense of laches is not applicable here because this is an action in ejectment. They cite no authority for this position, and we find none. Authority for the contra position is *Hughes v. Oliver; Oliver v. Hughes,* 228 N.C. 680, 47 S.E. 2d 6 (1948). *See also Poultry Co. v. Oil Co.,* 272 N.C. 16, 157 S.E. 2d 693 (1967). They also take the position that feme plaintiffs could not be guilty of laches because action was brought within any applicable period of limitation. In *Teachey v. Gurley,* 214 N.C. 288, 294-95, 199 S.E. 83, 88 (1938), the Supreme Court said:

> "Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay. Thus, where the property has greatly increased in value, es-

pecially if through the efforts of the defendant, unexplained delay of a very short time may be laches. . . . "

See also Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E. 2d 576 (1976).

[3] If defendants are entitled to assert the defense of laches in this case, and we conclude that they are, we must determine whether the court properly submitted an issue thereon to the jury.

> " ' Laches' is negligence consisting in omission of something which a party might do and might reasonably be expected to do towards vindication or enforcement of his rights, being generally a synonym of 'remissness', 'dilatoriness,' 'unreasonable or unexcused delay', the opposite of 'vigilance', and means a want of activity and diligence in making a claim or moving for the enforcement of a right, particularly in equity, which will afford ground for presuming against it or for refusing relief where that is discretionary with the court, but laches presupposes, not only lapse of time, but also the existence of circumstances which render negligence imputable." *Wynne v. Conrad,* 220 N.C. 355, 361, 17 S.E. 2d 514, 518-19 (1941).

Lapse of time is not, as in the case when a claim is barred by a statute of limitation, the controlling or most important element to be considered in determining whether laches is available as a defense. The question is primarily whether the delay in acting results in an inequity to the one against whom the claim is asserted based upon " . . . some change in the condition or relations of the property or the parties." 27 Am. Jur. 2d, Equity, § 163, p. 703. Also to be considered is whether the one against whom the claim is made had knowledge of the claimant's claim and whether the one asserting the claim had knowledge or notice of the defendant's claim and had been afforded the opportunity of instituting an action. *Id.* at § 162, p. 701.

[4] We must now consider whether the evidence was sufficient to support findings by the jury that plaintiffs delayed an unreasonable length of time, had knowledge that defendants claimed the property, that defendants had no knowledge that plaintiffs claimed the property, and whether plaintiffs' delay in bringing this action has ". . . prejudiced, disadvantaged, or injured the defendants." *Taylor v. City of Raleigh, supra* at 624, 227 S.E. 2d at 586.

Defendant Query testified that he purchased the property and moved on it on 22 March 1947. He did not know Mrs. McRorie but did know Mrs. Burgess, who lived in the vicinity and passed his house often. When she passed when he was mowing the grass, they would " . . . throw up our hands at each other." She passed frequently. Neither Mrs. Burgess nor Mrs. McRorie ever contacted him or indicated in any manner that they owned or claimed an interest in the property. Neither did Mr. Cruse ever personally or through anyone else communicate to Mr. Query that he owned or claimed an interest in the property. Mr. Query had never heard of a lawsuit between Rosanna Misenheimer Taylor and J. J. Honeycutt. No one had ever contacted him to determine whether he would be interested in purchasing any interest which he did not own in the property. He was aware of the suit against Billy Ray Creswell but no one ever told him that that suit might involve his property. His first knowledge that anyone claimed an interest in the property was when the sheriff served the papers in this suit on him on 10 June 1968.

Query returned the property for taxes and paid ad valorem taxes every year from 1948 to the time of the trial.

Since 26 December 1965, to the date of his testimony (3 March 1976) Mr. Query had made improvements to the house other than the normal month-to-month or year-to-year maintenance. He testified " . . . I covered it and I paneled the breezeway and we put carpet on all the floors and put in a tile bath and I put in a central heating system, as well as built-in air conditioning. All this has been done after December 1965. I replaced the roof because I needed a new roof and had to have it."

Defendant Martin testified that he had no knowledge of any controversy involving the Misenheimer estate until 1954; that no one ever communicated a claim to him while he owned the property; that any increase in value of the land had occurred from 1954 to 1968 (the date of feme plaintiffs' deed to plaintiff Cruse): that he had known the feme plainiffs since they were young children and known plaintiff Cruse for some 12 to 15 years.

Plaintiff McRorie testified on cross-examination, that she had known as a child of 13 or 14 of the deeds exchanged between her parents and C. W. Misenheimer, and of the deed of trust to Crowell, Trustee, and of the foreclosure. In 1950, she

learned of the deed from Martin to Query. She knew there was a house on this property not long after it was built but was not by there often enough to notice any improvements. She never communicated to defendant Query that she claimed an interest in the property or would own it at her mother's death. "Right after my mother died on the 26th day of December, 1965, I was of the opinion that that property then belonged to me. . . . " She waited until June of 1968 to institute this action to obtain possession of the property because they had started an action against Creswell and " . . . were not finished with that one." In 1954, she conveyed to her attorney, plaintiff Cruse, an one-half interest in the property.

Plaintiff Burgess testified that she knew there was a house on the property but did not pass there regularly. She was present when Mr. Honeycutt talked to her mother about buying some property and knew of the suit against Honeycutt and that Mr. Cruse was one of the attorneys involved. She gave a deed to Mr. Cruse in 1954 for one-half of whatever she might be entitled to receive from her grandfather's estate. " . . . I did this because the Country Club was trying to buy our property for nothing and we had to come to you, Mr. Williams and talked to you about it and you said the deed was not any good. As to why I gave Ken Cruse a deed for one-half of whatever I might be entitled to, it was because we had been to other lawyers and all of them had turned us down and we had paid other lawyers too, you included, who had said the deed was no good." No money was given for the deed. The feme plaintiffs wanted to give him the deed because " . . . he was doing work for us . . . trying to clear the deed." After the deed was given to Cruse in 1954, the next thing which was done was to bring the suit against Creswell. That property was a vacant lot. No claim was ever made against Query until this suit was instituted. She did not know of the deeds and deed of trust given until they began to check the deeds and when her mother told her about them in the fifties when they went to talk to plaintiff Cruse. Neither she nor her sister had ever listed the property for taxes.

Plaintiff Cruse testified that he was familiar with all of the deeds introduced into evidence and with the final account filed in the estate of George Misenheimer. He represented defendant Honeycutt in the suit against him brought by feme plaintiffs' mother. At the time of the conveyances to him by feme plaintiffs, he did not know there was a house on the prop-

erty or that defendants Query were residing there. He did not know where the boundaries were, and it took him some years to see where the various lots were. He knew that if this property was not worth anything at that time that the feme plaintiffs might have been able to convey the property to defendants Query for some consideration. At the time he took the deeds from plaintiffs, Mr. Burgess and Mr. McRorie came to see him and talked about the whole situation. He gave them his opinion that Mrs. Taylor could not give good title and that the ultimate remaindermen could not be determined until her death. They agreed that if he would attempt to straighten it out at her death they would pay him as a fee one-half of what could be recovered, excluding the graveyard lot which was not involved. He did not attempt to sell to defendant Query his contingent interest or that of his clients. In 1954 there were some 30 individuals in possession of property in the Misenheimer estate in which he claimed an interest. The only one he contacted prior to instituting suit was Billy Creswell. He did contact Creswell and told him that he claimed an interest in the lot Creswell "owned." He did not bring suit against Query at the same time suit was instituted against Creswell for possession of the southern half of Lot 1 because he felt Creswell would be the easier of the two suits and he wanted to get that one over with first. He waited to bring this action on instructions from his client. His interest in the property never came to the attention of the court in the Creswell action and he was not a party. In this action, the complaint alleged that feme plaintiffs are the sole owners.

We think the evidence is more than sufficient for submission to the jury on the question of laches. Certainly as early as 1954 the feme plaintiffs knew that they intended to claim the property at the death of their mother and wanted to sell it before then for the benefit of their parents but were advised they could not give good title and that the mother could convey only a life estate. Very shortly after their mother's death in 1965, they brought suit to recover the southern one-half of Lot 1. There was no good and sufficient reason that they could not have also brought this action at that time. The only reason given by them was that they wanted to try the other action first. The jury could have found from the evidence that at least Mrs. Burgess was aware of improvements being made to the house, since she lived only a quarter of a mile from the property and passed it regularly.

There is no evidence with respect to the cost or value of improvements made by defendant Query after 1965. Common knowledge would dictate that the improvements made as testified to by defendant Query would cost a sizeable sum of money. There was also evidence that the property increased in value from 1954 to 1968. We think the evidence clearly indicates that plaintiffs negligently omitted to bring their action for an unreasonable length of time to defendants' prejudice. There can be no question but that an opportunity to bring the action immediately upon their mother's death was open to them, and they were well aware of the necessity to bring an action in order to obtain possession of the premises.

Indeed the situation here is very analogous to the situation in *Taylor v. City of Raleigh, supra,* where the Court held that plaintiffs in that case, which was tried before the court without a jury and upon an agreed statement of facts, were guilty of laches as a matter of law and affirmed the trial court's entry of summary judgment. There, plaintiffs brought their action to have declared unconstitutional two ordinances adopted by the City of Raleigh. The action was brought two years and 22 days after the rezoning ordinance was adopted. In the interim the individual defendant had expended some $23,000 in fees for architects, engineers, and attorneys.

Plaintiffs further argue that the court erred in failing to charge on the legal effect of the documentary evidence and exhibits introduced by plaintiffs. This was evidence to prove plaintiffs' title. The second issue submitted to the jury was: "Are the plaintiffs the owners in fee simple of the northern half of Lot Number 1, and have they been since December 26, 1965, as alleged in the complaint?" The court clearly instructed the jury that if they should find that the plaintiffs were not guilty of laches, it would be their duty to answer the second issue "Yes" if they found the facts as all the evidence tended to show. We cannot perceive any prejudice to plaintiffs in the failure of the court to read and explain all the documentary evidence. He did call to the attention of the jury all the documentary evidence introduced and listed it for the jury. Plaintiffs did not request additional instructions. In view of the peremptory instruction on the second issue, plaintiffs are in no position to show prejudice.

Plaintiffs also contend that in several places in its charge the court referred to actions of the parties prior to 26 Decem-

ber 1965, and that these references were inconsistent with the instruction that laches would only apply after 26 December 1965. There is no merit in these contentions. The court clearly instructed, on several occasions, that the period of time to be considered in determining whether plaintiffs were guilty of laches was from and after 26 December 1965. The dates of possession of Martin and Query and the evidence with respect to whether plaintiffs knew of their possession and alleged ownership and plaintiffs' knowledge of transactions affecting the property prior to 1965 went to the determination by the jury of plaintiffs' knowledge of a claim adverse to their own which would necessitate their immediate action upon the death of their mother.

Plaintiffs also assign as error the admission of testimony of defendant Martin that plaintiffs had never made any "claim to" him and his testimony that the property had increased in value three or four times from 1954 to 1968. Again, plaintiffs should not be heard to complain, because plaintiff Cruse gave the same testimony with respect to increase in value and all plaintiffs testified that they had not communicated their claim to the property to anyone in possession of the property.

At the end of all the evidence, plaintiffs moved that defendants be required to elect the remedy they sought, i.e., whether they relied on their title by mesne conveyances or laches. Prior to that motion, the court had advised the parties that it would submit two issues—one with respect to laches, and one with respect to plaintiffs' title to the land. We fail to see any inconsistency in these issues. The court, in effect, instructed the jury that title was in plaintiffs, but if they were guilty of laches in asserting their claim to possession, they could not prevail. No election of remedies was necessary.

Defendants made cross assignments of error and have argued them in their brief. However, in view of our disposition of the appeal, it is unnecessary to discuss them. Suffice it to say that we think the court correctly limited the issue of laches to the period of 26 December 1965 to 10 June 1968. We are quite aware of the suggestion of Judge Britt in *McRorie v. Shinn, supra,* and of the provisions of G.S. 41-10. However, since this question is not before us, we do not discuss it.

For the reasons stated, in the trial of this matter we find

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LEE OMIE CUMBER

No. 765SC658

(Filed 16 February 1977)

1. **Criminal Law § 159— record on appeal — voir dire from another trial**

The trial court did not err in ordering that a *voir dire* held in the trial of defendant for another crime be included in the record of the present case where that *voir dire* was the basis for the court's ruling that no *voir dire* was necessary in the present case to determine the legality of a search of defendant's premises because the search had been found valid in the prior trial.

2. **Searches and Seizures § 3— search warrant — affidavit based on informant's tip**

In order for an affidavit based on an informant's tip to be sufficient to show probable cause for the issuance of a search warrant, the affidavit must contain facts which show that there is illegal activity or contraband in the place to be searched, and it must contain some of the underlying facts and circumstances which show that the informant is credible or that the information is reliable.

3. **Searches and Seizures § 3— information from confidential informant — sufficiency of affidavit**

An affidavit based on information received from a confidential informant contained sufficient underlying circumstances showing the credibility of the informant or the reliability of his information where it stated that the informant had previously provided information which led to arrests and convictions of two named persons and that the informant had recently seen stolen liquor at the premises to be searched.

4. **Criminal Law § 84; Searches and Seizures § 4— seizure of items not listed in warrant — plain view doctrine — inadvertent discovery**

The trial court did not err in determining that an officer's discovery of stolen lawn furniture in plain view on defendant's premises while executing a warrant to search for stolen liquor was "inadvertent," and that the furniture was admissible in evidence, where the officer had previously been informed that the furniture was on defendant's premises by an informant who had not been proven reliable, and the officer lacked legal probable cause to believe the furniture would be on the premises until he actually went to the premises to assist in the execution of the warrant to search for liquor.

5. **Criminal Law § 84; Searches and Seizures § 4— legality of search — determination in trial for another crime — no right to another voir dire**

Defendant was not entitled as a matter of right to another *voir dire* on the legality of a search of her premises where the legality of the search had been determined after a *voir dire* conducted in a prior trial of defendant for another crime and defendant had been fully

heard in the prior trial on the issue of the admissibility of evidence seized from her premises.

6. **Criminal Law § 34— evidence of another crime — acquittal of larceny — competency to show common scheme of receiving**

In this prosecution for larceny and receiving of lawn furniture, a witness's testimony concerning lawn furniture which had been stolen from him and found on defendant's premises along with the lawn furniture in question was admissible to show a common scheme of receiving stolen property, although defendant had previously been acquitted of larceny of the witness's furniture.

7. **Criminal Law § 126— unanimity of verdict — erroneous instruction**

Defendant is entitled to a new trial where the court's instruction on unanimity of the verdict was susceptible to the interpretation that when a vote is taken and there is a majority, either for conviction or acquittal, the minority should then cast their votes with the majority and make the verdict unanimous before returning the verdict in open court.

APPEAL by defendant from *Martin, Judge.* Judgment entered 13 February 1976. Heard in the Court of Appeals 18 January 1977.

Defendant was indicted for felonious larceny and receiving stolen goods. Upon a plea of not guilty, she was convicted by a jury of felonious larceny. She was sentenced to imprisonment for four to five years, suspended for five years upon payment of a fine and return of the property.

On 16 September 1976, Sergeant G. M. Vallender of the New Hanover County Sheriff's Department received information from a confidential informant regarding the whereabouts of 57 cases of liquor which had been stolen from A.B.C. Store # 4 in Hampstead, North Carolina. Acting pursuant to this information, Vallender obtained a warrant to search a house trailer belonging to defendant. He was accompanied to the premises by Lieutenant Radewicz, also of the New Hanover Sheriff's Department. The two officers searched the premises but were unable to locate the missing liquor. They did, however, notice certain lawn furniture in defendant's yard which matched the description of furniture that had been reported stolen. Radewicz, who had been investigating the lawn furniture thefts, made a careful examination of the furniture on the premises and called the owners to identify the property, which they did. Thereupon, the officers seized three sets of lawn furniture as being stolen property, and defendant was subsequently charged by three

separate indictments with the felonious larceny and receiving of each set.

Other relevant facts are set out in the opinion below.

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

Thigpen, Blue and Stephens, by Daniel T. Blue, Jr., for defendant appellant.

MORRIS, Judge.

[1] State moved to consolidate all charges into one trial, and the motion was denied. This case, 75CR14282, involves furniture allegedly stolen from Joseph Lanier. Previously, however, defendant had been tried before Judge Martin in case 75CR14281 for felonious larceny and receiving of furniture belonging to Lacy Johnson and was acquitted on the charge. In the trial of 75CR14281, a voir dire was held on the issue of the admissibility of the Johnson furniture. After receiving evidence, the trial judge made findings of fact and conclusions of law and held that the Johnson furniture was seized incident to a lawful search and was properly admissible. During the trial of the present case, defendant moved for another voir dire to determine the admissibility of testimony with respect to the Lanier furniture. The motion was denied, and testimony with respect to the Lanier furniture was held admissible. On 5 August 1976, Martin, Judge, ordered that the voir dire of 75CR14281 be made a part of the record on appeal in the present case. Defendant contends that the trial court erred by ordering the inclusion of the voir dire from the other trial into the instant record. We disagree.

Rule 9(b)(3) of the North Carolina Rules of Appellate Procedure sets forth the necessary content of the record on appeal in a criminal case. Subsection (ix) requires that the record shall contain "copies of all other papers filed and *proceedings had in the trial courts* which are necessary for an understanding of all errors assigned . . . " (Emphasis supplied.) In the present case, defendant moved for a voir dire, presumably to determine the legality of the search which led to the seizure of the Lanier furniture. Yet the validity of that search had already been ruled upon as the subject of the voir dire in 75CR14281. It is apparent that the trial judge's denial of the motion for another hearing was based on the order in 75CR14281.

Rule 9(b) (3) (ix) is broadly worded so as to include any proceeding in any court which would be material to the consideration of the case on appeal. If there is a question as to the relevancy of the proceedings from other courts, the parties may settle the dispute according to the procedures provided in Rule 11. We believe, and so hold, that the trial judge properly ordered the inclusion of the voir dire of 75CR14281 into the present record.

Defendant's next assignments of error are directed to the findings and rulings of the trial judge in the voir dire in 75CR14281. Specifically, defendant objects to the judge's finding that "Lt. Radewicz and Sergeant Vallender were lawfully on the premises of 5830 Oleander Drive on the 16th day of September, 1975 for the purpose of lawfully executing a search warrant valid on its fact (sic)."

[2] A two-pronged test to determine the sufficiency of an affidavit based on an informer's tip to show probable cause to search was set forth in *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), and *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969). Under this test, the affidavit must contain facts which show that there is illegal activity or contraband in the place to be searched, and it must contain some of the underlying facts and circumstances which show that the informant is credible or that the information is reliable. *See also: State v. Hayes,* 291 N.C. 293, 230 S.E. 2d 146 (1976); *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. English,* 27 N.C. App. 545, 219 S.E. 2d 549 (1975).

The warrant in question was issued upon an affidavit which stated *inter alia:*

> "The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: This information was received by the applicant this date from a confidential reliable informant. This informant has given reliable information in the past that led to the arrest and conviction of James Wayne Smith for B&E Larceny, AWDW. This informant also gave information to lead to the arrest and conviction of Jackie Watts for Escape. The reliable informant stated the liquor stolen from the ABC Store # 4 Hampstead, N. C. was being stored in a trailer

located at 5830 Oleander Drive. The informant has seen said liquor within the past few days."

[3] Defendant contends that the search warrant failed to meet the requirements of *Aguilar* and *Spinelli* in that it did not state underlying circumstances showing the credibiltiy of the informant or the reliability of his information. We disagree. The affidavit stated that the informant had previously provided information which led to two arrests and convictions. Moreover, the affiant noted that the informant had recently seen the stolen liquor at defendant's premises. We believe, therefore, that the warrant was sufficient to meet the constitutionally-required showing of probable cause. *See State v. Shanklin,* 16 N.C. App. 712, 193 S.E. 2d 341 (1972), *cert. den.,* 282 N.C. 674, 194 S.E. 2d 154 (1973); *State v. Altman,* 15 N.C. App. 257, 189 S.E. 2d 793, *cert. den.,* 281 N.C. 759, 191 S.E. 2d 362 (1972); *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814 (1971). This assignment is overruled.

[4] On the voir dire in 75CR14281, Lieutenant Radewicz testified, *inter alia,* that he accompanied Sergeant Vallender to the premises in question to aid in the search for liquor; that he had knowledge of the description of the stolen lawn furniture and had conducted a prior investigation of the theft before going to the trailer; that he had previously been informed that the furniture was on defendant's premises by an informant who had not been proven reliable; that he did not attempt to procure a warrant to search for the furniture because he did not believe he had sufficient information to establish probable cause; and that when he saw the furniture in defendant's yard, he recognized it as matching the description of the stolen furniture. The trial judge concluded that Lt. Radewicz's discovery of the lawn furniture was "inadvertent" and that ". . . after Lt. Radewicz observed the lawn furniture in open and plain view, he possessed sufficient probable cause to believe that the wrought iron lawn furniture . . . was stolen property, and he therefore had sufficient probable cause to seize the said lawn furniture."

Searches, to be reasonable within the scope of the fourth amendment, must be pursuant to a warrant grounded upon probable cause unless they fit into certain carefully defined exceptions. *Cady v. Dombrowski,* 413 U.S. 433, 37 L.Ed. 2d 706, 93 S.Ct. 2523 (1973); *Schneckloth v. Bustamonte,* 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973). One such exception to

the warrant requirement is the so-called "plain view" doctrine, under which an item is lawfully seized if the officer is where he has a right to be and if the item is in plain view, even though the item is not listed in the warrant. *See Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034, *reh. den.,* 396 U.S. 869, 24 L.Ed. 2d 124, 90 S.Ct. 36 (1969); *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974).

Defendant argues, however, that since Lieutenant Radewicz had received information that the furniture would be on defendant's property, his discovery of it was not "inadvertent" as required by *Coolidge v. New Hampshire,* 403 U.S. 433, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. den.,* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). This is essentially the same contention made in *State v. Rigsbee, supra.* In that case, Justice Moore discussed the controversy and confusion surrounding *Coolidge's* requirement that the discovery of evidence in plain view be inadvertent. *See also United States v. Bradshaw,* 490 F. 2d 1097, 1101 n. 3 (4th Cir.), *cert. den.,* 419 U.S. 895, 42 L.Ed. 2d 139, 95 S.Ct. 173 (1974). However, even assuming *arguendo,* that the "inadvertence" requirement is still valid, which we seriously question, we do not reach this issue. After the voir dire, the trial judge made certain findings of fact and concluded that

> ". . . [t]he discovery of the lawn furniture by Lt. Radewicz was inadvertent in that he lacked legal probable cause to believe that the furniture would be on the premises until he actually went to the premises to assist in the execution of the aforementioned valid search warrant."

Although the evidence is conflicting on whether Radewicz's discovery of the furniture was in fact inadvertent, the trial court's conclusion has factual support in the record. "It is well established in North Carolina that findings of fact made by the trial judge and conclusions drawn therefrom on the voir dire examination are binding on the appellate courts if supported by evidence." *State v. Moore,* 281 N.C. 287, 291, 188 S.E. 2d 332, 335 (1972); *State v. Rigsbee, supra.* We hold, therefore, that the trial judge did not err in admitting the evidence under the plain view doctrine.

During the trial, Lanier was called as a witness by the State. When he testified as to the identity of the lawn furniture, counsel for defendant began a series of objections and motions for a voir dire. The objections were overruled and the motions

denied, and defendant now assigns as error the failure of the trial judge to grant a voir dire.

A voir dire is almost always necessary in order to rule on certain types of objections, such as those involving the introduction of confessions or evidence seized without a warrant, *State v. Altman, supra.* However, a voir dire is not required in all instances. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Altman, supra; State v. Eppley,* 14 N.C. App. 314, 188 S.E. 2d 758, *rev'd on other grounds,* 282 N.C. 249, 192 S.E. 2d 441 (1972). Although a voir dire may be proper when the competency of a witness or admissibility of evidence is in doubt, the burden is generally on the objecting party to show why the evidence is incompetent or inadmissible in order to be entitled to a voir dire on the issue. *Lloyd v. Poythress,* 185 N.C. 180, 116 S.E. 584 (1923). In the present case counsel for defendant did not specify the grounds for or purpose of his repeated motions for a voir dire, and the testimony objected to does not fall within one of the recognized instances where a voir dire is necessary or desirable. We believe, therefore, that the trial judge, in his discretion, properly overruled defendant's motions and committed no error by failing to order the voir dire as requested.

[5] When Officer Radewicz and State Bureau of Investigation Agent Godfrey were called to testify for the State, defendant again moved for a voir dire on the grounds that the evidence had been seized without a valid search warrant and was, therefore, inadmissible. The trial judge denied the motions, and defendant now assigns these denials as error. While a voir dire is generally necessary when the evidence objected to has allegedly been seized without a valid warrant, *State v. Altman, supra,* the issue in the present case for which the hearing was sought, the legality of the search, had previously been fully heard in the voir dire in case 75CR14281. Thus the question before us is not whether defendant was entitled to *a* voir dire on the question but whether she was entitled as a matter of right to *another* hearing on the same issue.

In *State v. Keitt,* 19 N.C. App. 414, 199 S.E. 2d 23, *cert. den.,* 284 N.C. 257, 200 S.E. 2d 657 (1973), this Court held that when criminal defendants have been sufficiently heard on a pretrial motion to suppress evidence, they are not entitled to another voir dire at trial. In the present case, defendant had

been fully heard in 75CR14281 regarding the admissibility of the evidence seized on her premises. We believe, and so hold, that the trial judge's denial of defendant's motions was a valid exercise of its inherent supervisory powers to insure an orderly administration of justice by preventing unnecessary piecemeal defenses. *State v. Vestal, supra.*

[6] The State called as a witness Lacy Johnson who testified, over objection, regarding his lawn furniture found in defendant's possession along with the furniture allegedly owned by Mr. Lanier. Defendant assigns as error the admission of Johnson's testimony, contending that the evidence was revelant only for the purpose of showing defendant's character or her disposition to commit larceny and should have been excluded. We disagree.

The rule regarding the admission of evidence of other offenses has been stated as follows:

> "Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury, N. C. Evidence, § 91, pp. 289-90 (Brandis Rev. 1973).

The instances in which the evidence has been admitted because it tends to prove other relevant facts were set out in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). One such instance is that "[e]vidence of other crimes is admissible when it tends to establish a common plan or *scheme embracing the commission of a series of crimes* so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." (Emphasis supplied.) 240 N.C. at 176, 81 S.E. 2d at 367. *See also State v. Hunter,* 290 N.C. 556, 227 S.E. 2d 535 (1976); *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972).

In case 75CR14281 involving the Johnson furniture, defendant was indicted for felonious larceny and receiving, but the case went to the jury solely upon the felonious larceny charge. Because defendant was acquitted of the larceny of the Johnson furniture, evidence involving that charge would be irrelevant under the exception in *McClain* to show commission of a series

of larcenies. In the present case, however, the State had not elected to proceed solely upon either the larceny or the receiving charge. Thus while the evidence was inadmissible on the larceny charge, the defendant's acquittal did not negate the inference that defendant might have been involved in a series of receiving offenses, and it was therefore admissible on the receiving charge.

Defendant also contends that the admission of Johnson's testimony regarding his stolen furniture subjected defendant to double jeopardy because the jury was asked to consider again the issue of whether she stole Johnson's furniture. However, Johnson's testimony was admissible for the purpose of showing a common scheme of receiving stolen property, supra, and did not amount to an attempt to re-try defendant for the larceny of Johnson's furniture. The offenses involved were separate and distinct instances of receiving, and double jeopardy is not violated merely because the same evidence is relevant to show both crimes. *State v. McIntosh,* 260 N.C. 749, 133 S.E. 2d 652 (1963), *cert. den.,* 377 U.S. 939, 12 L.Ed. 2d 302, 84 S.Ct. 1345 (1964); *State v. Lankford,* 31 N.C. App. 13, 228 S.E. 2d 641 (1976). This assignment is overruled.

[7] Defendant's remaining assignments of error relate to the judge's instructions to the jury. Only one assignment merits discussion. The judge charged, *inter alia:*

> "Now ladies and gentlemen of the Jury, there is no middle ground in this case. You may return only one of two verdicts. Guilty as charged or not guilty. Your verdict must be unanimous. That does not mean it must be unanimous when you retire but it must be unanimous when you return to open court.
>
> It is not usually well, in the Court's opinion, for a juror to take an adamant position from which he or she says they will not recede under any circumstances when you commence your deliberation for to do so may cause you embarrassment later on in the deliberation in the jury room. When you consult with the other jurors you may find that your original position was erroneous. I say that because a jury is a deliberative body. So when you return to open court you will return a unanimous verdict after you have deliberated together."

Defendant contends that this portion of the charge constituted prejudicial error which warrants a new trial. We agree. The charge 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." *State v. Parker,* 29 N.C. App. 413, 414, 224 S.E. 2d 280, 281 (1976). Accordingly, there must be a new trial.

New trial.

Chief Judge BROCK and Judge BRITT concur.

WHITLEY'S ELECTRIC SERVICE, INC. v. HENRY C. SHERROD AND SUDIE A. SHERROD

No. 767SC667

(Filed 16 February 1977)

1. Accounts § 1— mutual, open, current account defined

A mutual account is a course of dealing where each party furnishes credit to the other on the reliance that, upon settlement, the amounts will be allowed so that one will reduce the balance due the other; an open account results where the parties intend that the individual items of the account shall not be considered independently but as a connected series of transactions; and a current account is one with no time limitation fixed by agreement, express or implied.

2. Accounts § 1— credit by one party to account — payment by another party — no mutual, open, current account

An ordinary store account or any other account (though open and continued) where the credit is all on one side and the payments on account are on the other is not a mutual, open and current account under G.S. 1-31.

3. Accounts § 1— account for services performed — no mutuality

In an action on an account for services furnished by plaintiff to defendant, the account did not qualify as mutual, open and current within the meaning of G.S. 1-31 because of the absence of reciprocal demands and other characteristics of mutuality.

4. Accounts § 1— running account — characteristics

An "account current" is referred to as a "running account" and is so designated because the parties contemplated indefinite and con-

tinuous services with no fixed time for payment and with no agreement as to what services should be performed or the value thereof.

5. **Limitation of Actions § 6— running account — payment — tolling of statute of limitations**

Where a payment is made on an account current (or running account), the effect of the payment is to stop the running of the statute of limitations against all items not then barred and to fix a new starting point from which the statute would run.

6. **Limitation of Actions § 6— action on account — statute of limitations no bar — insufficient findings of fact**

In an action on an account, the trial court's conclusion that none of the account was barred by the statute of limitations was not supported by the findings of fact.

Judge VAUGHN dissenting.

APPEAL by defendant Henry C. Sherrod from *Tillery, Judge.* Judgment entered 17 March 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 19 January 1977.

On 23 October 1973 plaintiff filed a complaint alleging that defendants owed it $18,213.80 plus interest for services furnished by plaintiff to defendants between 6 April 1968 and 10 September 1971, which amount defendants have refused to pay despite written demand by plaintiff. Defendants answered, denied the debt and pled the statute of limitations as a defense on the ground that the services rendered to defendants were pursuant to several separate construction contracts and three years have elapsed since the accrual of an action on any contract between plaintiff and defendants.

The action against defendant Sudie Sherrod was subsequently dismissed, and no appeal was taken from the dismissal.

At a trial without a jury, plaintiff's evidence tended to show that between 1958 and 1971 defendant, a building contractor, employed plaintiff to install electrical, heating and air conditioning equipment in the houses and buildings built or remodeled by defendant; that prior to each construction project plaintiff would give defendant an estimate of its costs for that job and would then contract with defendant to do the job; that plaintiff kept three ledgers, one showing amounts owed by defendant for heat and gas, one for work performed pursuant to the electrical contracts entered into between plaintiff and defendant (which amounts plaintiff labeled according to the name

or address of the building's owner) and one for services rendered to defendant personally; that plaintiff billed defendant each month for the total amount owing on all three accounts; that as of October 1967 defendant was $14,000.00 in arrears on his account with plaintiff; that defendant agreed to borrow money to pay off the debt and endorsed a $14,000.00 note payable to Branch Banking and Trust Company ("BB&T"); that plaintiff was the maker of the note and primarily liable due to its favorable credit rating with BB&T, but defendant was to pay off the note; that the $14,000.00 proceeds of the loan were applied against defendant's outstanding account by plaintiff; that as additional security for the loan defendant assigned several second mortgages payable to him to plaintiff, which in turn assigned them to BB&T although the proceeds of the second mortgages continued to be paid into defendant's savings and loan account; that defendant did make payments on the note and several renewal notes were issued; that defendant missed several payments and plaintiff was forced to make them, after which it charged said amounts to defendant's account; that plaintiff and defendant continued to do business after 1967 and as of 10 September 1971 defendant owed plaintiff $18,213.80; that the last payment made by defendant on the account was $525.00 on 14 May 1971; that plaintiff's ledger does not indicate that the final payment was made for any particular job or contract; and that in a conversation with defendant in October 1972, he acknowledged the debt and promised to pay off the account.

Defendant testified that all work performed for him by plaintiff was pursuant to separate contracts; that plaintiff often overcharged him by billing him for special items installed at the owners' request and billable to the owners; that in 1967 when he endorsed the $14,000.00 note to BB&T he understood the transaction to be a sale of his second mortgages, and he expected to receive the proceeds of the loan and intended to purchase a farm with them; that instead plaintiff received the proceeds but never applied them to his account to his knowledge; that he has been paying on the $14,000.00 note and has paid it down to approximately $6,500.00; that he did not receive monthly bills from plaintiff, and plaintiff has never demanded that he pay the $18,213.80.

The court found that plaintiff had furnished $18,213.80 worth of goods and services to defendant through 10 September

1971 and that defendant had accepted but refused to pay for services valued at $17,450.83; that defendant ratified and acknowledged his indebtedness on 14 May 1971 by paying plaintiff the sum of $525.00 on the outstanding account; and that none of the account was barred by the statute of limitations. From the judgment awarding plaintiff $17,450.83, plus interest from 10 September 1971, defendant appeals.

Farris, Thomas & Farris by Robert A. Farris, Jr., for plaintiff appellee.

Vernon F. Daughtridge for defendant appellant.

CLARK, Judge.

The issue raised by this appeal is whether the facts are sufficient to support the conclusion of the trial court that none of the account was barred by the statute of limitations.

The sole basis that would support this conclusion from the facts found, and the one urged by plaintiff on appeal, is that the transactions between the parties constituted a "mutual, open, and current account" and that the present cause of action accrued, under G.S. 1-31, "from the time the latest item proved in the account on either side." The court found as a fact that defendant made his last payment to plaintiff on 14 May 1971 in the sum of $525.00. There is no evidence in the record of any writing made by the defendant at the time of this payment which could be construed as an acknowledgment within the requirements of G.S. 1-26. Nor is there evidence of circumstances surrounding this payment which would warrant a clear inference that defendant's payment was a part payment made in recognition of the entire indebtedness and of his obligation to pay it. *Bryant v. Kellum,* 209 N.C. 112, 182 S.E. 708 (1935).

If G.S. 1-31 were applicable plaintiff's action accrued on 14 May 1971, and since it was commenced on 23 October 1973, none of the account would be barred by the statute of limitations as the trial judge ruled. However, the judge did not conclude, nor on the facts found could he have concluded, that there was a mutual, open, and current account, and so the findings are insufficient to support the judgment of the trial court.

[1] A mutual account is a course of dealing where each party furnishes credit to the other on the reliance that, upon settlement, the amounts will be allowed so that one will reduce the

balance due the other. *Hollingsworth v. Allen,* 176 N.C. 629, 97 S.E. 625 (1918); Annot., 45 A.L.R. 3d 446 (1972). An open account results where the parties intend that the individual items of the account shall not be considered independently, but as a connected series of transactions. 1 Am. Jur. 2d, Accounts and Accounting § 4 (1962). A current account is one with no time limitation fixed by agreement, express or implied. *McKinnie v. Wester,* 188 N.C. 514, 125 S.E. 1 (1924).

[2] An ordinary store account or any other account (though open and continued) where the credit is all on one side and the payments on account are on the other is not a mutual, open and current account under G.S. 1-31. *Brock v. Franck,* 194 N.C. 346, 139 S.E. 696 (1927); *Hollingsworth v. Allen, supra; Robertson v. Pickrell,* 77 N.C. 302 (1877); *Green v. Caldcleugh,* 18 N.C. 320 (1835).

[3] Because of the absence of reciprocal demands and other characteristics of mutuality, the account in the case before us does not qualify as "mutual, open and current" under G.S. 1-31. Nor does the lump sum payment of about $14,000.00 in October, 1967, by means of a bank loan evidenced by promissory note made by plaintiff and endorsed by defendant, add anything to the mutuality of the account thereafter, which is the subject of this action. There was some evidence that the account was open and that it continued for several years after the 1967 payment, but the credit was all by plaintiff and the payments on account by the defendant.

[4] Though G.S. 1-31 is not applicable to the account which is the subject of this action, the statute of limitations does not bar all items thereof which were incurred before 23 October 1970, three years before the action was commenced, if the account qualifies as an "account current," which has been long recognized in this State. See *Newsome v. Person,* 3 N.C. 242 (1803) and *Kimboll v. Person,* 3 N.C. 394 (1806). In *Phillips v. Penland,* 196 N.C. 425, 147 S.E. 731 (1928), an "account current" is referred to as a "running account," and so designated because the parties "contemplated indefinite and continuous services with no fixed time for payment and with no agreement as to what services should be performed or the value thereof." 196 N.C. at 427, 147 S.E. at 732.

[5] Where a payment is made on an account current (or running account), the effect of the payment is to stop the running

of the statute of limitations against all items not then barred and to fix a new starting point from which the statute would run. *Supply Co. v. Banks,* 205 N.C. 343, 171 S.E. 358 (1933); *Steel Corp. v. Lassiter,* 28 N.C. App. 406, 221 S.E. 2d 92 (1976); 5 Strong, N. C. Index, Limitation of Actions § 6 (2d Ed. 1968).

[6] Since the conclusion that none of the account is barred by the statute of limitations is not supported by the findings of fact we must vacate the judgment and remand for a new trial. The finding that defendant made a payment of $525.00 on 14 May 1971 would have supported a judgment for recovery by plaintiff of so much of the account beginning three years prior to the payment, if the court had concluded that the transactions constituted an account current. Such finding would not support the judgment rendered because some of the items in the account for which recovery was allowed apparently arose prior to 14 May 1968. However, the evidence tends to show that there were other payments made within three years before the action was commenced and before the 14 May 1971 payment, which would start the statute of limitations running anew as to all items not barred at the time of those payments. On new trial such findings of fact and conclusions of law are for the trial court.

Reversed and remanded.

Judge HEDRICK concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

Defendant did not bring forward any exceptions to the facts as found by the court or to the failure of the court to find other facts. The court found, in part, as follows:

> "First, that Plaintiff, Whitley's Electric Service, Inc. furnished goods and services to Defendant, Henry C. Sherrod or to his benefit through September 10, 1971, of a total value of Eighteen Thousand Two Hundred Thirteen Dollars and Eighty Cents ($18,213.80);
>
> Second, that Defendant, Henry C. Sherrod received and accepted goods and services from Plaintiff, Whitley's Electric Service, Inc. through September 10, 1971 of the total value of Seventeen Thousand Four Hundred Fifty

Dollars and Eighty-three cents ($17,450.83) and has failed and refused to pay Plaintiff said amount after demand by Plaintiff;

Third, that Defendant, Henry C. Sherrod paid Plaintiff, Whitley's Electric Service, Inc., the sum of Five Hundred Twenty Five Dollars ($525.00), ratified and acknowledged his indebtedness to Plaintiff, Whitley's Electric Service, Inc. on May 14, 1971; and that

Fourth, Plaintiff, Whitley's Electric Service, Inc. commenced this action on October 23, 1973 against Defendant, Henry C. Sherrod . . . ."

In my opinion, those facts support the court's conclusion that plaintiff's right to bring this action is not barred by a statute of limitation. The court found as a fact that defendant made a payment on the account on 14 May 1971 and "ratified and acknowledged" his indebtedness to plaintiff. The question of whether there was evidence to support the finding is not presented on this record.

A statute of limitation bars the remedy and not the debt. Part payment on the account whereby, as here, the debtor has "ratified and acknowledged his indebtedness" fixes a new date from which a statute of limitation will run in order to bar the remedy of an action to collect the sums due on the account. It is equivalent to a new promise to pay. That rule is not limited to "mutual, open and current accounts." I vote to affirm the judgment.

STATE OF NORTH CAROLINA v. JAMES HARRISON STEWARDSON

No. 767SC634

(Filed 16 February 1977)

1. Arrest and Bail § 3— right to arrest for felony without warrant

An officer had probable cause to arrest defendant without a warrant for the felony of manslaughter where the officer had reasonable cause to believe that defendant, while under the influence of intoxicating liquor, had driven his car across the median of a highway, struck two vehicles, and killed the two occupants of one of the vehicles.

2. Automobiles § 126— breathalyzer test — effect of illegal arrest

Even if defendant's arrest was illegal, such illegality would not render inadmissible the results of a breathalyzer test administered to

defendant after his arrest since the right to administer a breathalyzer test depends solely upon the law enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. G.S. 20-16.2(a).

3. **Automobiles § 126— breathalyzer test — request in presence of breathalyzer operator**

Breathalyzer test results were not inadmissible on the ground that the request of the arresting officer to take the test was not made in the presence of the breathalyzer operator where the arresting officer testified that he made such request in the presence of the breathalyzer operator.

4. **Automobiles § 126— breathalyzer test results — failure to hold voir dire**

Breathalyzer test results were not inadmissible because the trial judge failed to conduct a *voir dire* to determine if defendant had been advised of his rights as required by G.S. 20-16.2(c) where there was evidence before the court that defendant had been fully advised of his rights.

5. **Automobiles § 127— breathalyzer test — inability to consent — implied consent**

A breathalyzer test was validly administered to defendant even if the evidence supported his contention that he could not understandingly consent to the test because of injuries received in an automobile accident since defendant's implied consent to the test by driving on a highway was not withdrawn by the fact that he was unconscious or otherwise in a condition rendering him incapable of refusal. G.S. 20-16.2(b).

6. **Automobiles § 113— drunken driving — involuntary manslaughter — sufficiency of evidence**

The evidence was sufficient for the jury in a prosecution for involuntary manslaughter where the State's evidence tended to show that defendant drove his automobile on a public highway while under the influence of intoxicating liquor, crossed the median of a four-lane highway and struck two vehicles traveling in the opposite direction, and where it was stipulated that two persons died as a result of injuries received in the collision with defendant's automobile.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 19 March 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 12 January 1977.

Defendant was tried on two bills of indictment, each charging him with the felony of manslaughter arising out of an automobile collision. One bill involved the death of Marissa Watkins Wible, and the other involved the death of Jack Allen Wible,

both of whom were occupants of a vehicle struck by defendant's vehicle.

Evidence for the State tends to show the following: On 16 February 1975 at approximately 6:00 p.m., it was cloudy, dark, and raining. One Johnny Strickland was driving his automobile south on Highway 301 in Wilson County, about one mile south of the corporate limits of the city of Wilson. The Wible automobile (the vehicle occupied by the two victims) was also traveling south on Highway 301. At this point Highway 301 is a four-lane highway with two lanes for southbound traffic and two lanes for northbound traffic. The northbound lanes and southbound lanes are divided by a painted median. The Strickland vehicle was in the inside or left lane for southbound traffic, and the Wible vehicle was in the outside or right lane for southbound traffic. The Wible vehicle was to the right and slightly to the rear of the Strickland vehicle, both traveling 40 to 45 miles per hour.

Defendant was traveling alone, driving his automobile north on Highway 301 in the inside or left lane for northbound traffic. Defendant's vehicle crossed the median, struck the right side of the Strickland vehicle, and then crashed into the Wible vehicle. As a result of the collision, the two occupants of the Wible vehicle were killed, and defendant suffered numerous broken bones and abrasions. Presumably none of the occupants of the Strickland vehicle was seriously injured.

There were several cans of beer in defendant's vehicle, one of which was punctured in the collision and had leaked out in the car. During the removal of defendant from his vehicle, a strong odor of alcohol was noticed in his vehicle. When the investigating officer saw defendant in the emergency room at the hospital, he detected the odor of alcohol on defendant's breath and after further observation formed the opinion that defendant was under the influence of alcohol. The officer warned defendant of his constitutional rights and advised him that he was under arrest for manslaughter. A breathalyzer machine was brought to the hospital by an operator. After being advised of his rights with regard to the breathalyzer test, defendant took the test. The result of the test showed 0.15 percent of alcohol by weight in defendant's blood. When the operator advised defendant of the test results, defendant asked, "That's too much, isn't it?" The operator answered, "Yes, sir."

Defendant offered no evidence.

Upon verdicts of guilty of both charges, the trial judge consolidated the charges and entered one judgment of imprisonment for a term of six years.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Farris, Thomas & Farris, by Robert A. Farris, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that evidence of the result of the breathalyzer test should have been suppressed because the arrest was illegal. Defendant urges that he was arrested without a warrant for the misdemeanor of driving under the influence of intoxicating liquor. From this basic premise he argues that none of the circumstances required by statute to authorize an arrest without a warrant for a misdemeanor was shown to exist in this case, *id est,* no showing of probable cause to believe that defendant had committed an offense in the officer's presence (G.S. 15A-401[b][1]), and no showing that defendant would not be apprehended or that he may cause damage to himself, others, or property unless immediately arrested (G.S. 15A-401[b][2]b. 1. and 2.). Defendant's argument of the statutory authority to arrest without a warrant appears sound. However, we do not agree with the basic premise upon which he makes the argument. In our view the arrest was for the felony of manslaughter. There was a showing that the officer had probable cause to believe that defendant had committed a felony. "An officer may arrest without a warrant any person who the officer has probable cause to believe . . . has committed a felony . . ." G.S. 15A-401(b)(2)a. Through his investigation the officer had reasonable cause to believe that defendant had driven his vehicle while under the influence of intoxicating liquor and that he had driven his vehicle across the median of the highway, struck one vehicle, and crashed into a second vehicle, killing the two occupants. Even so, defendant argues that the officer advised the defendant he was under arrest for driving under the influence—a misdemeanor. We do not agree. According to the record on appeal, the officer testified as follows: "I advised him in my opinion that he was under the influence and warned him of his Constitutional Rights and

arrested him and advised him that he would be under arrest for manslaughter and asked him if he would object to taking the breathalyzer test." Though rather awkwardly put by counsel's narration of the testimony, we think it is clear that the officer arrested defendant for the felony of manslaughter and so advised him.

[2] If defendant's argument that his arrest was illegal could be sustained, that, standing alone, would not justify suppressing the evidence of the result of the breathalyzer test. General Statute 20-16.2(a) provides in pertinent part:

> ". . . The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor . . ."

In commenting upon the above-quoted portion of the statute, the Supreme Court in *State v. Eubanks,* 283 N.C. 556, 196 S.E. 2d 706 (1973), had this to say: "It is apparent from the emphasized portion of the statute that administration of the breathalyzer test is not dependent upon the legality of the arrest but hinges solely upon 'the . . . law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor.' It follows that defendant's motion to suppress was properly denied." *Id,* p. 561.

[3] Defendant further argues that evidence of the result of the breathalyzer test should have been suppressed because the request of the arresting officer to take the test was not made in the presence of the breathalyzer test operator as required by G.S. 20-16.2(c). If we were convinced that such a request were mandatory in all cases, defendant's argument in this case would nevertheless be frivolous. The arresting officer, without contradiction, testified that he called Trooper King on the patrol radio to bring the breathalyzer instrument to the emergency room and that Trooper King arrived shortly thereafter. The arresting officer then testified that he told defendant, "I'm going to request that you submit to a Breathalyzer test," and that defendant nodded his head. The arresting officer even went so far as to explain why he asked in the presence of the operator. He stated, ". . . to make the test legal I have to ask him

in the presence of the Breathalyzer operator to take the test . . ."

[4] Defendant seems to argue that the evidence of the result of the breathalyzer test was inadmissible because the trial judge failed to conduct a *voir dire* to determine if defendant had been advised of his rights as required by G.S. 20-16.2. He cites *State v. Shadding*, 17 N.C. App. 279, 194 S.E. 2d 55 (1973), *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636 (1973). The holding in *Shadding* is inapplicable to this case. In *Shadding* the State offered no evidence that defendant had been advised of his rights as required by G.S. 20-16.2, and defendant objected to the introduction in evidence of the breathalyzer test specifically upon that ground. In the present case the evidence already before the court was that defendant was fully advised of his rights as required by G.S. 20-16.2. This argument is without merit.

[5] Defendant's final argument upon the admission of evidence of the result of the breathalyzer test concerns defendant's inability to consent to the test. Defendant argues that because of his physical injuries and resulting mental condition, "defendant could no more consent understandingly to this test than could an infant." If this argument were supported by the evidence, the statute would nevertheless authorize the test to be given. General Statute 20-16.2(b) provides: "Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this section and the test or tests may be administered, . . . " This argument is without merit.

We note that defendant's brief continually refers to suppressing the evidence of the results of the breathalyzer test. According to the record on appeal, defendant only objected generally to the evidence. Defendant has made no showing that he made a motion to suppress in accordance with G.S., Chap. 15A, Art. 53. In any event, we conclude that evidence of the breathalyzer test was properly admitted in evidence.

Defendant advances two further arguments concerning admission of testimony from the arresting officer. We do not feel that a discussion is justified. We have considered them carefully and find no prejudicial error.

[6] Defendant argues that it was error to deny his motion to dismiss for failure of the State to present evidence sufficient to

submit to the jury. Defendant cites *State v. Hewitt,* 263 N.C. 759, 140 S.E. 2d 241 (1965), and *State v. Markham,* 5 N.C. App. 391, 168 S.E. 2d 449 (1969), in support of his argument for dismissal. Those two cases are clearly distinguishable on their facts and give no support to the resolution of the question of the sufficiency of the evidence in this case.

It was stipulated that Marissa Watson Wible and Jack Allen Wible each died as a result of injuries received in the collision between defendant's vehicle and the Wible's vehicle. The State's evidence tends to show that at the time of the collision defendant was operating his motor vehicle on a public highway while under the influence of intoxicating liquor. While so operating his vehicle in a northerly direction on a four-lane highway, defendant drove his vehicle across the median so far that he struck the Strickland vehicle, which was traveling south in the inside lane for southbound traffic, on the right front with the right side of defendant's vehicle. Defendant's vehicle then collided with the Wible vehicle, which was in the outside lane for southbound traffic.

"An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *State v. Cope,* 204 N.C. 28, 167 S.E. 456 (1933). General Statute 20-138 is a statute designed for the protection of human life or limb. It provides: "It is unlawful . . . for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway . . . within this State." Death caused by a violation of G.S. 20-138 may constitute manslaughter. *State v. Griffith,* 24 N.C. App. 250, 210 S.E. 2d 431 (1974), *cert. denied,* 286 N.C. 546, 212 S.E. 2d 168 (1975). A precedent to a conviction of manslaughter for the violation of G.S. 20-138 is that its violation must have caused the accident and death of the victim. In our opinion the evidence in this case is sufficient to justify, but not compel, the jury's finding that defendant violated G.S. 20-138 and that such violation was a proximate cause of the death of Marissa Watson Wible and Jack Allen Wible. The trial judge did not err in the denial of defendant's motion to dismiss.

Defendant assigns error to several portions of the trial judge's instructions to the jury. We have reviewed each of these. When the instructions are considered in context and as a

whole, they adequately present the case to the jury under applicable principles of law. These assignments of error are overruled. In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and MORRIS concur.

HOWARD M. LOUGHLIN, KENNETH DONALD CLOSE, BILLY M. DUNCAN, AND THE NORTH CAROLINA SOCIETY OF SURVEYORS, INC. v. NORTH CAROLINA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS, ROBERT D. INMAN, N. NELSON SELLERS, WILLIAM I. BIGGER, JR., JOHN D. WATSON, HOWARD E. McCAULEY, JAMES R. BURROW, AND LARRY D. NIXON

No. 7610SC549

(Filed 16 February 1977)

1. **Professions and Occupations — licensed professional engineer — license as registered land surveyor — no practice of land surveying required**

G.S. 89C-13(b)(1)h, as enacted in 1975, does not require that a person duly licensed as a professional engineer when that act was passed show that he had also engaged in the practice of land surveying as a condition to obtaining a license as a registered land surveyor.

2. **Statutes § 4 — constitutionality of statute — testing by injunction — plaintiff's constitutional right impaired**

The constitutionality of a statute may never be tested by injunction unless a plaintiff alleges and shows that its enforcement will cause him individually to suffer a personal, direct, and irreparable injury to some constitutional right.

3. **Constitutional Law § 12; Professions and Occupations; Statutes § 4 — constitutionality of statute — injunctive proceedings — constitutional right impaired — insufficient allegations**

Where plaintiffs who were already registered land surveyors sought an injunction to prohibit defendant from issuing licenses as registered land surveyors to professional engineer applicants pursuant to G.S. 89C-13(b)(1)h on the ground that such statute was unconstitutional, allegations by plaintiffs that issuance of such licenses would result in diminished income for them, questioning of their competency, undermining of the public's confidence in them and in their profession in general, and serious impairment of plaintiffs' licenses to practice land surveying were insufficient to show that plaintiffs

individually would suffer irreparable injury to some constitutional right, particularly in view of the fact that, prior to passage of the questioned statute, *every* registered engineer could lawfully engage in the practice of land surveying in this State, but after passage of the statute *only* those registered engineers who filed written application with defendant Board within a stated time could lawfully engage in land surveying.

APPEAL by plaintiffs from *McKinnon, Judge*. Judgment entered 13 April 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 17 November 1976.

Prior to 1975, G.S. 89-12(9) provided that G.S. Chap. 89, entitled "Engineering and Land Surveying," should not be construed to prevent "[a] registered engineer engaging in the practice of land surveying." Chapter 681 of the 1975 Session Laws, which was ratified and became effective 19 June 1975, rewrote G.S. Ch. 89, the new act being codified as G.S. Ch. 89C. G.S. 89C-23 makes it unlawful for any person to practice land surveying in this State without first being registered as a land surveyor. G.S. 89C-13(b) sets forth the requirements for registration as a land surveyor. G.S. 89C-13(b)(1)g provides that a licensed professional engineer who can satisfactory demonstrate to the North Carolina State Board of Registration for Professional Engineers and Land Surveyors that his formal academic training in acquiring a degree and field experience in engineering includes land surveying, to the extent necessary to reasonably qualify him in the practice of land surveying, may be granted permission to take the two four-hour examinations on the principles and practices of land surveying. Upon satisfactorily passing the examinations, such licensed professional engineer may then also be granted a license to practice land surveying in this State.

G.S. 89C-13(b)(1)h is as follows:

"h. Professional Engineers in Land Surveying.—Any person presently licensed to practice professional engineering under this Chapter shall upon his application be licensed to practice land surveying, providing his written application is filed with the Board within one year next after June 19, 1975."

Plaintiffs, alleging that the individual plaintiffs are registered land surveyors practicing under the laws of North Carolina and that the corporate plaintiff is a corporation dedicated

to the improvement of surveying in North Carolina, filed this action on 24 February 1976 against the North Carolina State Board of Registration for Professional Engineers and Land Surveyors and against the individuals who comprise the membership of the Board, seeking a temporary restraining order and a preliminary and a permanent injunction enjoining defendants from issuing licenses as registered land surveyors to professional engineer applicants who fail to complete the application showing prior experience in land surveying. Plaintiffs also prayed that G.S. 89C-13(b)(1)h be declared unconstitutional. A temporary restraining order was issued. The matter was heard upon plaintiffs' motion for a preliminary injunction and defendants' motions to dismiss the complaint under G.S. 1A-1, Rule 12(b)(6), and for summary judgment under Rule 56. The parties stipulated to the following:

Following enactment of G.S. Ch. 89C, the Board determined that granting licenses as registered land surveyors to professional engineers as provided by G.S. 89C-13(b)(1)h would be subject to review by the Board to determine whether the professional engineer had been engaged in the practice of land surveying prior to the enactment of the statute on 19 June 1975. While that procedure was in effect, the Board reviewed and denied thirty-nine applications which did not contain information that the applicant had been engaged in land surveying prior to 19 June 1975. Subsequently, the Attorney General advised the Board that it was without discretion in the matter and that upon application by any registered professional engineer, and without any experience in land surveying being shown in the application, the Board must grant to such applicant a license as a registered land surveyor. Following this opinion, the Board, by a vote of four to three, reversed its earlier decision and advised the thirty-nine applicants previously rejected that their applications were granted. Ninety-five applications were received thereafter up to the date of the hearing, which applications were granted without review by the Board with respect to whether such applications contained any showing of experience in land surveying.

The court, being of the opinion that G.S. 89C-13(b)(1)h, as enacted in 1975, does not require that a person theretofore licensed as a professional engineer show that he had actually engaged in the practice of, or that he had experience in, land surveying as a condition to obtaining a license as a registered

land surveyor, and further being of the opinion that G.S. 89C-13(b)(1)h is a valid exercise of legislative authority and does not violate any constitutional rights of the plaintiffs, and that the complaint failed to state a claim for relief, dissolved the temporary restraining order theretofore entered and ordered the action dismissed. Plaintiffs appealed.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for plaintiff appellants.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr., for defendant appellees.

PARKER, Judge.

[1] Appellants first contend that the trial court erred in its construction of G.S. 89C-13(b)(1)h. They argue that this section, properly construed, does not require the Board to issue a license to practice land surveying to a person who was licensed to practice professional engineering at the time the statute was passed merely upon the timely filing of a written application within one year next after 19 June 1975 and without regard to whether the applicant had engaged in land surveying prior to passage of the act. In support of this contention, appellants argue that G.S. 89C-13(b)(1)h must be construed together with the remaining sections of G.S. Ch. 89C and that, when this is done, a reasonable, consistent, and harmonious construction of the entire chapter requires that the persons to whom G.S. 89C-13(b)(1)h applies be restricted to "Engineers in Land Surveying" as reflected by applications which show that they were regularly engaged in land surveying prior to the effective date of the act. Such a construction, however, ignores the plain language of G.S. 89C-13(b)(1)h. To incorporate into it the limitation which appellants suggest requires both that we ignore the clear and express language which the legislature employed and that we read into the statute by strained judicial construction words which it simply does not contain. Therefore, we reject appellants' first contention and agree with the trial judge that G.S. 89C-13(b)(1)h, as enacted in 1975, does not require that a person duly licensed as a professional engineer when that act was passed show that he had also engaged in the practice of land surveying as a condition to obtaining a license as a registered land surveyor.

[2] Appellants' second contention is that if G.S. 89C-13(b)(1)h does require issuance of licenses to practice land surveying to all persons who were licensed to practice professional engineering when the act was passed, provided only that they file written application with the Board within one year next after 19 June 1975, then the statute is unconstitutional in that it purports to grant a separate emolument or privilege forbidden by Art. I, Sec. 32, and in that it creates an unjustifiable classification in violation of the "equal protection of the laws" clause of Art. I, Sec. 19, of the Constitution of North Carolina. "The constitutionality of a statute, however, may never be tested by injunction unless a plaintiff alleges and shows that its enforcement will cause him individually to suffer a personal, direct, and irreparable injury to some constitutional right. A party who is not personally injured by it may not assail a statute's validity." *D & W, Inc. v. Charlotte,* 268 N.C. 577, 583, 151 S.E. 2d 241, 245 (1966). "When public officials act in accordance with and under color of an act of the General Assembly, the constitutionality of such statute may not be tested in an action to enjoin enforcement thereof unless it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury." *Fox v. Commissioners of Durham,* 244 N.C. 497, 500, 94 S.E. 2d 482, 485 (1956). *See* 42 Am. Jur. 2nd, Injunctions, § 187.

[3] In the present case the complaint contains allegations to the effect that the plaintiffs would be seriously, immediately and irreparably harmed if defendants comply with G.S. 89C-13(b)(1)h by issuing the licenses as therein directed, in that plaintiffs' licenses to practice land surveying would be seriously impaired, their competency would be subject to question, their income would be reduced, and the public's confidence in the plaintiffs and in their profession in general would be undermined as a result of having unqualified persons licensed to practice in the field of land surveying. It is obvious that these allegations have no application to the corporate plaintiff, the North Carolina Society of Surveyors, Inc., which is identified only as "a corporation dedicated to the improvement of surveying in North Carolina" and which is not alleged to be itself licensed to practice or to be engaged in practicing land surveying in this State. Insofar as these allegations may apply to the three individual plaintiffs, Loughlin, Close, and Duncan, who are alleged to be "registered land surveyors, licensed and prac-

ticing under the laws of the State of North Carolina," we note that similar allegations as to lowering of standards and diminishing of income were found in *Motley v. Board of Barber Examiners,* 228 N.C. 337, 45 S.E. 2d 550 (1947), to be insufficient to give plaintiffs already licensed standing to invoke equitable protection to prevent others from being licensed in their occupation by virtue of a statute alleged to be unconstitutional. We find the allegations in the present case also insufficient. Here, prior to passage in 1975 of the act now codified as G.S. 89C, of which the challenged G.S. 89C-13(b)(1)h is a part, *every* registered engineer could lawfully engage in the practice of land surveying in this State. Former G.S. 89-12(9) expressly so provided. After passage of G.S. 89C, *only* those registered engineers who file written application with the Board within one year next after 19 June 1975 may lawfully engage in land surveying. Necessarily the number of registered engineers who elect to file such applications cannot be greater, and in all probability will be substantially smaller than the total number of registered engineers eligible to file. If registered professional engineers are in fact not qualified by their specialized education and training to engage in land surveying, which is not shown on the present record, then we fail to see how plaintiffs could suffer any "personal direct, and irreparable injury" to any constitutional right because of a statute which permits fewer than all to do what all might have lawfully done before.

Nothing in this opinion should be interpreted as suggesting that we disagree with the trial judge's expressed view that G.S. 89C-13(b)(1)h is a valid exercise of legislative authority. We hold only that plaintiffs have failed to show standing to challenge its constitutionality in this action.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. CLARENCE WILLIAM CRAFT, LACY ADAMS CHURCH AND J. C. RUTHERFORD

No. 7623SC661

(Filed 16 February 1977)

1. **Criminal Law § 92— joint trial of three defendants — no deprivation of alibi evidence**

The three defendants were not deprived of evidence corroborating their alibis by the consolidation of their trials for breaking and entering and larceny where the first defendant took the stand and gave testimony which tended to establish an alibi for the other two defendants, there was nothing to indicate that testimony by the second and third defendants would have corroborated an alibi for each other or otherwise aided in securing a fair trial, and evidence of the first defendant showed that the other two defendants were in no position to corroborate the alibi testimony of his other witnesses.

2. **Criminal Law § 145.1— consent to searches — condition of probation**

Defendant's waiver of his right to be free from warrantless searches of his person, residence or automobile conducted in the presence of his probation officer was a valid condition of his probation.

3. **Criminal Law § 84; Searches and Seizures § 2— consent to search as condition of probation**

Items were lawfully seized without a warrant from defendant's house trailer and automobile where defendant, as a condition of his probation, waived his right to be free from warrantless searches of his person, residence and automobile conducted in the presence of his probation officer, and his probation officer was present during the search and seizure.

4. **Burglary and Unlawful Breakings § 5; Larceny § 7— possession of recently stolen property — sufficiency of evidence for jury**

The State's evidence was sufficient for submission to the jury of issues as to the guilt of three defendants of breaking and entering and larceny under the theory of possession of recently stolen property where it tended to show that a store was broken and entered and quantities of widely distributed brand name products were stolen therefrom; identification numbers on cartons of cigarettes stolen from the store matched numbers on cartons found in the trunk of the first defendant's car some hours after the crimes; a jar of instant coffee found in the first defendant's house trailer and jars of coffee taken from the store had the same kind of price markings; the second defendant's fingerprints were found on some of the cigarette cartons seized from defendant's car; and the third defendant told the arresting officer that he had brought the coffee into the trailer.

APPEAL by defendants from *Walker, Judge*. Judgments entered 1 April 1976. Heard in the Court of Appeals 18 January 1977.

Defendants pled not guilty to charges of felonious breaking and entering and felonious larceny.

The State's evidence tended to show that on the morning of 9 November 1975 a G & S Food Store was broken into and that the following items were taken: two hundred and fifty cartons of cigarettes, four skill saws, one hundred cans of meat, fifty pounds of bacon, fifteen packages of country ham, ten jars of instant coffee and three two-pound cans of coffee. The State's evidence tended to show further that about 7:00 p.m. on 9 November 1975, five police officers, including defendant Craft's probation officer, saw the defendants together in an automobile and followed them to Craft's house trailer; that as a condition of probation Craft had waived "his right to being searched (without a search warrant) of his person, residence, or automobile by his Probation Officer or any other law enforcement officer in the presence of his Probation Officer."; that the officers searched the house trailer and found in the refrigerator three cans of ham and three packages of sliced ham and found in a cabinet two jars of instant coffee; that the officers asked defendant Craft for a key to the trunk of his automobile; that he stated he did not have one; that an officer removed the back seat of the automobile and could see cartons of cigarettes in two large boxes; that upon further request defendant Craft gave the officer a key to the trunk and that the officer unlocked the trunk and found seventy-three cartons of cigarettes in the boxes. Defendants were then arrested and fingerprinted. The State offered testimony which tended to show that the identification numbers on the cartons of cigarettes taken from the grocery store, which were placed upon the cartons by the distributor, matched the numbers on the cartons found in the trunk of defendant Craft's automobile; that one jar of instant coffee seized from the trailer had two price tags, reflecting a change in price, and the jars taken from the store had been marked in that same manner to reflect the same prices; that fingerprints which matched those of defendants Craft and Rutherford were found on some of the cartons; and that at the time the coffee and meat were being seized defendant Church said that "he had brought the stuff there."

The State also offered evidence which tended to show that the glass in the front door of the store had not been broken before 2:00 or 3:00 a.m.; that defendant Craft's car was parked beside his trailer at 1:30 a.m. and at 2:30 a.m., was gone around

3:00 or 4:00 a.m., and was again parked there about 5:30 a.m.; and that the break-in was discovered between 8:00 and 9:00 a.m.

Defendants Craft and Rutherford offered no evidence. Defendant Church offered evidence which tended to show that he and friends had been at a party drinking beer and liquor until about 2:00 a.m. on the morning of the break-in; that they returned to their trailer, which was located near defendant Craft's trailer, about 3:00 a.m.; that defendant Church went to Craft's trailer to have another drink; that Craft and Rutherford were unconscious and could not be awakened; that he returned to his friends' trailer; that he slept until about 8:00 a.m.; that on 9 November 1975, he did not see Craft and Rutherford until about 6:00 p.m. when he asked them to take him to the store to buy some wine; that he had left a ham and some steaks and bacon in defendant Craft's trailer for a party they were going to have; that he objected when the officer took his ham; that neither the cigarettes, coffee, nor other meat was his, but he had seen the meat and coffee there at least three days prior to the break-in; that he had nothing to do with the break-in; and that he had two prior convictions for breaking and entering. The two friends with whom defendant Church lived testified that when they returned to the trailer on 9 November 1975, Church was drunk; that they undressed him and put him to bed; and that they saw him asleep at 4:30, 5:15 and 6:30 a.m.

Defendants were found guilty as charged and appeal from sentences imposing imprisonment.

Attorney General Edmisten by Associate Attorney Wilton E. Ragland, Jr., for the State.

Vannoy & Reeves by Wade E. Vannoy, Jr., for defendant appellant Craft.

Vannoy & Reeves by Jimmy D. Reeves for defendant appellant Church.

Allen Worth for defendant appellant Rutherford.

CLARK, Judge.

Defendants have submitted separate briefs, but have raised the same three questions. The questions are not related to perti-

nent assignments of error and exceptions as required by North Carolina Rules of Appellate Procedure 28(b)(3).

[1] Defendants first assign error to the consolidation of their trials and rely upon *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976). It is well settled that consolidation is in the discretion of the trial judge, and, in the absence of a showing that a joint trial has deprived a defendant of a fair trial, the exercise of the judge's discretion will not be disturbed on appeal. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968). In *Alford* a new trial was granted to one codefendant where it was shown that the codefendant who had not taken the stand had given a pretrial statement that appeared to corroborate the other codefendant's alibi. Defendants Craft and Rutherford may not complain with respect to defendant Church since he took the stand and offered testimony which tended to establish alibis on their part. Nor may they complain with respect to each other, since there is nothing to indicate, as there was in *Alford,* that testimony of the other would corroborate an alibi or otherwise aid in securing a fair trial. *Alford* does not require severance merely because of the hypothetical possibility that a codefendant may provide exculpatory testimony. Defendant Church may not complain with respect to defendants Craft and Rutherford because there was no showing that their testimony would aid him in his defense. His testimony was that they were unconscious when he went to their trailer, and thus by his own evidence they would have been in no position to corroborate the alibi testimony of his other witnesses.

[2, 3] Defendants next assign error to the denial of their motions to suppress the evidence seized from defendant Craft's house trailer and automobile. The Fourth Amendment generally requires a warrant for a search or seizure, but a party may waive this requirement and consent to the search or seizure. *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973). As a condition to probation, Craft had waived his right to be free from warrantless searches conducted in the presence of his probation officer. This Court has approved a similar condition to probation so long as the search is conducted in an otherwise lawful manner. *State v. Mitchell,* 22 N.C. App. 663, 207 S.E. 2d 263 (1974). We do not think that such a condition is unreasonable or that the consent was not voluntarily given. *People v. Mason,* 5 Cal. 3d 759, 97 Cal. Rptr. 302, 488 P. 2d 630 (1971), *cert. denied* 405 U.S. 1016, 92 S.Ct. 1289, 31 L.Ed. 2d 478

(1972). Our conception of criminal justice has long progressed beyond the notion that conviction automatically means incarceration. However, it would be absurd to hold unreasonable all those things which are agreed to as a condition of freedom by the convicted criminal, who could otherwise be confined in prison. Although the condition imposed herein is not among those listed in G.S. 15-199, that list is not exclusive. *State v. Foust,* 13 N.C. App. 382, 185 S.E. 2d 718 (1972), *overruled on other grounds,* 21 N.C. App. 316, 204 S.E. 2d 185 (1974), (condition that probationer reimburse State for fees paid to appointed counsel is permissible). Nor does G.S. 15-207, which creates a qualified privilege for "information and data obtained in the discharge of official duty by any probation officer" apply to the present case, since the items seized were not "information and data." Even were they so construed, the denial of the motion to suppress constitutes an order by a judge, as required by G.S. 15-207, that such information be receivable as evidence in court. Since we find no merit to this argument as raised by defendant Craft, we need not decide whether defendants Church and Rutherford have standing to raise it.

[4] Defendants finally assign error to the denial of their motions for nonsuit. Upon motion for nonsuit all the evidence considered must be considered in the light most favorable to the State. 4 Strong, N. C. Index, Criminal Law, § 104 (3d Ed. 1976) and cases cited therein. The State produced evidence of a breaking and entering, of a larceny, and of possession of the stolen property by defendants shortly after the time of the crimes, which circumstances raise a presumption that the possessors were guilty of the crimes. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Black,* 14 N.C. App. 373, 188 S.E. 2d 634 (1972).

Though the stolen property consisted of widely distributed brand name products, the owner testified that there were identifying features, such as numbers and prices, stamped on the cartons of cigarettes and jars of coffee. The evidence of identification was sufficient. *State v. Crawford,* 27 N.C. App. 414, 219 S.E. 2d 248 (1975). The cigarettes and coffee were found in Craft's trailer and automobile, which were in his possession and control. Defendant Rutherford's fingerprints were found on some of the cigarette cartons. Defendant Church told the arresting officer that he brought the coffee in the trailer. Thus, there was evidence tending to show possession of recently stolen prop-

erty by each of the three defendants sufficient to invoke the presumption arising from such possession. And this evidence with other facts satisfactorily proved was sufficient to support the verdicts.

No error.

Judges VAUGHN and HEDRICK concur.

ROYAL BUSINESS FUNDS CORPORATION, PLAINTIFF v. SOUTH EASTERN DEVELOPMENT CORP., d/b/a LAND RESOURCES, INC., DONALD K. APPLETON, SOUTHERN PINES ESTATES, INC., APPLETON FARMS, INC., AND APPLETON ENTERPRISES, INC., DEFENDANTS

No. 7610SC165

(Filed 16 February 1977)

1. **Process § 14— foreign corporation — service on Secretary of State — acceptance or rejection of Secretary's mailing of process**

In order for service of process on a foreign corporation by substituted service on the Secretary of State to be effective, G.S. 55-146 does not require that the corporation must either accept or reject the mailing of process by the Secretary of State to its principal office, since service of process is deemed complete under the statute when the Secretary of State is served.

2. **Process § 14— foreign corporation — service on Secretary of State — actual notice**

Actual notice to a foreign corporation was not constitutionally required in order for service of process on the corporation by substituted service on the Secretary of State to be effective.

3. **Process § 14— foreign corporation — validity of service on Secretary of State**

Service of process on a foreign corporation authorized to do business in this State by substituted service on the Secretary of State was sufficient to confer *in personam* jurisdiction over the corporation where the original process was addressed to an individual as registered agent of the corporation; summons was returned "Unable to locate the registered agent"; plaintiff obtained an alias and pluries summons which was served on the Secretary of State; the Secretary of State sent the summons by registered mail to the corporation at the address of its home office in the state of its incorporation; and the letter was returned "Unknown."

4. Process § 12— domestic corporation — service on Secretary of State — actual notice

Service of process on North Carolina corporations by substituted service on the Secretary of State after process directed to the registered agent of the corporation was returned unserved because the registered agent could not be found was valid although registered letters from the Secretary of State forwarding the process to the corporation at its registered office were returned marked "Unclaimed," since under G.S. 55-15(b) service of process was deemed complete when the Secretary of State was served, the corporations were not constitutionally entitled to actual notice of process from the Secretary of State, and the notice given was of a nature reasonably calculated to give them actual notice and the opportunity to defend.

5. Process § 7— insufficient service on individual

There was no proper service of process on an individual where the original summons was returned marked "Unable to locate within the thirty day time limit," and no other attempt was thereafter made to serve the individual.

APPEAL by defendants from *Hobgood, Judge*. Order entered 19 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 11 January 1977.

On 24 October 1975, plaintiff, a New York corporation, instituted this suit to recover on a promissory note and related deed of trust and guaranty agreement and for the appointment of a receiver. Relief was sought against South Eastern Development Corporation, a New York corporation domesticated in North Carolina (hereinafter referred to as "South Eastern"); Donald K. Appleton, a citizen and resident of North Carolina (hereinafter referred to as "Appleton"); and Southern Pines Estates, Inc., Appleton Enterprises, Inc., and Appleton Farms, Inc., all North Carolina corporations (hereinafter referred to as "Southern Pines," "Appleton Enterprises" and "Appleton Farms," respectively).

Civil summons was issued against the five defendants on 24 October 1975. On 27 October 1975, the summonses as to the four corporate defendants were returned "Unable to locate the registered agent." The summons as to Appleton was returned 1 December 1975 containing the notation "Unable to locate within the thirty day time limit." On 5 November 1975, alias and pluries summonses were issued against the four corporate defendants and were served upon the Secretary of State as their statutory agent. On 7 November 1975, the Secretary of State sent copies of the summons, complaint and exhibits to the four

corporate defendants by registered mail. The letter as to South Eastern was returned marked "Unknown," and the letters to Southern Pines, Appleton Enterprises and Appleton Farms were returned marked "Unclaimed."

On 11 December 1975, defendants made a special appearance in which they moved to dismiss the action against them on the grounds of lack of jurisdiction over the subject matter, lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief could be granted. A hearing on the matter was held in Wake County Superior Court, and on 19 December 1975, Hodgood, Judge, entered an order which stated, *inter alia:*

> "It appearing to the Court that the plaintiff has complied with NC GS 55-15B and NC GS 55-143B by serving the North Carolina Secretary of State as substitute process agent for said corporations when after due and diligent search the sheriff was unable to locate the registered agent or office of said corporation as recorded in the records of the North Carolina Secretary of State; and the Court finding as a fact that the plaintiff has complied with said statutes; and the defendants' through counsel contending that said statutes are unconstitutional; and it appearing to the Court that the motions should be denied;
>
> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that the motions are hereby denied;".

Defendants appeal from this order.

Other relevant facts are set out in the opinion below.

Smith, Hibbert and Pahl, by Carl W. Hibbert, for plaintiff appellee.

Tharrington, Smith and Hargrove, by J. Harold Tharrington and Peter E. Powell, for defendant appellants.

MORRIS, Judge.

The sole issue for consideration on this appeal is whether the trial court erred in denying defendants' motion to dismiss the action. Since the determination of this question varies among the several defendants, we shall treat the matter separately according to the nature of the problems involved.

AS TO DEFENDANT SOUTH EASTERN

[3] The original service to South Eastern was addressed to Donald K. Appleton (individual defendant herein) as the registered agent of the corporation. When that summons was returned "Unable to locate the registered agent," plaintiff obtained an alias and pluries summons which was served upon the Secretary of State pursuant to G.S. 55-143(b). The Secretary of State then sent the summons by registered mail to South Eastern in care of the address of its home office in New York, and the letter was returned "Unknown." South Eastern contends that the motion to dismiss should have been allowed as to it because the service was ineffective. We disagree.

G.S. 55-143 provides in pertinent part:

> "(b) Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served."

G.S. 55-146 sets out the procedure by which foreign corporations may be served by service upon the Secretary of State.

> "(a) Service on the Secretary of State, when he is agent of a foreign corporation as provided in this Chapter, of any process, notice or demand shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. *Service of process on the foreign corporation shall be deemed complete when the Secretary of State is so served.* The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail with return receipt requested addressed to such corporation at its principal office as it appears in the records of the Secretary of State or, if there is no address of the corporation on file with the Secretary of State, then to said corporation at its office as shown in the official registry of the state of its incorporation. . . .
>
> (b) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of

such registered mail, or upon the return of such registered mail showing refusal thereof by such foreign corporation, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(c) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign corporation to accept delivery of the registered mail provided for in subsection (a) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign corporation refusing to accept delivery of such registered mail shall be charged with knowledge of the contents of any process, notice or demand contained therein." (Emphasis supplied.)

[1] South Eastern argues that G.S. 55-146 contemplates only two possible responses to the mailing by the Secretary of State—either delivery and acceptance by the defendant corporation, or refusal to accept delivery. In this case, neither response occurred because the letter was returned marked "Unknown." Therefore, as South Eastern would have it, no service took place within the meaning of G.S. 55-146, and the North Carolina courts never acquired in personam jurisdiction over it. However, this argument overlooks that portion of subsection (a) which states, *"Service of process on the foreign corporation shall be deemed complete when the Secretary of State is so served."* While the remainder of the statute provides the procedures which the Secretary of State must follow once he has been served, there is nothing in its language to indicate that the registered mail *must* be either accepted or rejected in order for service to be complete. Such an interpretation would be contrary to the clear legislative intent as expressed in subsection (a) that service is complete when the Secretary of State is served.

[2] Further, we do not believe that actual notice to South Eastern was constitutionally required. In *Washington v. Superior Court,* 289 U.S. 361, 77 L.Ed. 1256, 53 S.Ct. 624 (1933), the defendant was a foreign corporation which had dissolved and failed to keep a registered agent to receive service of process as required by Washington law. Service was made upon the Washington Secretary of State who was not required by State law to forward service to the defendant. As a result, the defendant received no actual notice of the litigation and sought a writ of prohibition to prevent further prosecution of the action. The Supreme Court held that service upon the Secretary of State without actual notice to the foreign corporate defendant did not violate defendant's right to due process, and noted:

> ". . . Admission [of a foreign corporation to do business in a State] might be conditioned upon the requirement of substituted service upon a person to be designated either by the corporation, (citations omitted), or might, as here, be upon the terms that if the corporation had failed to appoint or maintain an agent service should be made upon a state officer (citations omitted)." 289 U.S. at 364, 77 L.Ed. at 1259, 53 S.Ct. at 626.

[3] Having determined that actual notice to South Eastern was not required by either G.S. 55-146 or by constitutional guarantees of due process, we believe, and so hold, that the substituted service upon the Secretary of State was sufficient to confer in personam jurisdiction over South Eastern.

AS TO DEFENDANTS SOUTHERN PINES, APPLETON ENTERPRISES, AND APPLETON FARMS

[4] Service upon these defendants, all North Carolina corporations, was first attempted by personal service upon Donald K. Appleton in his capacity as defendants' registered agent. All process was returned unserved with the notation "Unable to locate the registered agent." Plaintiff then procured alias and pluries summonses which were served upon the Secretary of State pursuant to G.S. 55-15(b) which provides:

> "(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process,

notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State."

Defendants maintain that since the forwarding letters from the Secretary of State were returned marked "Unclaimed," the service was ineffective to bring them within the personal jurisdiction of the North Carolina courts. Again, we cannot agree.

Service upon a corporation by substituted service upon the Secretary of State has been held not to violate due process of law. *Harrington v. Steel Products, Inc.*, 244 N.C. 675, 94 S.E. 2d 803 (1956); *Sisk v. Motor Freight Co.*, 222 N.C. 631, 24 S.E. 2d 488 (1943). In those cases, however, there was no question, as here, involving the failure of the defendant to receive actual notice of the litigation from the Secretary of State. G.S. 55-15(b), which directs the Secretary of State to forward the process by registered mail, does not require that the defendant corporation receive actual notice. Therefore, although the statute was fully complied with in this case, we must examine whether defendants were, as they contend, constitutionally entitled to actual notice of process from the Secretary of State.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), the Supreme Court established the test for the constitutional validity of service of process:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314, 94 L.Ed. at 873, 70 S.Ct. at 657.

See also: Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E. 2d 676 (1974); *McLean v. McLean*, 233 N.C. 139, 63 S.E. 2d 138

(1951); *Huggins v. DeMent,* 13 N.C. App. 673, 187 S.E. 2d 412, *appeal dismissed,* 281 N.C. 314, 188 S.E. 2d 898 (1972). Thus the test is not whether defendants received *actual* notice but whether the notice was of a nature *reasonably calculated to give them actual notice* and the opportunity to defend.

Here, the defendants were required by G.S. 55-13 to maintain a registered office and registered agent. Their failure to do so caused the process to be twice returned without personal service. Had they conformed to the statutory requirements, both methods of service would have resulted in their receiving actual notice of the lawsuit. Therefore, we believe that the notice given (attempted personal service on registered agent, followed by substituted service on the Secretary of State) was in fact ". . . reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Accordingly, we hold that the service upon the Secretary of State was constitutionally valid and that the trial court acquired in personam jurisdiction over the North Carolina corporations.

AS TO DEFENDANT APPLETON

[5] The original summons to defendant Appleton was returned marked "Unable to locate within the thirty day time limit." Thereafter, no other attempt to serve him was made. Plaintiff conceded on oral argument that there has been no proper service on this individual defendant so as to confer personal jurisdiction upon the trial court. We agree. Therefore, the portion of the order of Hobgood, Judge, which upheld jurisdiction over defendant Appleton is reversed.

Affirmed in part; reversed in part.

Chief Judge BROCK and Judge BRITT concur.

RONDA IRENE BELL, BY AND THROUGH HER GUARDIAN AD LITEM, JOHN LESTER BELL, AND JOHN LESTER BELL, INDIVIDUALLY v. CAROL GWYN WALLACE

No. 7623DC511

(Filed 16 February 1977)

1. **Automobiles § 89— last clear chance — insufficient evidence for jury**

In an action to recover for personal injury and property damage sustained in an automobile accident, the trial court did not err in refusing to submit an issue of last clear chance to the jury where there was no evidence from which the jury could find that after the minor plaintiff came into a position of peril as result of the concurrent negligence of both parties, there then remained time sufficient or means by which the defendant could have avoided the accident.

2. **Automobiles § 54— passing car travelling in same direction — failure to sound horn — instruction on common law duty proper**

In an action to recover for personal injury and property damage sustained in an automobile accident, the trial court's instruction on the duty of a motorist to sound his horn before passing correctly embodied the common law duty to use reasonable care.

3. **Automobiles § 72— sudden emergency — plaintiff's negligence as cause — failure to instruct on sudden emergency**

In an action to recover for personal injury and property damage resulting from an automobile accident, the trial court did not err in failing to instruct the jury on the doctrine of sudden emergency where the evidence tended to show that the minor plaintiff attempted to pass the defendant, who was travelling in the same direction, when defendant began to cross the center line; the plaintiff did not sound her horn prior to passing; and plaintiff veered away from defendant's vehicle to avoid a collision and wrecked her own vehicle.

APPEAL by plaintiffs from *Osborne, Judge.* Judgment entered 9 March 1976 in District Court, WILKES County. Heard in the Court of Appeals on 16 November 1976.

This is a civil action for damages in which the minor plaintiff, Ronda Irene Bell, seeks to recover for her personal injuries, and her father, John Lester Bell, seeks to recover for damages to his automobile, allegedly caused by defendant's negligence. Defendant denied negligence and pled contributory negligence. Prior to trial, plaintiffs were permitted to amend their pleadings to plead last clear chance.

Plaintiffs' evidence showed: On the morning of 19 February 1975 the minor plaintiff was driving her father's family-

purpose Buick automobile on her way to school. At the same time the defendant was driving her Ford on the same road and in the same direction. Defendant was following a loaded pickup truck, and plaintiff was following the defendant. All three vehicles were travelling in the same direction at around 35 to 40 miles per hour. The road was a two-lane paved road and at the point where the accident occurred passed through open country. The speed limit was 55 miles per hour. After following defendant for about a mile and a half, the minor plaintiff pulled over to pass. At that time she was in a marked passing zone with approximately 500 feet of clearly visible road ahead, and no vehicle was approaching from the opposite direction. As plaintiffs' Buick got beside the rear portion of defendant's Ford, the Ford began drifting approximately two feet over the center line into the passing lane. Plaintiffs' Buick moved to the left, going off of the left side of the road into the ditch and coming to rest with its back end in the ditch and its front end up on the highway. The minor plaintiff was injured and her father's Buick was severely damaged. Defendant's Ford went off of the right hand side of the road and stopped a little distance further down the road. At no time did the two vehicles come into contact.

The minor plaintiff testified that she blew her horn twice, that when she blew it first, "just this little part of the car had got beside her car. The front bumper of my car was kindly past the back of her car when I blew the horn. Nobody in the car did anything when I blew the horn. She did not put her hand out or give any electric signal or anything that she was going to turn left." The minor plaintiff also testified that following the accident the defendant told her "she was sorry, it was her fault. She didn't know she was running me off the road, that she wasn't paying attention. . . . "

On cross-examination, the minor plaintiff testified: "I gave a turn signal and pulled out to pass. There was no traffic behind me, but I gave a left turn signal. I then pulled out to pass Carol and when my front bumper kindly got beside her she kindly, you know, started drifting over. I blowed my horn. She kept coming over. When I went left, I blowed the horn again and then went on into the ditch."

Defendant's evidence showed: While travelling down the road, she came upon the loaded pickup truck going about 30

to 35 miles per hour. Not seeing anything when she looked into her rear view mirror and out her side window, she started pulling out to pass the truck. She then heard one of her passengers holler, and "about the same time I heard Ronda (the minor plaintiff) and it sounded like she was trying to put on the gas, trying to go on you know, and make it." Defendant immediately pulled back into her lane.

Defendant testified: "I did not know Ronda was behind me prior to the incident. I did not hear any horn sound prior to the incident. After I pulled out, it sounded like she mashed the gas. That is the first time I knew the car was behind me. I had no warning prior to that time. When I heard it and everything, I pulled back in my lane real fast. I slid around. My vehicle landed almost in a hole on the right side of the road." Two passengers in defendant's automobile also testified that they did not hear a horn blow at any time prior to the accident.

The jury answered issues of negligence and contributory negligence in the affirmative. From judgment that plaintiffs recover nothing on their claims against the defendant, plaintiffs appealed.

McElwee, Hall & McElwee by William H. McElwee III for plaintiff appellants.

Hudson, Petree, Stockton, Stockton & Robinson by Robert J. Lawing for defendant appellee.

PARKER, Judge.

Appellants' three assignments of error all relate to the court's charge to the jury.

[1] First, plaintiffs contend the court erred in refusing their request to submit an issue of last clear chance to the jury. We find no error. The issue of last clear chance did not arise on the evidence in this case. "[T]o bring into play the doctrine of the last clear chance, there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, *and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so.*" *Exum v. Boyles,* 272 N.C. 567, 576, 158 S.E. 2d 845, 853 (1968). (Emphasis

added.) Here, there was ample evidence from which the jury could find that defendant was negligent in pulling out to pass the pickup truck without first seeing that the passing lane was clear so that she could move into it with safety. There was also evidence to support a jury finding that the minor plaintiff was contributorily negligent in undertaking to pass the plaintiff without first giving timely warning of her intention so to do by blowing her horn. The jury was also justified in finding that these two acts of negligence, which all of the evidence showed occurred substantially simultaneously, combined to cause plaintiffs' injuries. Indeed, but for the combined negligence of the defendant and the negligence of the minor plaintiff working concurrently, the minor plaintiff would never have been in any position of peril. In this case, however, there was no evidence from which the jury could find that *after* the minor plaintiff came into a position of peril as result of the concurrent negligence of both parties, there then remained time sufficient or means by which the defendant could have avoided the accident. Once the negligence of the parties combined to place the minor plaintiff in danger, such opportunity to avoid the accident as may have existed was equally available to the minor plaintiff as it was to the defendant. The trial judge committed no error in refusing to submit an issue of last clear chance to the jury.

[2] Plaintiffs' second assignment of error is directed to the following portion of the trial judge's charge:

> "Now, with respect to the duty to control her vehicle, I instruct you that the driver of an automobile who wishes to pass another ahead of him must keep his automobile under control so as to avoid a collision if the driver ahead of him apparently does not hear his signal or is not aware of his intention to pass. Now, furthermore, Miss Bell would have some—you would consider whether she had a duty with respect to sounding her horn. I instruct you that the law in the State of North Carolina with respect to sounding a horn when passing another vehicle is as follows: 'A driver or a motorist does not have an absolute duty to sound a horn when overtaking and passing another vehicle, that is, an absolute duty to sound his horn in all cases. On the other hand, in a type of situation where a reasonably prudent person would sound his horn under those circum-

stances, then the motorist does have the duty to sound his horn in that type of situation.' "

Plaintiffs assert that the court's charge places on the driver of an overtaking vehicle the positive responsibility to sound his horn contrary to the present language in G.S. 20-149(b). In that connection, plaintiffs point out that the General Assembly amended G.S. 20-149(b) by Ch. 1330, Sec. 15, 1973 Session Laws so as to eliminate the previously existing responsibility. However, the statutory duty prescribed in G.S. 20-149(b) is not here at issue. What is involved here is the duty imposed upon a passing motorist by the common law to use reasonable care. "The common law imposes upon him the duty to use reasonable care to avoid injury to other persons upon the highway and, for that purpose, to blow his horn if, under like circumstances and conditions, a reasonably prudent driver would have done so. . . . In the absence of a statutory requirement, 'a motorist is required, when reasonably necessary, to blow his horn to give warning to travelers ahead.' " *Lowe v. Futrell,* 271 N.C. 550, 553, 157 S.E. 2d 92, 95 (1967). This common law duty to operate an automobile with the care a person of ordinary prudence would exercise under similar conditions to prevent injury to other persons on the highway exists regardless of statutes regulating the operation of automobiles. *Boykin v. Bissette,* 260 N.C. 295, 132 S.E. 2d 616 (1963). The trial judge correctly embodied the common law duty in his charge. Plaintiffs' second assignment of error is overruled.

[3] Plaintiffs finally assign as error the failure of the trial court to instruct the jury on the doctrine of sudden emergency. However, when one's own negligence brings about a sudden emergency or contributes to it in whole or in part, one cannot invoke the doctrine in exculpation of one's negligence. *Boykin v. Bissette, supra.* "A party is not entitled to the benefit of the doctrine of sudden emergency, if he himself contributes to its creation in whole or in part." *Rodgers v. Thompson,* 256 N.C. 265, 276, 123 S.E. 2d 785, 792 (1962). The doctrine of sudden emergency was not applicable in the present case.

In the trial appealed from, we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

Nelson v. Harris

DAVID THOMAS NELSON AND WIFE BARBARA T. NELSON, AND ALLIE ALLRED NELSON v. MARYETTA NELSON HARRIS, INDIVIDUALLY; MICHAEL FILMORE ROUTH AND WIFE, DIANE C. ROUTH; DONALD NELSON ROUTH; TERRI LYNN ROUTH; CYNTHIA ANN ROUTH; AND MARYETTA NELSON HARRIS AS TRUSTEE FOR MICHAEL FILMORE ROUTH, DONALD NELSON ROUTH, TERRI LYNN ROUTH AND CYNTHIA ANN ROUTH, DEFENDANTS AND CLIFFORD PAUL HARRIS, ADDITIONAL DEFENDANT

No. 7619SC689

(Filed 16 February 1977)

1. **Reformation of Instruments § 6— intent of parties — testimony by grantor and attorney**

In an action to reform deeds for mutual mistake, testimony by a grantor and the lawyer who prepared the deeds was competent to show the intention of the parties to the deeds.

2. **Reformation of Instruments § 1— mutual mistake of parties**

The equitable remedy of reformation of a deed will be granted when it is shown by clear, cogent and convincing evidence that due to the mutual mistake of the parties the deed does not express the actual agreement made between the parties.

3. **Reformation of Instruments § 1— absence of consideration — unilateral mistake of grantor**

The grantor of a conveyance for which no consideration was given by the grantee is entitled to reformation when the deed fails to express the actual intent of the parties due to the grantor's unilateral mistake.

4. **Reformation of Instruments § 7— reformation of deed for mutual mistake**

The evidence was sufficient to support the trial court's determination that a 3.28 acre lot lying outside the land conveyed by a deed, rather than a 4.25 acre lot lying within the land conveyed, was excepted from the deed because of the mutual mistake of the parties, and that the grantors were entitled to reformation of the deed to except the 4.25 acre lot.

APPEAL by defendants from *Albright, Judge.* Judgment entered 30 April 1976 in Superior Court, RANDOLPH County. Heard in Court of Appeals 20 January 1977.

This is a civil action wherein the plaintiffs, David Thomas Nelson, Barbara T. Nelson, and Allie Allred Nelson, seek the reformation of a deed made and entered into on 3 July 1973 "by and between David Thomas Nelson and wife, Barbara T. Nelson, parties of the first part, and Maryetta Nelson Harris

as Trustee as hereinafter stated, for the life of Maryetta Nelson Harris, and at her death to Michael Filmore Routh, Donald Nelson Routh, Terri Lynn Routh, and Cynthia Ann Routh, parties of the second part . . ."

Plaintiffs' complaint was filed and notice of lis pendens was docketed on 14 April 1975. At a trial before the judge without a jury plaintiffs offered evidence tending to show the following:

In 1965 Allie Nelson owned a 62-acre tract of land in Randolph County. In 1965 she conveyed by deed (Exhibit C) to her son, David Thomas (Bobby) Nelson, and his wife, Barbara Nelson, a 4.25-acre tract of land known as the "well lot" which is a part of the 62-acre tract. In 1968 she conveyed to David and Barbara a 3.28-acre tract which is not a part of the 62-acre tract. In 1969 she conveyed the balance of the 62-acre tract to David.

In 1973 Allie's daughter, defendant Maryetta (Marty) Harris, moved to North Carolina from California and asked her mother to convey some property to her so she and her husband could have their own house. Allie offered to give her a 135-acre tract located on the east side of the 62-acre tract, but Marty wanted the 62-acre tract instead. David and Barbara agreed to take the 135-acre tract in exchange for the 62-acre tract with the exception of the well lot. They wanted to keep the well lot because Allie had bought a mobile home and was planning to set it up there. This proposal was communicated to Marty and the exchange was agreed to.

Allie went to a lawyer and asked him to prepare the deeds. The lawyer was to prepare a deed from Allie to Marty for the 135-acre tract (Exhibit E-1), a deed from Marty and her husband, Cliff Harris, to David and Barbara for the 135-acre tract (Exhibit E) and a deed from David and Barbara to Marty as trustee for her life, with remainder free of trust to defendants Routh for the 62-acre tract except the well lot (Exhibit A). The lawyer met with Marty, Cliff, David, and Allie in his office to discuss the deeds with them. It was specifically stated that the well lot was to be excepted from the 62-acre tract, and Marty and Cliff made no objection to the exception. Allie told the lawyer that all three deeds were parts of a single transaction, and that none of them were to take effect unless all of them did.

The deeds were prepared and were signed by the parties. They were delivered to Allie who recorded them on 28 September 1973.

In reality the well lot was not excluded from the 62-acre tract conveyed by Exhibit A. The deed purported to except the 3.28-acre tract which is not a part of the 62-acre tract. The mistake occurred because Barbara mistakenly gave Allie the deed to the 3.28-acre lot when Allie went to her home to get the deed to the well lot to give to the lawyer to prepare the description in Exhibit A.

Allie placed her trailer on the well lot in September 1973 with no objection from Marty. Marty made no claim to the lot until March 1974 when a surveyor discovered that the well lot was not excepted from the 62-acre tract described in Exhibit A. On 1 August 1974 and 6 May 1975 defendants Routh conveyed by deeds (Exhibits F and G) their remainder interest in the 62-acre tract to Marty. On 20 June 1975 Marty by deed (Exhibit H) conveyed the tract to herself and Clifford Harris as tenants by the entirety. These three deeds were recorded on 2 July 1975 after plaintiff had filed notice of lis pendens on the well lot.

Defendants offered no evidence.

The trial court made findings of fact substantially as set out above. The conclusions of law, based on the findings of fact, except where quoted, are summarized as follows:

The three deeds drawn by the lawyer "were made as a part of a unified plan . . . . " Allie Nelson received no money or property in consideration for any of three conveyances. David and Barbara Nelson received no consideration from the Rouths for their remainder interest in the 62-acre tract. "[I]t was the intention of David Thomas Nelson and wife, Barbara T. Nelson, Allie A. Nelson and Maryetta Nelson Harris, individually and as Trustee for her four-named children, that the deed marked Exhibit 'A' should include an exception of the 4¼-acre well-lot, but by mutual mistake of the said parties, the deed contained an exception of the 3.28-acre house tract of Bobby Nelson." The conveyances to Marty Harris represented by plaintiff's Exhibits F and G, and the conveyance to Marty Harris and Clifford Harris, as tenants by the entirety, were made after defendants Marty and Clifford Harris had notice of the error contained in Exhibit A. The plaintiffs are entitled to have Exhibits A, F, G, and H reformed to express the true intention of the parties as of the date Exhibit A was executed.

From the order of the court reforming the deeds to effectuate the true intention of the parties, defendants appealed.

Coltrane and Gavin by W. E. Gavin for plaintiff appellees.

Bell and Ogburn by John N. Ogburn, Jr., for defendant appellants.

HEDRICK, Judge.

[1] By assignments of error 1 and 2 based on numerous exceptions duly noted in the record, defendants contend the court erred in admitting the testimony of Allie Nelson and the lawyer who prepared the several deeds. Defendants argue that this testimony violated the parol evidence rule.

In an action to reform a deed for mutual mistake, parol evidence is admissible to prove that due to the mutual mistake of the parties, the deed does not express the actual intent of the parties. *Hubbard and Co. v. Horne,* 203 N.C. 205, 165 S.E. 347 (1932). "A witness in a position to know may testify concerning the intention of the parties to an agreement, to the same effect as to any other fact." 66 Am. Jur. 2d, Reformation of Instruments, § 118, p. 645 (1973).

Obviously the testimony challenged by these exceptions was probative of the intention of the parties, and certainly Allie Nelson and the lawyer were in a position to know the intention of the parties. These assignments of error have no merit.

By assignments of error 4 and 5 defendants contend the court erred in not allowing their motions for involuntary dismissal. In support of these assignments of error defendants argue that their motions should have been allowed "for there was NO COMPETENT evidence before the Court proving mutuality of mistake between David Thomas Nelson and Barbara T. Nelson, and the defendants, and the additional defendant. . . . Certainly, the defendants, Michael Filmore Routh, Donald Nelson Routh, Terri Lynn Routh, and Cynthia Ann Routh, and the additional defendant, Clifford Paul Harris, were never consulted about the reservation in the deed, nor is there any evidence in the record to show same."

[2] The equitable remedy of reformation of a deed will be granted when it is shown by clear, cogent, and convincing evidence that due to the mutual mistake of the parties the deed does

not express the actual agreement made between the parties. *Yopp v. Aman,* 212 N.C. 479, 193 S.E. 822 (1937); *Durham v. Creech,* 32 N.C. App. 55, 231 S.E. 2d 163 (1977).

[3] The grantor of a conveyance for which no consideration was given by the grantee is entitled to reformation when the deed fails to express the actual intent of the parties due to the grantor's unilateral mistake. 66 Am. Jur., Reformation of Instruments, § 45 (1973); Annot. 69 A.L.R. 423, 430-431 (1930).

[4] The record in the present case is replete with competent evidence supporting all the material facts found by the trial judge. Those facts dictate the conclusion that the 3.28-acre lot rather than the 4.25-acre well lot was excepted from Exhibit A because of the mutual mistake of the parties. The defendants Routh did not participate in the negotiations with the grantors which culminated in their obtaining a remainder interest in the property without having given any consideration whatsoever. Their mother acted for them as trustee, and any mistake she may have made while acting in their behalf extends to them. These assignments of error have no merit.

Defendants bring forward additional assignments of error substantially similar to those already discussed. We have considered all of the assignments of error and find them to be without merit. The judgment appealed from is

Affirmed.

Judges VAUGHN and CLARK concur.

CHESTER H. PRENTICE AND BETTY L. PRENTICE v. TALMADGE ROBERTS AND LINDA ROBERTS

No. 7628SC635

(Filed 16 February 1977)

Frauds, Statute of § 2; Boundaries § 10— contract to convey land and easement — description — latent ambiguity

In an action to have defendants specifically perform an alleged contract for the sale of a tract of land together with an easement to said land, the trial court erred in holding that the description of the land and easement contained in the sales agreement and an at-

tached property sketch was patently ambiguous, since it was possible to locate the property by the use of extrinsic evidence referred to in the sales agreement and sketch, and the sales agreement and sketch described the easement intended to serve the land with reasonable certainty.

APPEAL by plaintiffs from *Briggs, Judge.* Judgment entered 5 March 1976 in Superior Court, BUNCOMBE County. Heard in Court of Appeals 12 January 1977.

In this civil action plaintiffs, Chester H. and Betty L. Prentice, seek to have defendants, Talmage and Linda Roberts. specifically perform an alleged contract for the sale of a ½-acre tract of land together with an easement to said land. Plaintiffs' complaint, except where quoted is summarized as follows:

On 15 December 1971 plaintiffs and defendant Linda Roberts, acting for herself and as agent for her husband, defendant Talmadge Roberts, signed a "sales agreement" which in pertinent part provides:

> "This agreement is between Mrs. Talmadge (Linda) Roberts, Seller, and Chester H. & Betty L. Prentice, Buyers, all of Black Mountain, N. C.
>
> In consideration of $300.00 and other valuable considerations, Seller agrees to sell to Buyers, a portion of her property, lying at the top of the ridge to the East of Walker Cove Road in the Black Mountain area, being approximately ½ acre in size and shown more fully in the property sketch attached.
>
> Seller also agrees that the sale shall include an easement, in perpetuity from Walker Cove Road to an extension of the easement across Mrs. Nanney's property to the South. The easement shall be of about 30 feet in width and total length and exact position to be determined by road builder and/or engineer. Generally, it shall be approximately as shown on the attached plan.
>
> Buyers agree to build an all-weather road (gravel with gradient of less than 15%), and a cold water line and to obtain telephone and electric service for the area."

(The sales agreement and the property sketch, marked "plaintiff's Exhibit A," were attached to and made a part of the complaint.) Plaintiffs constructed a residence partially on the

½-acre tract, and pursuant to the agreement they constructed the all-weather road and the cold water line and obtained telephone and electrical service for the area. Prior to the construction of the road and the water line, the attainment of the telephone and electrical service, and the construction of the residence, "both defendants reasserted their willingness to proceed with the transaction as set forth in said contract," and told plaintiffs to proceed with the construction of the residence, assuring them that a deed conveying the property would be delivered as soon as it could be prepared. Plaintiffs then proceeded, "in reliance upon said contract and the verbal assurances of defendants" and "at considerable expense to plaintiffs and to the enrichment of defendants." Plaintiffs have tendered to defendants the sum of three hundred dollars and stand ready to comply with all the terms of the agreement, but defendants refuse to convey the ½-acre tract and the easement.

Defendants filed an answer wherein they admitted that Linda Roberts signed the "sales agreement" but alleged that she signed the agreement " . . . in reliance upon the representation by the plaintiff, Chester H. Prentice, that the figure of $300.00 would be stated as consideration in said instrument only in order to make the same a valid and legal instrument and upon his further representation that the same did not constitute the purchase price for the property which was to be later agreed upon to be conveyed and that the parties would negotiate and agree upon the purchase price at some later date." In addition defendants denied that the property sketched was attached to the sales agreement when Linda Roberts signed it. They alleged that the agreement was void under the statute of frauds, G.S. 22-2, "for indefiniteness and uncertainty." Defendants also counterclaimed for damages resulting from plaintiffs' alleged trespass upon their property.

Defendants moved for summary judgment on the grounds that the contract upon which plaintiffs base their claim is void because it does not contain a sufficient description of the ½-acre tract and the easement to comply with the statute of frauds "even assuming the drawing plaintiffs claim was attached to the paperwriting which is the subject of the action was actually attached . . . . " Plaintiffs moved for partial summary judgment, pursuant to G.S. 1A-1, Rule 56(b), on the issue of the sufficiency of the descriptions of the ½-acre tract and the easement, "assuming for the purposes of this Motion and that

the sketch referred to in the Sales Agreement constituted a part of the Sales Agreement." The court concluded that "the alleged paperwriting upon which plaintiffs' claim is based contains no valid description and is vague, indefinite, uncertain and is patently ambiguous on its face," and entered an order allowing defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment. Plaintiffs appealed.

McGuire, Wood, Erwin & Crow by Charles R. Worley for plaintiff appellants.

Bennett, Kelly & Cagle by Robert F. Orr for defendant appellees.

HEDRICK, Judge.

Plaintiffs assign as error the summary judgment entered for defendants. The question presented by this assignment of error is whether the descriptions of the lot and the easement in the sales agreement and the property sketch are patently or latently ambiguous.

> " . . . The only requisite in evaluating the written contract, as to the certainty of the thing described is that there be no patent ambiguity in the description. There is a patent ambiguity when the terms of the writing leaves the subject of the contract, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified with certainty . . . .
>
> A patent ambiguity raises a question of construction; a latent ambiguity raises a question of identity. If the ambiguity is latent, evidence *dehors* the contract is both competent and necessary. A description is said to be latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. In such case plaintiff may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity." (Citations omitted.) *Lane v. Coe,* 262 N.C. 8, 12-13, 136 S.E. 2d 269, 273 (1964). See also *Kidd v. Early,* 289 N.C. 343, 222 S.E. 2d 392 (1976).

An easement is an interest in land and is subject to the statute of frauds. *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541 (1953); *Gruber v. Eubank,* 197 N.C. 280, 148 S.E. 246 (1929). "No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. . . . The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements." (Citations omitted.) *Hensley v. Ramsey,* 283 N.C. 714, 730, 199 S.E. 2d 1, 10 (1973). When the grant does "describe with reasonable certainty the easement created and the dominant and servient tenements," but does not definitely locate it, the easement is not held void for uncertainty under the statute of frauds, but instead, the grantee is entitled to a reasonable and convenient way located in the manner and within the limits set forth in the grant. *Andrews v. Lovejoy,* 247 N.C. 554, 101 S.E. 2d 395 (1958); *Borders v. Yarbrough, supra; Feldman v. Gas Pipe Line Corp.,* 9 N.C. App. 162, 175 S.E. 2d 713 (1970); 28 C.J.S. Easements § 80 (1941). The easement may also be located by the practical location by the grantee, acquiesced in by the grantor. *Borders v. Yarbrough, supra;* Annot. 110 A.L.R. 174, 178-180 (1937).

The property sketch referred to in the sales agreement, and made a part of the record on appeal is quite specific and depicts two tracts of land lying on the east side of a road running generally north and south. The northern tract is labeled "Roberts" and the southern tract is labeled "Nanney." At the eastern side of the Roberts' tract is depicted the four sides of a smaller tract. The easement referred to in the sales agreement is shown on the property sketch and runs from the road through the Nanney and Roberts tracts ending at the smaller parcel on the east side of the Roberts' tract. The property sketch is in considerable more detail than herein described; however, we do not feel it necessary to have the sketch reproduced in this opinion.

We hold the court erred in concluding that the description of the lot and easement contained in the sales agreement and property sketch is patently ambiguous. The description is latently ambiguous, and it may be possible to locate the property by the use of extrinsic evidence referred to in the sales agreement and sketch. The sales agreement and sketch also describe

the easement intended to serve the ½-acre lot with reasonable certainty.

Plaintiffs assign as error the denial of their motions for partial summary judgment. There can be no adjudication of plaintiffs' claim, or any part thereof, until there has been a resolution of the issue of whether the property sketch was attached to and made a part of the sales agreement. This assignment of error is not sustained.

For the reasons stated the order denying plaintiffs' motion for partial summary judgment is affirmed, the order allowing defendants' motion for summary judgment is reversed, and the cause is remanded to the superior court for further proceedings.

Affirmed in part; reversed and remanded in part.

Judges VAUGHN and CLARK concur.

IN THE MATTER OF RONALD ALLEN FRYE

No. 7617DC690

(Filed 16 February 1977)

1. Infants § 10— delinquency hearing — breaking or entering — sufficiency of evidence

In a hearing upon petitions alleging that respondent was a delinquent child within the meaning of G.S. 7A-278(2), evidence was sufficient to show that respondent committed a breaking or entering where it tended to show that numerous items similar to, though not identified as, those stolen were found in a car driven by respondent; respondent's companion in the car had a fresh cut on his hand, and at the store that was broken into blood was found on the window and near the cash register; and an officer observed the car being driven by respondent under suspicious circumstances backing out from behind the store.

2. Infants § 10— no probation revocation hearing — no notice required

Where respondent who had previously been placed on probation was before the court upon two petitions alleging him to be a delinquent child in that he broke and entered a store and operated a vehicle without a driver's license, no hearing was held to revoke probation, and therefore no notice was necessary.

3. Constitutional Law § 20; Infants § 10— no juvenile facilities within county — commitment outside home county — equal protection of law

Respondent's contention in a juvenile delinquency proceeding that the lack of community based residential care in his county, which would result in commitment outside his county, denied him equal protection of the law was unfounded.

4. Burglary and Unlawful Breakings § 3; Infants § 10— wrongful breaking or entering — ownership of building not alleged — no error

Where a petition charged the juvenile defendant with a wrongful breaking or entering, a violation of G.S. 14-54(b), it was not necessary to allege ownership of the building involved.

APPEAL by respondent from *Harris, Judge.* Judgment entered 12 May 1976 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 20 January 1977.

Respondent was brought before district court on two juvenile petitions alleging that he is a delinquent child within the meaning of G.S. 7A-278(2). The first petition alleges that Frye unlawfully and wilfully operated a motor vehicle without first having obtained a driver's license, a violation of G.S. 20-7(a). The second petition alleges that he unlawfully and wrongfully broke and entered into the Bill Whitlow Grocery & Service Station on Highway 158 West in Monroeton, a violation of G.S. 14-54(b).

Frye was arraigned and pleaded not guilty. At the juvenile hearing the following evidence was given:

Police Officer Larry Carlson testified that he saw a car drive out from behind the Hop-In store on Highway 158 West. Because there was no attendant in the store, Officer Carlson became suspicious and followed the car. He checked ownership of the car and found it was owned by one Mr. Faint. He stopped the car, and there were two persons inside it. Ronald Allen Frye, the respondent, was the driver, and Mr. Faint's son was the passenger. Officer Carlson asked Frye for his driver's license. Frye replied that he did not have a driver's license. Officer Carlson also saw a large quantity of beer, candy, cigarette lighters and a bag of change sitting in plain view on the back seat. He advised the two boys of their rights and called the Sheriff's Department.

Deputy Sheriff Lemons testified concerning his investigation of a break-in at Bill Whitlow's Grocery & Service Station. A rear window had been broken and blood was found on the window, near the cash register and near the beer cooler. Deputy

Lemons later saw items similar to those missing from the store in the back of the Faint automobile. Bill Whitlow testified that an unknown quantity of beer, candy, cigars, cigarette lighters and $40.00 in change was missing from his store. Officer Lemons also stated that young Mr. Faint, the passenger arrested by Officer Carlson, had a fresh cut on his hand.

The judge found as fact beyond reasonable doubt that Ronald Allen Frye committed the acts alleged in the petitions. The judge further found as fact that the acts committed were "in violation of his probation upon which he was placed . . . by the undersigned." Respondent was found to be "within the juvenile jurisdiction of the court as delinquent" and he was committed for placement in such school or institution as deemed appropriate by the Department of Human Resources. Respondent appeals.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Gwyn, Gwyn & Morgan, by Melzer A. Morgan, Jr., for respondent appellant.

ARNOLD, Judge.

There is no merit to respondent's contention that no competent evidence was before the court to show he had no driver's license. Obviously, respondent was less than sixteen years old, the legal age to be licensed to drive, G.S. 20-9(a), since he was within the juvenile jurisdiction of the court. He admitted to the officer that he had no driver's license, and he was unable to produce a license upon the officer's request. Evidence that respondent had no driver's license is overwhelming and uncontradicted.

[1] Respondent contends that there is insufficient evidence to prove that he wrongfully broke and entered into the Bill Whitlow Grocery & Service Station. Since the property found in the car he was driving was not identified by the owner as that stolen from his store, according to respondent, there is no evidence to prove that he stole the property. He argues that since the doctrine of possession of recently stolen property does not apply in this case there was insufficient evidence to support the charge.

If respondent had been charged with breaking or entering and *larceny* there might be merit in his position. However, respondent was charged with breaking or entering in violation of G.S. 14-54(b). The State's position is that there was sufficient circumstantial evidence to support the charge. We agree. Circumstantial evidence is sufficient to take the case to the jury if there is " . . . any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it . . . . " *State v. Parker,* 268 N.C. 258, 260, 150 S.E. 2d 428 (1966), quoting, *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956). As State's brief points out, there was sufficient circumstantial evidence from which the court could have found that respondent committed the breaking or entering: (1) numerous items similar, though not identified, as those stolen were found in the car driven by respondent; (2) respondent's companion in the car had a fresh cut on his hand and at the store that was broken into blood was found on the window and near the cash register; (3) and the officer's observation of the car being driven by respondent under suspicious circumstances "backing out from behind" the store and thereafter stopping the car.

[2] Respondent next assigns as error and argues that the court revoked his probation in violation of G.S. 110-22 because he did not receive proper notice and hearing as required by that statute. It is apparent from the order entered that prior to this action respondent had been placed on probation by the very same judge who heard this juvenile proceeding. Among the conditions of his probation was a requirement that he violate no laws. However, respondent was not before the court to determine if his probation should be revoked pursuant to G.S. 110-22. He was properly before the court, under the authority of G.S. 7A-285, to determine if he should be adjudicated a "delinquent child" within G.S. 7A-278(2). The indicia of delinquency are violations of (1) the criminal law, (2) the motor vehicle laws, or (3) the conditions of previous probation. Respondent was brought to this juvenile hearing on petitions which charged (1) a violation of the criminal law and (2) a violation of the motor vehicle laws. It appears that adjudication of guilt of the juvenile petitions in this case would also prove a violation of probation. Nevertheless, no hearing was held to revoke probation, and therefore no notice was necessary. (There is no contention that respondent had inadequate notice of the juvenile hearing.)

[3] Respondent was committed after the court found "that community based residential care is not available." His argument, that the lack of community based residential care in Rockingham County, which results in his commitment outside his community, denies him equal protection of the law, is unfounded. No authority is cited, but respondent's argument is that he has suffered from an act of unfair discrimination because his community is not wealthy enough to provide facilities that might be available elsewhere in the State. This argument, with respect to educational facilities, was rejected by the United States Supreme Court in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973), *reh. den.* 411 U.S. 959, 36 L.Ed. 2d 418, 93 S.Ct. 1919 (1973). We also reject this position.

[4] Finally, respondent says that the petition charging breaking and entering and larceny is insufficient because the petition fails to allege ownership of the building and the property carried away. As has already been noted, respondent misconstrues the petition. It does not charge breaking or entering with intent to commit larceny, a violation of G.S. 14-54(a). It charges respondent with a wrongful breaking or entering, G.S. 14-54(b). It was not necessary to allege ownership.

Finding no error prejudicial to respondent the order of the court is

Affirmed.

Judges PARKER and MARTIN concur.

BRANTLEY LINDSAY SNIDER, PLAINTIFF v. DARRELL WAYNE DICKENS, DEFENDANT-THIRD PARTY PLAINTIFF v. KENNETH DOUGLAS SNIDER, THIRD PARTY DEFENDANT

No. 7622SC672

(Filed 16 February 1977)

1. Automobiles § 79— intersection accident — failure to take evasive action

In a passenger's action to recover for injuries received in a collision which occurred when defendant drove his car from a servient road into the path of third party defendant's car on the dominant

highway, an issue of negligence by the third party defendant was properly submitted to the jury where there was evidence tending to show that a tractor-trailer truck which had blocked the views of both drivers left the intersection in time for third party defendant to have an unobstructed view of the intersection, to see defendant driving into his path, and to avoid the accident by braking or swerving to one side.

2. **Automobiles § 90— approaching intersection — obstruction of view — duty of care — instructions**

Trial court's instruction on the increased duty of care required of a driver on a dominant highway when unusual conditions, such as a turning tractor-trailer rig, obstruct his view of an intersection he is approaching was proper when considered with other instructions on the right of the driver on a dominant highway to assume that a driver on a servient road will yield the right-of-way.

APPEAL by third party defendant from *Kivett, Judge.* Judgment entered 19 May 1976 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 20 January 1977.

This case arises out of a traffic accident between automobiles driven by Darrell Wayne Dickens (Dickens), the defendant-third party plaintiff, and Kenneth Douglas Snider (Snider), the third party defendant. The plaintiff Brantley Lindsay Snider was a passenger in the Snider car. Plaintiff brought suit against Dickens, and Dickens, in turn, filed a third party complaint against Snider for contribution.

Evidence showed that the accident occurred at the intersection of Highway 109 and Kennedy Road at about 1:30 p.m., 6 July 1973. The weather was clear, and the road was dry. Highway 109 is the dominant road and has five lanes at this intersection. Two are northbound, and two are southbound. The center lane is for traffic turning across Highway 109. Kennedy Road is a two lane road, and it is the servient road at the intersection, which is indicated by a stop sign. Nothing at this intersection obstructs the view of the drivers on either road.

At the time of the accident, Snider was driving north on the inside lane, that is, the lane between the outside northbound lane and the middle "turn" lane. Dickens, who was stopped at the stop sign, westbound on Kennedy Road, drove slowly into Snider's path, and there was a collision. Neither driver, according to testimony, saw the other until the instant before the crash.

At about the time of the accident, a tractor-trailer truck turned right out of the outside northbound lane of Highway 109

onto Kennedy Road. Dickens testified that the truck had its turn signal on and was in the process of making the turn when he began to pull across the highway. Snider testified that the truck had completed its turn and was, perhaps, twice its length down Kennedy Road before he entered the intersection.

The case was submitted to the jury who found that each party was negligent, and that the negligence of each was a proximate cause of plaintiff's injury. Judgment was entered accordingly. Snider, the third party defendant, appeals.

Walser, Brinkley, Walser & McGirt, by Charles H. McGirt and G. Thompson Miller, for third party defendant appellant.

Haworth, Riggs, Kuhn, Haworth & Miller, by John Haworth, for third party plaintiff appellee.

ARNOLD, Judge.

[1] Error is assigned by third party defendant (Snider) to the denial of his motions for directed verdict and judgment *non obstante veredicto*. He contends that there was insufficient evidence of negligence on his part to go to the jury. All the evidence, according to Snider, shows that both drivers' view of the intersection was obstructed by the tractor-trailer, and yet defendant drove from a servient highway into third party defendant's car in violation of the duty to yield to traffic on the dominant highway. Since he could not see defendant's oncoming car, Snider argues, he had no notice to anticipate anything, but could assume that any traffic on the servient highway would yield. Applying G.S. 1A-1, Rule 50, the evidence is to be considered in light most favorable to defendant (Dickens), the party resisting the motions.

Evidence in the record conflicts concerning the exact location, at the time of the accident, of the tractor-trailer truck which turned in an eastward direction from the outside northbound lane of Highway 109 onto Kennedy Road. Resolving these conflicts in favor of Dickens, there is evidence from which the jury could find that the tractor-trailer truck left the intersection and drove away in time for third party defendant, Snider, to have an unobstructed view of the intersection, to see defendant driving into his path, and to avoid the accident by braking or swerving to one side.

Plaintiff testified concerning the tractor-trailer that "Before we got clear of the crossing, the tractor-trailer was down [done?] leaving 109 on Kennedy Road. It was clear from 109 at that time we got there." On cross-examination plaintiff stated, "As to whether I am saying that the tractor-trailer had completely turned off the road and was all the way up in Kennedy Road before the wreck ever happened, it had done cleared 109 when the wreck happened." Third party defendant's motions were properly denied.

Additional evidence, considered in the light most favorable to defendant, which supports a finding that third party defendant should have seen defendant entering the highway and thus have been put on notice so that he could no longer assume that defendant would yield the right-of-way, comes from the third party defendant's own deposition:

> "The tractor-trailer had completed that turn before the wreck happened. It was already off the road when I caught up with it, until I passed it. The tractor-trailer was already off and in Kennedy Road before I got to the intersection. As to how far into Kennedy Road the tractor-trailer was when I passed it, the length of it, maybe two. I don't know how long the tractor-trailer was in feet, I couldn't say. It was longer than my car."

[2] Assignments of error are also directed by third party defendant to the court's charge to the jury. He argues that the instructions fail to explain his duty to maintain reasonable and proper control of his vehicle, that the instructions are confusing and place upon him the burden of anticipating another driver's negligence, which is a heavier burden than the law requires.

The following portion of the charge is objected to by third party defendant:

> "[M]embers of the jury, when one is driving on a main highway approaching an intersection when there may be unusual conditions existing at the scene which could exist by way of some tractor trailer rig ahead of one and turning; or other such circumstances . . . , if any such existing condition or conditions might obstruct one's view of the intersection which one is approaching and consequently any danger in so approaching might thereby be increased to

[beyond?] that which normally exists at the intersection, then the care required of the driver is increased correspondingly."

We do not believe that this instruction, when considered in light of the charge as a whole, is erroneous. In the portion of the charge immediately preceding, the court properly charged the jury on the third party defendant's right to assume that a servient driver will yield the right-of-way to a motorist on a dominant highway. The judge did nothing more than state the corresponding duty of the dominant driver to exercise the care of a reasonably prudent person under the circumstances. Considering the instruction *vis a vis* the charge as a whole, we do not find reasonable grounds to believe that the jury was misled. *Jones v. Satterfield Dev. Co.*, 16 N.C. App. 80, 191 S.E. 2d 435 (1972). Upon reading the entire charge, we do not find prejudicial error.

No error.

Judges PARKER and MARTIN concur.

GRIER G. NEWLIN, ADMINISTRATOR OF THE ESTATE OF WILLIAM HENRY KIMREY, DECEASED v. EDWIN GILL, TREASURER OF THE STATE OF NORTH CAROLINA, THE ESTATE OF THOMAS PRESTON KIMREY, ET AL.

No. 7619SC669

(Filed 16 February 1977)

1. **Escheats— collateral kinsman — great-grandparent as common ancestor**

Under G.S. 29-14 and G.S. 29-15 a collateral kinsman may not succeed to a decedent's estate unless the common ancestor of the collateral kinsman and the decedent is a parent or grandparent of the decedent; therefore, an estate escheated pursuant to G.S. 29-12 where decedent was survived only by collateral kinsmen, and the common ancestor of decedent and each collateral kinsman was a great-grandparent of the decedent.

2. **Escheats— prevention of escheat — parent or grandparent as common ancestor**

The proviso of G.S. 29-7 operates to prevent an escheat by providing for unlimited succession by collateral kinsmen when there is no collateral kinsman within the fifth degree only when the common

ancestor of the collateral kinsmen and the decedent is a parent or grandparent of the decedent.

APPEAL by defendants, Edwin Gill, Treasurer of the State of North Carolina, and the Estate of Thomas Preston Kimrey, from *Lupton, Judge.* Judgment entered 1 June 1976 in Superior Court, RANDOLPH County. Heard in Court of Appeals 19 January 1977.

Plaintiff, Grier G. Newlin, Administrator of the Estate of William Henry Kimrey, brought this action for a declaratory judgment to determine how the decedent's estate should be distributed. Defendants are decedent's surviving collateral kinsmen, including the estate of Thomas Preston Kimrey, and the State Treasurer. The following facts are not in controversy:

William Henry Kimrey died intestate on 15 March 1975. He was not survived by any living descendants of his parents or grandparents. He was survived by Thomas Preston Kimrey, a collateral kinsman in the fifth degree, and numerous collateral kinsmen in the sixth and higher degrees. All of the surviving kinsmen are related to the decedent through one of his great-grandparents. Thomas Preston Kimrey died on 31 March 1976.

The trial court concluded that the estate of William Henry Kimrey did not escheat pursuant to G.S. 29-12 and ordered that the estate "be distributed to all the collateral kin of the late William Henry Kimrey as by law provided. . . . "

The State Treasurer and the Estate of Thomas Preston Kimrey appealed.

Moser and Moser by Thad T. Moser for plaintiff appellee.

Wade C. Eulis for defendant appellee, Nancy Martin Sharpe.

Lacy L. Lucas, Jr., and J. Thomas Keever, Jr., for defendant appellees, Floyd Ray Kirkman, et al.

Morgan, Byerly, Post, Herring & Keziah by J. V. Morgan for defendant appellant, the Estate of Thomas Preston Kimrey.

Attorney General Edmisten by Assistant Attorney Charles J. Murray for defendant appellant, Edwin Gill, Treasurer of the State of North Carolina.

HEDRICK, Judge.

This appeal involves the construction of G.S. 29-12, 29-14, 29-15, and 29-7. G.S. 29-12 provides:

> "If there is no person entitled to take under G.S. 29-14 or G.S. 29-15 . . . the net estate shall escheat as provided in G.S. 116A-2."

The persons entitled to take under the provisions of G.S. 29-14 and 29-15 are the decedent's surviving spouse, lineal descendants, parents and their lineal descendants, and grandparents and their descendants. G.S. 29-7 provides:

> "There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating."

The State Treasurer contends the trial court erred in concluding that the estate did not escheat pursuant to the provisions of G.S. 29-12. The other defendants, collateral kinsmen of the decedent, contend that G.S. 29-12 and 29-7 are in direct and irreconcilable conflict, and that the trial judge correctly concluded that G.S. 29-7 prevented decedent's estate from escheating.

Statutes on the same subject should be construed so as to give effect to the fair and reasonable intendment of each statute. *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1975); *McLean v. Board of Elections,* 222 N.C. 6, 21 S.E. 2d 842 (1942); *Allen v. Reidsville,* 178 N.C. 513, 101 S.E. 267 (1919).

[1] No provision is made in G.S. 29-14 or 29-15 for any collateral kinsman to succeed to a decedent's estate unless the common ancestor of the collateral kinsman and the decedent is a parent or grandparent of the decedent. Since the common ancestor of the decedent and each collateral kinsman, in this case, is a great-grandparent of the decedent, none of the collateral kin are entitled to take under G.S. 29-14 or 29-15. The estate, therefore, escheats pursuant to the provisions of G.S. 29-12.

[2] In our opinion G.S. 29-7 has no application unless the common ancestor of the collateral kin and the decedent is a parent or grandparent of the decedent. In such an event the main clause in G.S. 29-7 operates to exclude a collateral kinsman of a sixth or higher degree from succeeding to the estate, even though he is a lineal descendent of the decedent's parents or grandparents. The *proviso* in G.S. 29-7 in order to prevent the escheat of the decedent's estate provides for unlimited succession by collateral kinsmen who are descendants of the decedent's parents or grandparents when there is no such collateral kinsman within the fifth degree.

We hold the trial court erred in concluding that the property did not escheat as provided by G.S. 29-12. This decision makes it unnecessary to discuss the assignment of error brought forward and argued by the defendant, the Estate of Thomas Preston Kimrey.

For the reasons stated the judgment is reversed, and the cause is remanded to the superior court for the entry of a judgment consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. TOMMY EDWARD BUFF

No. 7629SC654

(Filed 16 February 1977)

1. **Parent and Child § 9— wilful failure to support children — father's employment and income — sufficiency of evidence**

In a prosecution of defendant for wilful failure to support his children, defendant's contention that there was no evidence that he was employed or had any income and that the case should therefore be dismissed was without merit where there was evidence tending to show that defendant was employed at a named mill and that about the time the warrant was issued in this case defendant increased support payments from $20 a month to $25 a week.

2. **Criminal Law § 114— jury charge on State's contentions — no expression of opinion**

The trial court did not express an opinion in his jury charge in violation of G.S. 1-180 when he stated contentions of the State which were supported by ample evidence.

State v. Buff

APPEAL by defendant from *Fountain, Judge.* Judgment entered 27 May 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 18 January 1977.

On 26 September 1975 a warrant for the arrest of defendant was issued at the instance of his former wife, charging unlawful and willful failure to provide adequate support for his children in violation of G.S. 14-322. Defendant was found guilty in district court, whereupon he appealed to superior court.

At trial *de novo* in superior court before a jury, the State presented the testimony of the wife as prosecuting witness. Her testimony tended to show that she and defendant had six children by their marriage, all of whom were minors and four of whom were residing with her at the time the warrant was issued. She and defendant had been divorced for approximately four years. Prior to the issuance of the warrant, defendant had been providing only twenty dollars a month for the support of his children. On or about the time the prosecuting witness sought to obtain the warrant, defendant began paying her twenty-five dollars a week for support. Her testimony further tended to show that since October, 1975, until the time of this trial, defendant had not missed a weekly payment and that he had a job in a mill in Rutherfordton.

Defendant presented no evidence. He was found guilty and sentenced to six months' imprisonment. From this judgment defendant appeals.

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

Robert L. Harris, for the defendant.

BROCK, Chief Judge.

[1] Defendant raises three arguments for consideration. First, defendant contends that the trial court erred in denying his motion to dismiss at the close of evidence. A motion to dismiss tests the sufficiency of the prosecution's evidence; therefore, the evidence must be considered in the light most favorable to the State. *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680 (1971). Defendant contends that there was no evidence that he was employed or had any property or income on or about 26 September 1975, the date of the warrant. All the State need

produce to overcome a motion for dismissal is any evidence that tends to prove the fact in issue or that reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction. *State v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904 (1954). The State's evidence in this case tended to show first, that the defendant was employed at Reeves Mill and secondly, that about the time the warrant was issued the defendant increased support payments from twenty dollars a month to twenty-five dollars a week. Such evidence, uncontradicted by defendant, is sufficient to show employment and income to the extent necessary to overcome defendant's motion for dismissal.

[2] In his second and third arguments defendant claims that the judge in his charge expressed opinions to the jury on two occasions. In each the judge was stating the contentions of the State. An expression of opinion prohibited by G.S. 1-180 occurs when the judge's remarks imbalance the evidence in a manner which deprives the accused of a fair and impartial trial. *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974). "A statement of a valid contention based on competent evidence is not error." *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). An examination of the record discloses ample evidence to support the contentions stated by the trial court. Furthermore, objections to the statement of contentions must be made before the jury retires to afford the trial judge an opportunity for correction. *State v. Virgil, supra.* No such objections were made by the defendant.

Defendant having failed to show prejudicial error, the verdict and judgment will be upheld.

No error.

Judges BRITT and MORRIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 FEBRUARY 1977

FURNITURE CO. v. McCLOUD No. 7625DC632	Caldwell (76CVD37)	Reversed and Remanded
MORRIS v. ALEXANDER No. 7620SC670	Union (75CVS291)	Affirmed
PEGRAM v. PEGRAM No. 7617SC664	Rockingham (75CVS464)	Affirmed
STATE v. BAKER No. 7619SC633	Montgomery (75CR969) (75CR970)	No Error
STATE v. BROWN No. 7621SC637	Forsyth (75CR48951) (75CR48952)	No Error
STATE v. CAMPBELL No. 7626SC640	Mecklenburg (74CR64837) (74CR64838)	No Error
STATE v. CHAPMAN No. 761SC651	Perquimans (75CR1602)	No Error
STATE v. HAITH No. 7618SC642	Guilford (75CR19646) (75CR19648)	Affirmed
STATE v. KIRKPATRICK No. 7619SC631	Rowan (75CR13478)	No Error
STATE v. POLLNITZ No. 766SC676	Hertford (76CR1160) (76CR1162)	No Error
STATE v. SIMS No. 7626SC643	Mecklenburg (75CR71006)	No Error
STATE v. SMITH No. 7626SC630	Mecklenburg (74CR76534)	No Error
STATE v. SPRINGS No. 7619SC624	Rowan (74CR7132)	Affirmed
STATE v. STARR No. 7625SC565	Caldwell (75CR2858) (75CR2859) (75CR2860) (75CR2862) (75CR2863)	No Error—Remanded for correction in Judgment No Error No Error No Error No Error

STATE v. WATSON No. 7620SC688	Moore (76CR1130) (76CR1131)	Affirmed
TIDDY v. OWENSBY No. 7627SC653	Cleveland (73CVS1919)	Affirmed
WILLIAMS v. HOLLIDAY No. 768DC645	Wayne (76CVD263)	Judgment Awarding Support Payment Affirmed Judgment Awarding Attorney Fees Remanded

FILED 16 FEBRUARY 1977

BOWEN v. JONES No. 7628SC673	Buncombe (71CVS1973)	No Error
STATE v. BELL No. 763SC629	Carteret (76CR466)	No Error
STATE v. BLAKNEY No. 7626SC692	Mecklenburg (75CR42858)	No Error
STATE v. DORSEY No. 7626SC620	Mecklenburg (75CR69869)	No Error
STATE v. EDWARDS No. 7611SC702	Johnston (75CR10740)	Reversed
STATE v. LOCKLEAR No. 7616SC712	Robeson (76CR4112) (76CR4113) (76CR4114) (76CR4116) (76CR1637)	No Error
STATE v. THURGOOD No. 7612SC678	Cumberland (76CR16749)	No Error

NORTH CAROLINA STATE PORTS AUTHORITY, AN AGENCY OF THE STATE OF NORTH CAROLINA v. LLOYD A. FRY ROOFING COMPANY, A CORPORATION, UNITED PACIFIC INSURANCE COMPANY, A CORPORATION, DICKERSON, INC., A CORPORATION, AND E. L. SCOTT ROOFING COMPANY, A CORPORATION

No. 763SC662

(Filed 2 March 1977)

1. Limitation of Actions § 4— six year limitation — plaintiff in possession of property

The six year statute of limitations of G.S. 1-50(5) did not apply to an action for the negligent installation of roofs on a transit shed and warehouse where the transit shed and warehouse were only additions to plaintiff's existing facilities and plaintiff was at all times in possession of the buildings during construction by defendants.

2. Limitation of Actions § 4— hidden defects — extension of limitation period — contract actions

The statute extending the time of accrual of a cause of action based on a hidden bodily injury or a hidden defect in or damage to property, G.S. 1-15(b), does not apply to contract actions but applies only to tort actions.

3. Negligence § 2— negligent performance of contract

Negligent performance of a contract may constitute a tort as well as a breach of contract.

4. Negligence § 22— negligent installation of roofs — statement of claim in tort

Plaintiff's complaint stated claims for relief in tort against a general contractor and a roofing subcontractor based on the subcontractor's use of damaged materials in roofs for buildings constructed for plaintiff and the general contractor's failure to inspect and discover the defective materials.

5. Limitation of Actions § 4— negligent installation of roofs — action against subcontractor barred

Plaintiff's claim against a roofing subcontractor for damages allegedly caused by the negligent installation of roofing materials accrued when the roofing work was performed in the summer of 1967, and an action brought in 1973 was barred by the three-year statute of limitations.

6. Limitation of Actions § 4— action against contractor — hidden defects — effect of statute extending limitation period

The trial court erred in dismissing plaintiff's claim against a general contractor for the negligent installation of roofs on buildings constructed for plaintiff on the ground the claim was barred by the three-year statute of limitations where it appears from plaintiff's complaint that defendant's work on the buildings was completed some-

time in the summer of 1968, but it does not appear whether plaintiff's claim was barred before the enactment of G.S. 1-15(b), which extended the time of accrual of an action based on a hidden defect, or whether enactment of the statute extended the time for plaintiff's claim.

7. Negligence § 24— pleading wrong measure of damages

Plaintiff's complaint against a contractor for the negligent installation of a roof did not fail to state a claim in tort because the measure of damages alleged in the complaint was not the tort standard of loss in fair market value but was the contract standard of cost of repairs.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 1 July 1976 in Superior Court, CARTERET County. Heard in the Court of Appeals 19 January 1977.

Plaintiff (the Ports Authority) filed a complaint on 7 August 1973 and alleged that during the summer of 1967 it contracted with defendant Dickerson to build a transit shed and warehouse in Morehead City. Dickerson, a general contractor, subcontracted with E. L. Scott Roofing Company (Scott) to construct the roofs. Scott purchased materials, began work in the summer of 1967, and the buildings were completed and occupied in the summer of 1968.

In April 1972 the roofs were leaking and an investigation revealed that the roofing material had blistered and bubbled. The Ports Authority had to remove much of the material stored in the buildings. It alleged that the damage to the roofs was caused by the negligent installation of the roofs by defendants, Dickerson and Scott. It also sought to recover from Dickerson for breach of the building contract.

Defendants answered and pled the three year statute of limitations, among other defenses, and moved to dismiss [Rule 12(b)(6)] for failure to state a claim upon which relief could be granted. The action was dismissed as to Dickerson and Scott. The Court found that plaintiff's claim accrued during the summer of 1967 and was barred "by the Statute of Limitations as set forth in G.S. 1-52(1) and (5)." The Ports Authority appeals.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr., and Associate Attorney George J. Oliver, for plaintiff appellant, the State.

Dawkins and Glass, by W. David Lee, and White, Allen, Hooten & Hines, P.A., by Thomas J. White III, for defendant appellees.

ARNOLD, Judge.

Error is assigned to the granting of defendants' motion to dismiss under Rule 12(b)(6). Plaintiff contends that the court "misapplied and misconstrued" the law on the statutes of limitation. Several arguments are presented by plaintiff in support of its position.

First, plaintiff argues that the proper statute of limitations is ten years [G.S. 1-47(2)] because the construction contract bears Dickerson's corporate seal and the contract is therefore a sealed instrument. This question cannot be considered, however, since that contract is not part of the record before this Court, and the complaint contains no allegation that the contract is a sealed instrument.

[1] Second, it is argued by the Ports Authority that the six year statute of limitations, G.S. 1-50(5), applies. This argument is also incorrect. Plaintiff was at all times in possession of the buildings during the construction by defendants. The transit shed and warehouse were only additions to plaintiff's facilities in Morehead City. G.S. 1-50(5) contains this proviso:

> "This limitation shall not apply to any person in actual possession and control as owner . . . of the improvements at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury. . . ."

G.S. 1-50(5) does not apply. *See Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973).

In its third argument plaintiff contends that even if the three year statute of limitations is controlling, nevertheless its claim is not barred. This argument is tenable.

Plaintiff alleges an action in tort against Scott and Dickerson. It also alleges a breach of contract as against Dickerson. From the complaint it appears that the claim in contract arose

in the summer of 1968 when plaintiff occupied the two buildings in question. Nothing else appearing, the time of occupation must have been when the contract was completed, and this is when the breach of contract occurred. Again, judging from the complaint, any claim in tort also arose during the summer of 1968, since *a claim for negligent construction of a building ordinarily arises when the general contractor delivers the building. Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1 (1965); *see also: Sellers v. Refrigerators, Inc., supra.*

G.S. 1-15(b) provides:

> "Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief."

This statute supersedes the common law rule that a claim arises, and the statute of limitations begins to run, as soon as the injured party's rights are violated. *See also* G.S. 1-15(a). Thus, under our former law, a cause of action could be barred before the aggrieved plaintiff discovered his plight, where there existed a hidden or unknown defect or injury.

[2] Though only a few reported cases have involved G.S. 1-15(b), most of those cases arose in tort. We find no authority to suggest that the statute applies to contracts. *See, e.g., Sellers v. Refrigerators, Inc., supra,* and *Raftery v. Construction Co.,* 291 N.C. 180, 230 S.E. 2d 405 (1976). *Also, Williams v. GMC,* 393 F. Supp. 387 (M.D. N.C., 1975). We conclude that the statute does not extend the statute of limitations in contract actions. The statute only applies where a hidden bodily injury or a hidden defect in or damage to property is an "essential element" of the cause of action. Such an injury, defect or damage might be material in an action for breach of contract, but it would not be an "essential element." Bodily injury, damage to and defects in property are, however, "essential elements" in many

tort actions. *See, Construction Co. v. Holiday Inns,* 14 N.C. App. 475, 477, 188 S.E. 2d 617 (1972). (The products liability action for breach of warranty is controlled by a separate statute of limitations, G.S. 25-2-725.)

The court properly dismissed the third cause of action alleged by plaintiff in the amended complaint. This cause of action was in contract and is barred because it was not timely filed.

[3] Plaintiff's second cause of action, alleged against both defendants, purports to arise in tort out of the negligent failure to construct the roofs properly. Defendants contend that the only cause of action against them lies in contract (1) because the only duty they owed plaintiff was the duty defined by contract; (2) because the only allegation of physical injury to plaintiff concerned the roofs which were the subject of the contract; and (3) because the measure of damages for injuries to the roofs, as alleged in the complaint, is not the accepted tort standard of loss in the fair market value but instead the contract standard of cost of repairs. We disagree. "Negligent performance of a contract may constitute a tort as well as a breach of contract, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done." *Sims v. Mobile Homes,* 27 N.C. App. 25, 28, 217 S.E. 2d 737 (1975).

Legal writers have defined a tort as a wrong unconnected with a contract. *See,* 2 Harper and James, The Law of Torts, § 18.6, p. 1049 (1956); 1 Cooley on Torts, § 60, p. 169 (4th ed., 1932); Bishop on Non-Contract Law, § 73 (1889). Without attempting a better definition, we agree with Dean William L. Prosser that this one is unsatisfactory and leads to confusion. Prosser on Torts, § 1 (4th ed., 1971). Actually, claims for tort and breach of contract can and do sometimes arise out of the same facts. The only restriction is against double recovery for the same injury. *Williamson v. Dickens,* 27 N.C. 259 (1844).

The relationship between tort and breach of contract is frequently stated in this way: The breach of a contract is never a tort unless it is also the breach of a common-law duty. *Insurance Co. v. Sprinkler Co.,* 266 N.C. 134, 146 S.E. 2d 53 (1966); *Toone v. Adams,* 262 N.C. 403, 407, 137 S.E. 2d 132 (1964); *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893 (1955); *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551 (1951); *Sims*

v. Mobile Homes, supra; 1 Cooley on Torts, *supra;* Bishop on Non-Contract Law, § 76 (1889). Special duties sometimes arise as a matter of law between parties to certain contracts because of the historical evolution of the common law writs of case and assumpsit. These special duties attend contracts for bailment, common carriage of freight and passengers, and other such public undertakings. See, e.g., *Insurance Assoc. v. Parker,* 234 N.C. 20, 65 S.E. 2d 341 (1951) (bailment); *Pace Mule Co. v. Seaboard Air Line Ry. Co.,* 160 N.C. 215, 76 S.E. 513 (1912) (common carrier); Prosser, The Borderland of Tort and Contract, in Selected Topics on the Law of Torts, 380 (1954); Cooley on Torts, *supra.* However, there is no need to dwell on these examples, since the allegation contained in the Ports Authority's complaint is of negligence. Negligence is the tortious breach of the ordinary duty of due care, and this duty may arise as a consequence of contractual relationships. *Jewell v. Price, supra; Insurance Co. v. Sprinkler Co., supra; Toone v. Adams, supra; Pinnix v. Toomey, supra; Council v. Dickerson's, Inc., supra; Sims v. Mobile Homes, supra.*

It was said in *Flint & Walling Mfg. Co. v. Beckett,* 167 Ind. 491, 79 N.E. 503 (1906):

> "If a defendant may be held liable for the neglect of a duty imposed on him, independently of any contract, by operation of law, *a fortiori* ought he to be liable where he has come under an obligation to use care as the result of an undertaking founded on a consideration." *Id.* at 498.

In *Pinnix v. Toomey, supra,* a building contractor and a plumbing contractor separately contracted to construct parts of a building. The plumber negligently flooded the basement, causing the building contractor's half-finished wall to collapse. The building contractor sued in tort. He alleged the contract between the plumber and the buyer and, in addition, the specifications contained therein. His purpose was to show negligence by showing violation of the specifications. The plumbing contractor moved to strike both the contract and the specifications from the complaint. Our Supreme Court held that the specifications ought to be stricken but that the fact of the contract ought to remain. The court said:

> ". . . Moreover, while [the] duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual

relationship, the theory being that accompanying every contract is a common law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. But it must be kept in mind that the contract creates only the relation out of which arises the common law duty to exercise ordinary care. Thus in legal contemplation the contract merely creates the state of things which furnishes the occasion for the tort. . . . " *Id.* at 362.

The case of *Council v. Dickerson's, Inc., supra,* is similar. There a highway paving contract placed the contractor and a passing motorist in a relationship which gave rise to a duty of due care. And, in the case of *Gorrell v. Water Supply Co.,* 124 N.C. 328, 32 S.E. 720 (1899), a resident of Greensboro successfully sued the municipal water supplier in tort, because the water company negligently failed to maintain the water pressure required to fight fires, as stipulated in the water company's contract with the city.

It is possible that a cause of action in tort, arising on facts which also constitute a breach of contract, exists against both Dickerson, which was in privity with the plaintiff, and Scott, though it was not in privity. The elements of this particular tort are (1) a duty of reasonable care owed by one person to another and (2) the breach of that duty, (3) which is the proximate cause (4) of harm to the person to whom the duty is owed. *Pace Mule Co. v. Seaboard Air Line Ry. Co., supra;* Prosser on Torts, *supra* § 30.

[4] Taking these elements in order, first, there was a duty of due care owed by both defendants to the Ports Authority. Second, the facts alleged amount to a breach of that duty. A breach of contract does not always amount to a breach of tort duty. Pure non-feasance, i.e., failure to begin performance, is usually not a tort. Prosser, The Borderland of Tort and Contract, *supra.* But in this case there is alleged misfeasance, an action taken without proper care. It is alleged that Dickerson and Scott were responsible for using damaged materials in construction of the roofs. Scott used the material and Dickerson permitted it. While Dickerson's alleged failure to inspect and discover the problem was an omission, it may nonetheless constitute a breach of duty. In *Insurance Co. v. Sprinkler Co., supra,* there was a breach when the contractor failed to dis-

cover and correct a flaw in the sprinkler system. Also, in *Council v. Dickerson's, Inc., supra,* there was a breach of duty when the contractor failed to post adequate warnings.

The elements of proximate cause and harm are also satisfied. There is a causal connection, which is reasonable, natural and probable, between the breach of due care, i.e., the negligent installation of roofing materials, and the tortious injury, a leaking roof.

[5] Plaintiff has stated a claim for relief in tort, but with respect to Scott, the subcontractor, the claim is barred. The alleged tortious act by Scott was the negligent installation of the roofing materials. As soon as Scott negligently performed plaintiff had a right to bring suit. Therefore, plaintiff's claim accrued, according to its complaint, in the summer of 1967 when it is alleged that Scott performed the roofing work. A cause of action accrues, in general, and starts the statute of limitations, as soon as the right to bring suit arises. *See Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1957). Plaintiff was barred, as against Scott, by the statute of limitations, in the summer of 1970.

[6] However, in this case in order to tell whether plaintiff is barred as against defendant Dickerson, by the statute of limitations, it must be determined from plaintiff's pleadings when the cause of action accrued. From those pleadings it appears that plaintiff occupied the buildings when they were completed sometime during the summer of 1968. The statute of limitations ordinarily would have run sometime during the summer of 1971. It was on 21 July 1971 that the General Assembly enacted G.S. 1-15(b) as previously discussed. Thus, it does not appear whether plaintiff's claim was barred before the enactment of G.S. 1-15(b) or whether the enactment of G.S. 1-15(b) extended the time for plaintiff's claim. The order dismissing plaintiff's claim against Dickerson under Rule 12(b)(6) must be reversed.

[7] The argument by defendants that plaintiff failed to state a claim in tort because it pled the wrong measure of damages, the cost of repairs to the roofs instead of the reduction in fair market value, cannot be maintained. G.S. 1A-1, Rule 8(a)(2) only requires that the complaint include: "A demand for judgment for the relief to which he deems himself entitled." The Ports Authority deems itself entitled to money damages, and

money damages are appropriate. In addition, Rule 8(a) (2) permits the pleading of alternative theories of relief, and plaintiff includes a prayer for all relief which is appropriate and just, which would support an award of money damages. Moreover, it is not a crucial error to demand the wrong relief. Rule 54(c) provides that "every final judgment shall grant the relief to which the party . . . is entitled, even if the party has not demanded such relief in his pleadings."

The order dismissing plaintiff's action against Scott is affirmed. The order dismissing plaintiff's action against Dickerson is reversed.

Affirmed in part.

Reversed in part.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL JONES

No. 767SC696

(Filed 2 March 1977)

1. **Automobiles § 112— speed of vehicle — admissibility of opinion evidence**

In a prosecution for manslaughter the trial court did not err in allowing a deputy sheriff who observed defendant's vehicle for some time prior to the accident in question and at the time of the accident to give his opinion of the speed of the vehicle; moreover, defendant waived his objection to testimony about speed where similar testimony was permitted without objection.

2. **Criminal Law § 75— defendant as driver of car — no arrest — admissibility of statement**

The trial court in a manslaughter prosecution did not err in permitting a deputy sheriff to testify that defendant told him immediately after the accident that he was the driver, since, at the time defendant made the statement, he was not under arrest or in custody, and the inquiry by the deputy was a reasonable and necessary on-the-scene investigation.

3. **Criminal Law § 169— evidence that defendant drove car — admission not prejudicial**

Even if the trial court in a manslaughter prosecution erred in permitting a deputy sheriff to testify that a passenger told the deputy

that defendant was the driver of the car in question, such error was not prejudicial, since defendant himself admitted that he was driving the car.

4. **Criminal Law § 35— offense committed by another — admissibility of evidence**

The trial court in a manslaughter prosecution did not err in denying defendant the right to incriminate another person as the driver of the vehicle causing death instead of defendant, since, in order to be competent, evidence that the crime was committed by another must point unerringly to the latter's guilt.

5. **Criminal Law § 104— motion to dismiss — evidence considered**

All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon a motion to dismiss.

6. **Automobiles § 113— high speed in heavy traffic — manslaughter — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for manslaughter where it tended to show that defendant drove at an excessive speed in heavy traffic; defendant drove to his left of the median; defendant's vehicle struck another vehicle; and the deaths of the occupants of the second vehicle were the proximate result of the illegal operation of defendant's vehicle.

APPEAL by defendant from *Cowper, Judge.* Judgments entered 1 April 1976 in Superior Court, NASH County. Heard in the Court of Appeals 8 February 1977.

Defendant was charged in two bills of indictment with the felonies of manslaughter in the deaths of Carolyn James Stevey and James Martin Stevey, Jr.

At trial it was stipulated that Carolyn James Stevey and James Martin Stevey, Jr., each died at about 4:02 p.m. on 29 December 1975 as a proximate result of injuries received in a collision between a 1972 Plymouth automobile in which they were riding and a 1974 Ford Thunderbird automobile on Sunset Avenue, Rocky Mount, North Carolina, at approximately 4:02 p.m. on 29 December 1975.

The State's evidence tended to show the following: In the afternoon of 29 December 1975 Deputy Sheriff Moody of Nash County was driving east towards Rocky Mount on Highway 64 leading from the business district of Nashville. He observed a Ford Thunderbird make a dangerous turn in front of another vehicle in order to turn onto the ramp leading to the Highway

64 bypass. The deputy pursued the Ford Thunderbird onto the bypass and turned on his blue lights and siren. The Ford Thunderbird accelerated to 100 to 120 miles per hour. The Thunderbird turned right on the Winstead Avenue exit, knocked down the stop sign at the end of the exit, and turned right onto Winstead Avenue, traveling in a southerly direction.

Winstead Avenue is a four-lane street with two lanes for northbound traffic and two lanes for southbound traffic. At its intersection with Sunset Avenue there is an additional lane for traffic turning left from Winstead onto Sunset. There are electrically operated stop and go traffic lights at the intersection. As the Thunderbird, traveling south on Winstead, approached the Sunset intersection, the light for traffic on Winstead was red. An automobile was stopped in the left turn lane on Winstead waiting for the green light. The Thunderbird drove to the left of the stopped car, drove south on a lane for northbound traffic, and made a left turn onto Sunset Avenue.

Sunset Avenue is a four-lane street with two lanes for eastbound traffic and two lanes for westbound traffic. The eastbound and westbound lanes are divided by a painted median. Traffic in the eastbound lanes and in the westbound lanes was heavy. The posted speed limit on Sunset Avenue was 35 miles per hour. The Thunderbird traveled easterly, weaving back and forth in the eastbound lanes passing other vehicles. At times the Thunderbird traveled between 70 and 80 miles an hour as it accelerated to pass other vehicles. As the Thunderbird accelerated to about 70 miles per hour to pass a vehicle in front of it, the Thunderbird crossed the median, ran into the lane for westbound traffic, and crashed into the front of the 1972 Plymouth. The automobile immediately behind the Plymouth crashed into the rear of the Plymouth. The Thunderbird spun around into a position almost heading back in the direction from which it had come.

Except for a brief time at a curve on the Highway 64 bypass, Deputy Moody kept the Thunderbird in sight and was steadily pursuing it with his blue lights and siren on. Deputy Moody saw the collision occur.

Immediately after the accident defendant was in the driver's seat of the Thunderbird. He was assisted from the driver's seat and helped to the curb. One Aaron Boone was a passenger in the Thunderbird and was also assisted to the curb. Boone

suffered a broken leg. Deputy Moody asked defendant and Boone who was driving the car. Boone pointed to defendant and said, "He was driving." Deputy Moody then asked defendant if he (defendant) was driving, and defendant said he was. Deputy Moody then asked defendant for his driver's license and vehicle registration. The driver's license was for William Earl Jones, 408 Dixie Street, Enfield, North Carolina. The vehicle was registered in the name of Lillie Mason Smith, 408 Dixie Street, Enfield, North Carolina.

Defendant and Boone were transported to the Nash General Hospital by the rescue squad. Officer Thompson of the Rocky Mount Police Department assisted Deputy Moody during the investigation at the scene. Later Officer Thompson went to Nash General Hospital and arrested defendant on the two charges of manslaughter.

Defendant offered no evidence.

The cases were submitted to the jury on two charges of involuntary manslaughter, and upon verdicts of guilty of involuntary manslaughter two judgments for concurrent terms of eight years' imprisonment were entered.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Hux & Livermon, by James S. Livermon, Jr., for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that it was error to permit Deputy Moody to give his opinion of the speed of the defendant's vehicle while it was traveling on Sunset Avenue and at the time of the wreck. This argument is without merit. Deputy Moody was in pursuit of defendant's vehicle for a long while. He observed it on Highway 64, on Winstead Avenue, and on Sunset Avenue. Defendant's vehicle was in the deputy's view at the time of the impact. The inconsistencies which defendant maintains he developed in the deputy's testimony on cross-examination, if inconsistencies were in fact developed, were for resolution by the jury. Inconsistencies, standing alone, do not render testimony inadmissible. In any event Deputy Moody was permitted to testify without objection that in his opinion the Thunderbird automobile was traveling "approximately 70

miles per hour at the time it left the eastbound lane of Sunset Avenue, crossed over into the westbound lane and struck the Plymouth automobile." Defendant waived the benefit of his objection to testimony of his speed by permitting the above testimony of his speed to be admitted without objection. *State v. Creech*, 265 N.C. 730, 145 S.E. 2d 6 (1965).

[2] Defendant argues that it was error to permit Deputy Moody to testify that defendant told the deputy that defendant was driving the Thunderbird. Before the admission of defendant's statement, a *voir doir* was held from which the trial judge determined that the statement was admissible. At the time Deputy Moody asked who was driving the car, defendant and Boone were not under arrest nor were they in custody. They had been assisted from the Thunderbird and were sitting on the curb. The inquiry by the deputy was a reasonable and necessary on-the-scene investigation. Clearly there was no police dominated atmosphere, and there was no coercion of defendant. In our view defendant's statement was properly admitted. *See State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974).

[3] Defendant argues that it was error to permit Deputy Moody to testify that Boone told the deputy defendant was driving the car. After checking on the condition of the persons in the Plymouth and after calling for ambulances, Deputy Moody walked over to where defendant and Boone were seated on the curb. He inquired of the two of them, "Who was driving the vehicle?" Boone answered by pointing his finger at defendant and saying, "He was." Immediately thereafter defendant answered that he (defendant) was driving. Assuming, *arguendo*, that Boone's statement to the deputy was inadmissible, it cannot be held to be prejudicial error. Defendant admitted that he was driving the car. The witness Buchan, who reached the Thunderbird before defendant was assisted therefrom, positively identified defendant as the person in the driver's seat immediately after the accident. "To warrant a new trial it should be made to appear by defendant that the admission of the evidence complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued if the evidence had been excluded." *State v. Temple*, 269 N.C. 57, 152 S.E. 2d 206 (1967).

[4] Defendant argues that it was error to deny him the right to incriminate Boone as the driver of the Thunderbird instead

of defendant. Defendant sought to show that Boone had no driver's license and that Boone was under the influence of alcohol. Defendant argues that had he been permitted to show these two things, it would have established that Boone was the driver of the Thunderbird. Defendant reasons that there was no cause for defendant to flee from the deputy, while there was cause for Boone to flee. Therefore, since Boone had a cause to flee from the deputy, it would be more reasonable to believe that Boone was the driver. This is a resourceful argument but not convincing. In order to be competent, evidence that the crime was committed by another must point unerringly to the latter's guilt. *State v. Smith,* 211 N.C. 93, 189 S.E. 175 (1937). "Evidence which can have no effect except to cast suspicion upon another or to raise a mere conjectural inference that the crime may have been committed by another . . . is not admissible." *State v. Shinn,* 238 N.C. 535, 78 S.E. 2d 388 (1953). *See* 4 Strong, N. C. Index 3d, Criminal Law, § 35.

[5, 6] Finally defendant argues that his motion to dismiss should have been allowed. Basically defendant maintains that the evidence identifying him as the driver and the evidence of the speed of the vehicle were incompetent and that evidence to establish that Boone had a motive to flee from Deputy Moody was erroneously excluded. With the identification of the driver and evidence of the speed stricken, and the motive of Boone admitted, defendant maintains that his motion to dismiss should have been allowed. This argument overlooks a fundamental principle in our jurisprudence. All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon a motion to dismiss. *State v. Walls,* 4 N.C. App. 661, 167 S.E. 2d 547 (1969). When considered in the light most favorable to the State, the evidence in the present case tends to show that defendant drove at an excessive speed in heavy traffic; that defendant drove to his left of the median; that his Thunderbird struck the Plymouth; and that the deaths of the occupants of the Plymouth were the proximate result of the illegal operation of the Thunderbird. "An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *State v. Cope,* 204 N.C. 28, 167 S.E. 456 (1933); *State v. Stewardson,* 32 N.C. App. 344,

232 S.E. 2d 308. Evidence of an unlawful killing of a human being, unintentionally and without malice, proximately resulting from some act done in a culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, will support a conviction of involuntary manslaughter. *State v. Robinson,* 15 N.C. App. 542, 190 S.E. 2d 427 (1972).

In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MORRIS concur.

GLEN DOLEN LAWRENCE, T/A LAWRENCE NURSERY v. RELIANCE INSURANCE COMPANY

No. 769DC718

(Filed 2 March 1977)

1. Insurance § 76— fire damage — cost of repairs — replacement cost — cash value

In an action to recover under an insurance policy for damages to a tractor allegedly caused by fire wherein it was disputed whether all damages to the tractor were caused by the fire, evidence of the cost of all repairs to the tractor, the purchase price of the tractor, and the fair market value of the tractor before and after the fire was relevant to show that the cost of repairs was less than the cash value or replacement cost within the provision of the policy limiting defendant insurer's liability under the policy.

2. Trial § 10— expression of opinion — harmless error

Where a witness testified he was not undertaking to tell the jury that he knew the cause of a tractor fire, the trial judge's comment that he thought "that's exactly what he has done" did not constitute a prejudicial expression of opinion on the evidence since the observation made by the court was so apparent to the jury that any error was harmless.

3. Evidence § 48— qualification of expert — ruling by implication

The trial court by implication ruled that a witness was an expert where plaintiff offered the witness as an expert and asked him questions regarding his qualifications, and the trial court overruled defendant's objection to a hypothetical question asked the witness.

4. Evidence § 49— expert testimony — possible cause

The trial court did not err in permitting plaintiff's expert witness to testify "that it was possible that the fire damaged the interior of the engine" where the testimony was in response to a question as to whether the fire "could" have caused the damage to the engine.

5. Insurance § 76— fire damage to tractor — deductible

In an action to recover under an insurance policy for fire damage to a tractor, the trial court erred in entering judgment on the verdict without reducing the amount of the verdict by the amount of a "deductible" set forth in the policy.

APPEAL by defendant from *Peoples, Judge.* Judgment entered 7 May 1976 in District Court, VANCE County. Heard in the Court of Appeals 10 February 1977.

In this action plaintiff seeks to recover under a policy of insurance issued by defendant for damages to his International 150 tractor loader caused by fire or collision. Defendant denied that the damage was caused by fire, alleging that it was caused from the tractor becoming overheated.

Plaintiff was allowed to amend his complaint to allege in the alternative that the oil pan of his tractor was struck by a piece of timber or similar object, resulting in a bending of the oil pan which in turn caused the piston rod to knock a hole in the pan, allowing dirt to sift through the engine in sufficient quantity to cause extensive damage.

At trial the insurance policy was introduced into evidence. Pertinent provisions of the policy indicate coverage for damages caused by fire or collision, with exclusions for losses "caused by or resulting from mechanical or structural breakage or failure; wear and tear . . . gradual deterioration or depreciation." The policy also limits defendant's liability to the actual cash value of the property at the time of the loss, but in no event to exceed the cost of repairs to, or replacement cost of, the machine. Plaintiff offered further evidence tending to show:

He purchased the tractor in 1969 for $25,000 and in 1970 purchased the insurance policy in question from defendant. The fair market value of the machine before and after the fire was $17,500 and $14,000 respectively. On 13 April 1971 he loaned the tractor to a neighbor, Charles King, for the purpose of loading some dirt. King's employee, James Ayscue, drove the tractor about 50 to 75 yards, over some timbers (either two by fours or one by fours) and had loaded one load of dirt when

he noticed the engine heating up; he turned the engine off and as he was walking away to get some water for it, he noticed that the tractor was on fire. Ayscue and King poured several buckets of water on the tractor around the engine but the fire continued to burn for some fifteen minutes. The fire appeared to be coming from the belly pan located under the oil pan, both of which were underneath the tractor. After the fire, oil was seen on the ground under the tractor and the hoses and wires on the engine were burned.

The tractor was taken to Raleigh for repairs; after it had been dismantled plaintiff saw that the oil pan had a hole in it and was bent upwards so that the rod would hit it each time it came down. W. H. O'Neal was the foreman in charge of making the repairs and plaintiff paid a bill for the repairs in the amount of $2,657.04.

At the time of the fire the tractor had been operated approximately 1100 hours and had never overheated before. The machine had been carefully and regularly maintained by the changing of the oil and air filters at least every three weeks. In the opinion of Willie Hill, accepted by the court as an expert in the field of heavy equipment maintenance, it was possible that a fire on the tractor would damage it to the extent of the repair work specified in the bill paid by plaintiff.

Defendant's evidence consisted primarily of the testimony of O'Neal whom the court qualified as an expert on International 150 tractor loaders. He testified in pertinent part: In his opinion the only damage to the tractor caused by fire was the burning of the hoses, wires and paint, the repair of which cost $672.30; and that the other parts which he repaired, the crankshaft, pistons, sleeves and oil pump, were worn out from lack of maintenance and the use of dirty oil. In his opinion the dirt got into the oil through the hole in the oil pan but it probably took two or three days for the dirt to get in and damage the engine. Normally a machine similar to plaintiff's would go 3,000 to 4,000 hours before needing any major overhaul, but plaintiff's machine had worn out much quicker due to the dirty oil. Every part listed on the repair bill *could* have been damaged by fire if it got hot enough, but, in his opinion, in this particular case the main damage was not caused by fire.

Issues were submitted to and answered by the jury as follows:

1. Was the plaintiff's International 150 Tractor damaged by fire within the meaning of the insurance policy as alleged in the complaint?

ANSWER: Yes.

2. If so, in what amount?

ANSWER: $2,657.04.

3. Was the plaintiff's 150 International Tractor damaged by collision within the meaning of the insurance policy as alleged in the complaint?

ANSWER: (No answer)

4. If so, in what amount?

ANSWER: (No answer)

From judgment entered on the verdict in favor of plaintiff in the sum of $2,657.04, plus interest from date of judgment, and costs, defendant appealed.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn, for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay, by T. Edward Johnson, for defendant appellant.

BRITT, Judge.

[1] Defendant contends the court erred in allowing plaintiff to testify that the cost of repairs to his tractor was $2,657.04 and in admitting into evidence an itemized statement of the repairs. Defendant argues that said evidence allowed the jury to infer that all damages resulted from the fire. We find no merit in the contention.

The policy limited defendant's liability to the cost of repairs, provided said cost was less than the actual cash value of the tractor or its replacement cost. Plaintiff showed that the actual cash value and replacement cost of the tractor were considerably more than the cost of repairs, therefore, evidence with respect to the cost of repairs was relevant. Furthermore, any error was rendered harmless in view of subsequent testimony by defendant's witness O'Neal who pointed out the items on the statement which defendant claimed were not caused by the fire. In fact, during the trial defendant admitted its

liability for $672.30, the cost of replacing burned items on the outside of the motor, and defendant used the statement to designate items for which it admitted liability.

Defendant contends the court erred in allowing plaintiff to testify as to the fair market value of the tractor before and after the fire and in admitting into evidence certain documents showing the purchase price of the tractor. This contention has no merit. As indicated above this evidence was relevant to show that the cost of repairs was less than the value of the tractor or the cost of replacement.

[2] Defendant contends that the court erred in that it expressed an opinion on the evidence. The record reveals that during the cross-examination of plaintiff's witness Jimmy Lawrence, the witness stated that he thought the fire could have been caused by the rod hitting the bent oil pan. Defendant's attorney then asked, "In other words, you yourself, are not undertaking to tell the jury that you know what caused the fire?" Lawrence replied, "No." The court then interjected, "Well, I think that's exactly what he has done." We find no merit in this contention.

It was very apparent to the jury that defense counsel had elicited an inconsistent statement from the witness. While it would have been better for the court not to have commented, we think the observation made by the court was so apparent to the jury that any error was harmless.

Defendant contends the court committed reversible error in allowing plaintiff's witness to testify as an expert witness "that it was possible that the fire damaged the interior of the engine." We find no merit in this contention.

[3] Testimony challenged here was given by plaintiff's witness Hill. Defendant argues first that the court never declared the witness to be an expert on engines of the type in question but we think the court did so by implication. The record reveals that plaintiff offered the witness as an expert and asked him numerous questions regarding his qualifications. The witness was then asked a hypothetical question, defendant objected, the court overruled the objection and the witness answered. Defendant then moved to strike the answer and the motion was overruled. In 1 Stansbury's North Carolina Evidence, Brandis Revision, § 133, p. 431, we find:

"Objection that the witness is not qualified as an expert is waived if not made in apt time. The absence of a record finding in favor of his qualification is no ground for challenging the ruling implicitly made by the judge in allowing him to testify. In such a case, at least if the record indicates that such a finding could have been made, it will be assumed that the judge found him to be an expert, or that his competency was admitted, or that no question was raised in regard to it."

[4] Defendant next argues that under authority of *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964), it was entitled to have the witness' answer stricken. We disagree. The record reveals that the pertinent hypothetical question was ended as follows:

"Have you an opinion, satisfactory to yourself, assuming that further, that the jury should find as a fact that after the fire on April 13th, repairs were made to this tractor requiring labor and parts as shown on plaintiff's Exhibit Number 2. Have you an opinion, satisfactory to yourself, as to whether fire could cause damage to the tractor to the extent that repairs requiring the labor and parts specified in plaintiff's Exhibit Number 2 would be necessary?"

The witness was then asked if he had an opinion, he replied that he did and when asked to give his opinion stated, "I think that it's possible that the fire would damage the pistons and the sleeves and gaskets and everything about an engine resulting from the heat."

Defendant insists that Mr. Hill's answer violated the North Carolina rule restated in *Lockwood* that "if the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it *did* produce such result"; and that *Lockwood* holds that the "could or might" stated in the rule refers to probability and not mere possibility.

In 1 Stansbury's North Carolina Evidence, Brandis Revision, § 137, pp. 453-455, we find:

"If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion

a particular event or condition *could* or *might* have produced the result in question, not whether it *did* produce such result. A question in the latter form has been thought to be objectionable as invading the province of the jury, although a more plausible (but still unconvincing) objection would seem to be that it unwarrantedly excludes the possibility of some other cause not referred to in the hypothetical question. In any event, the rule is an unfortunately technical one, and in several cases the Court has avoided its application by drawing narrow distinctions or by finding that any error in admission was harmless. Though currently a rigid observation of the rule is the only safe course for counsel to follow, it is devoutly to be hoped that the Court will soon find an occasion to abandon it, thus allowing a witness to make a positive assertion of causation when that conforms to his true opinion, reserving 'could' and 'might' for occasions when he feels less certainty."

We do not think *Lockwood* controls defendant's contention in the instant case. First, we note that in *Lockwood,* where plaintiff was seeking recovery for personal injury, plaintiff's medical expert witness was asked if he had an opinion, based on the hypothesis stated, whether the accident was a "contributing factor" to plaintiff's attack of amnesia and depression on a specified date and his inability to carry on his work and business. The witness responded that "it *may* have had an influence on his condition." (Emphasis ours.) Although the court restated the rule and used the language set out above, it failed to find error in the question propounded to, and the answer given by, the medical expert.

In the second place, the rule addresses itself to the question asked and not necessarily the answer given. It will be noted that in the case *sub judice* the witness was asked if he had an opinion whether the fire *could* have caused the damage to the motor complained of. Although the witness used the term "possible" in his answer, we think the effect of the use of the word in his answer was tempered by the wording of the question.

In the third place, we think any error the court committed in not striking the answer was rendered harmless by the testimony given without objection by defendant's witness O'Neal on cross-examination as follows:

"Oh yes, if it gets hot enough heat can damage. If fire gets hot enough, it can cause a crankshaft to warp, a piston rod to melt, and a piston to crack. Well, if a piston becomes too hot, it can lose its tension in the ring. It's true that every part that is placed in my bill could have been damaged by fire if it got hot enough . . . . "

Defendant contends the court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict in the amount of $672.30, the amount tendered by defendant. Defendant argues that plaintiff's evidence failed to establish a collision claim and yet the jury evidently considered the damages complained of as being caused by a collision of the tractor with timber. This contention has no merit. The policy provided coverage for damage caused by collision or fire and plaintiff's evidence tended to show that all of the damage complained of was caused by fire and the jury verdict was returned on that contention.

Defendant contends the court erred in its instructions to the jury. We have carefully reviewed the instructions and conclude that when they are considered as a whole, they are free from reversible error.

[5] Finally, defendant contends the court erred in entering judgment on the verdict without reducing the amount of the verdict by $100, the amount of "deductible" set forth in the policy. This contention has merit, therefore, the amount of the judgment is hereby reduced to $2,557.04.

Except for the trial court's failure to give defendant credit for the $100, we find no error in the trial or judgment.

No error in trial; judgment modified and affirmed.

Judges HEDRICK and CLARK concur.

In re Spinks

IN THE MATTER OF THE ADOPTION OF NANCY MARGARET SPINKS

No. 7619SC728

(Filed 2 March 1977)

1. **Adoption § 5; Notice § 1— adopted child — natural parents' identity sought — notice to natural parents not required**

In a proceeding to require respondent to reveal to petitioner, an adopted child, the identity of her natural parents, the applicable statute, G.S. 48-25(c), did not require that the natural parents be served with summons and notice of petitioner's motion.

2. **Adoption § 5— adopted child — natural parents' identity sought — finding required for disclosure**

In North Carolina upon motion to open the files or the record of an adoption proceeding, there must be a finding of fact that the information sought to be revealed is necessary for the best interest of the child or the public before an order can be entered requiring disclosure of the information, and, in making such a determination, the trial judge should carefully weigh the interests of the child *and* the public, including the interests of the adoptive parents and the natural parents; however, any conflict should be resolved in favor of the best interest of the child. G.S. 48-26; G.S. 48-1(3).

3. **Adoption § 5— adopted child — natural parents' identity sought — best interests of child not determined — disclosure order improper**

In a proceeding to require respondent to reveal to petitioner, an adopted child, the identity of her natural parents, the trial court erred in failing to determine the best interests of the child, and the court's conclusion that it could consider only "the benefit or lack thereof resulting from the revelation of this information to the petitioner and/or society" failed to support the order of disclosure in this case.

APPEAL by respondent from order of *Tillery, Judge*. Order entered 21 July 1976 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 10 February 1977.

Petitioner, Nancy Margaret Spinks, now 18 years of age, filed a motion in this cause pursuant to G.S. 48-26 before the Clerk of Superior Court of Montgomery County requesting that the identity of her natural parents be revealed to her. Notice of the motion and hearing was duly served on the Director of the Montgomery County Department of Social Services (respondent) as required by statute. The clerk summarily denied the motion and the petitioner gave notice of appeal.

Following a hearing in superior court the trial judge found facts, made conclusions of law and entered an order as follows:

1. That the petitioner/adopted child has repeatedly been the victim of rumors concerning the identity of her natural parents and has suffered great mental torment due to these unfounded rumors.

2. That the petitioner/adopted child has made diligent and consistent efforts to find out the true identity of her natural parents.

3. That the petitioner/adopted child has had a disturbed emotional and mental outlook as a result of not being able to correctly ascertain the true identity of her natural parents.

4. That the petitioner/adopted child is not able to accept her adoptive status but continually and persistently has made attempts to find out the identity of her natural parents.

5. The adoptive parents, Mr. and Mrs. Russell Spinks have fully consented to and encouraged their adopted child, Nancy Margaret Spinks, to petition this Court to find out the whereabouts and true identity of her natural parents.

6. That the Montgomery County Department of Social Services has encouraged both the adopted parents and adopted child to seek legal counsel in order to initiate these proceedings pursuant to G.S. 48-26.

BASED UPON THE FOREGOING FINDINGS OF FACT HIS HONOR MADE THE FOLLOWING CONCLUSION OF LAW:

1. That pursuant to the applicable statutory authority, G.S. 48-26, his Honor was obliged only to consider the benefit or lack thereof resulting from the revelation of this information to the petitioner and/or society; however, he was unable to consider the effect, if any, upon the petitioner's natural parents for their identity was not known to his Honor nor were they before the Court as provided for in G.S. 48-26.

NOW THEREFORE, BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Director of Montgomery County Department of Social Services, Mr. Frank Ledbetter, is hereby to reveal

the identity and whereabouts of the petitioner's natural parents to her within a reasonable time from the entry of this Order.

From the entry of this order, the respondent director appealed.

Harry E. Fisher for petitioner appellee.

Charles H. Dorsett for respondent appellant.

BRITT, Judge.

Respondent contends first that petitioner's motion was insufficient in that it failed to state the grounds upon which she sought to obtain the requested relief under Rule 7 of the Rules of Civil Procedure. This contention is without merit.

Respondent argues that the motion was insufficient in that it fails to allege that the disclosure of the requested information would be in the best interest of herself or the public. We think the motion is sufficient to withstand this argument. Among other things the motion recites the applicable statute (G.S. 48-26) under which the grounds for disclosure of the information is set forth. Under the liberal notice theory of pleading established by the new rules, we hold that the motion was sufficient to advise respondent of the grounds upon which petitioner sought relief.

[1] Respondent contends that under G.S. 1-394, the natural parents, as adverse parties in this special proceeding, should have been served with summons and notice of the motion. This contention lacks merit.

The applicable statute, G.S. 48-25(c), requires that before a director of social services shall be required to disclose any information acquired in contemplation of the adoption of a child, the director must be served with the motion and notice of hearing. There is no requirement that the natural parents be served. Furthermore, when a final order of adoption is entered, the natural parents are divested of all rights pertaining to the child. G.S. 48-23(2). Here, the petitioner complied with the requirements of the statute and we hold that the notice given was sufficient.

Respondent contends that the trial court's findings of fact were not supported by competent evidence. He specifically ar-

gues that the finding that petitioner has a disturbed mental outlook is not supported by competent evidence in that no psychologist or other qualified individual testified with respect to petitioner's mental outlook. We do not reach this question. None of the evidence introduced at the hearing was brought forward in the record, therefore, it is presumed that the findings are supported by competent evidence. *In Re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761 (1951).

Respondent's sole exception to the entry of the order does present the question whether the order is supported by the findings of fact and conclusions of law. Rule 10, N. C. Rules of Appellate Procedure, 1 Strong, N. C. Index 3d, Appeal and Error § 26. Therefore, we will proceed to determine if the findings of fact and conclusion of law made by the trial court are sufficient to support the order requiring disclosure of the requested information.

The statute applicable to this case is G.S. 48-26. It provides that:

> "(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction who may issue an order to open the record. Such order must be reviewed by a judge of the superior court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, he may approve the order to open the record.
>
> "(b) The original order to open the record must be filed with the proceedings in the office of the clerk of the superior court. *If the clerk shall refuse to issue such order, the party requesting such order may appeal to the judge who may order that the record be opened, if, in his opinion, it be to the best interest of the child or of the public."* (Emphasis ours.)

This statute has not been interpreted by the appellate courts of this State and judicial considerations by other courts as to "sealed records" statutes are limited and of little help. *See, e.g., Spillman v. Parker,* 332 So. 2d 573 (La. App. 1976) ; *In Re Wells,* 281 F. 2d 68 (D.C. Cir. 1960) ; *Hubbard v. Superior Court,* 189 Cal. App. 2d 741, 11 Cal. Rptr. 700 (1961) ; *People v. Doe,* 138

N.Y.S. 2d 307 (1955); Application of Minicozzi, 51 Misc. 2d 595, 273 N.Y.S. 2d 632 (1966).

Some legislative intent is provided by our legislature in G.S. 48-1 where it is stated that:

> "The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—
>
> * * *
>
> "(3) When the interest of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed."

Nevertheless, public policy dictates that certain records in adoption proceedings be handled in a most confidential manner. G.S. 48-25 provides that the original file of the adoption proceeding is not open for general public inspection. That statute also provides that it shall be a misdemeanor for any person in charge of the files to disclose any information concerning the contents of the adoption papers or for any director or employee of the social services to disclose any information concerning the natural, legal, or adoptive parents, except as provided in G.S. 48-26.

Much attention has been focused recently by the communications media on the efforts and rights of adopted children to learn of their biological origins. The various forms of cloture and sealed adoption record statutes enacted by the great majority of states have come under attack by some writers. *See, e.g., Sealed Records In Adoptions: The Need For Legislative Reform,* 21 Catholic Lawyer 211 (1975); Note, *The Adoptee's Right To Know His Natural Heritage,* 19 N.Y.L. Forum 137 (1973); Note, *The Adult Adoptee's Constitutional Right To Know His Origins,* 48 S. Cal. L. Rev. 1196 (1975).

Nevertheless, we think the confidentiality required by our adoption statutes should be protected except in compelling cases. Upon adoption in North Carolina, the statutes relieve the natural parents of legal obligations, divest them of their rights with respect to the person adopted, and give the adoptee the same legal status he would have if he had been born the legitimate child of the adoptive parents. G.S. 48-23. *Crumpton v. Crumpton,* 28 N.C. App. 358, 221 S.E. 2d 390 (1976). We think the continued confidentiality of the adoption records helps the adop-

tive family establish itself as a social unit, free from outside interference, and provides an environment in which the child is encouraged to identify with his adoptive home. *Terzian v. Superior Court,* 10 Cal. App. 3d 286, 88 Cal. Rptr. 806 (1970).

[2] In North Carolina, upon motion to open the files or the record of an adoption proceeding, the judge must determine that the disclosure of any necessary information would be in the best interest of the child or the public. G.S. 48-26. In making the determination we think the judge should carefully weigh the interests of the child *and* the public, including the interests of the adoptive parents and the natural parents. Any conflict, however, should be resolved in favor of the best interest of the child. G.S. 48-1(3).

What may be in the best interest of the adopted child is not easily discernible. The child's age and mental capability to be able to deal with the disclosure of this information are certainly important factors. Medical necessity such as the need for a specific type of blood would be a situation where the best interest of the child or public would be served by disclosure of pertinent information contained in the adoption files. It is also possible that many adopted children develop severe emotional or psychological difficulties caused by their preoccupation with the desire to know their biological origin or identity. The disclosure of the identity of the natural parent or parents may be in the adoptee's best interest in this type of circumstance.

The interests of the adoptive parents must also be weighed in determining what is in the best interest of the child or the public. Generally, they should be protected from possible interference from the natural parents particularly during the formative years of the child. That factor is not present in the case *sub judice* since the adoptive parents agreed to the disclosure.

Finally, the interests of the natural parents should be considered when determining if adoption proceeding records should be disclosed. Adoption is favored and encouraged as a matter of public policy. To this end the natural parent or parents must feel secure in the knowledge that their identity usually will remain confidential. Certainly the assurance of anonymity is an important consideration in the parents' decision to consent to the adoption of their child. The recent acceptance of abortion as a means to ending unwanted pregnancies might become more desirable if parent or parents realize that the details of adop-

tion proceedings are easily subject to disclosure. Since the trial judge does not know the identity of the natural parents or their desires, his determination of what is in the best interest of the child or the public can only be tempered by the realization that the opening of the records necessarily will affect the natural parents. Still, any conflict between the rights of the adopted child and those of the adoptive or natural parents should be resolved in favor of the child. G.S. 48-1(3).

[2] The determination as to what is in the best interest of the child or the public should be made by weighing the totality of the circumstances. As in child custody and support cases, the trial judge in this type of case is given wide discretion. Nevertheless, he is required to make sufficient findings from which it can be determined that the orders are justified and appropriate. *Ramsey v. Todd,* 25 N.C. App. 605, 214 S.E. 2d 307 (1975); *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Powell v. Powell,* 25 N.C. App. 695, 214 S.E. 2d 808 (1975); *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967). We hold that there must be a finding of fact that the information sought to be revealed is necessary for the best interest of the child or the public before an order can be entered requiring disclosure of the information.

[3] It has been well stated in *Peoples v. Peoples,* 10 N.C. App. 402, 409, 179 S.E. 2d 138, 142 (1971), that:

> "There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. . . . " *Woodard v. Modecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951).

Specific factual findings as to each ultimate fact at issue upon which the rights of the litigants are predicated must be found. *Peoples v. Peoples, supra.* Here, the ultimate fact at issue was the determination of the best interests of the child. The trial judge failed to make this required ultimate finding of fact.

The trial court made six evidentiary findings and concluded in part:

> "That pursuant to the applicable statutory authority, G.S. 48-26, his Honor was obliged only to consider the benefit

or lack thereof resulting from the revelation of this information to the petitioner and/or society . . . . "

We think also that this conclusion is insufficient to support the order that the information be disclosed to petitioner. Under the statute, disclosure is permitted when the trial judge determines it to be in the best interest of the child or the public. The conclusion that the trial judge could only consider "the benefit or lack thereof resulting from revelation of this information" fails to support the order of disclosure in this case.

The order appealed from is vacated and this cause is remanded for a new hearing and determination consistent with this opinion.

Order vacated and cause remanded.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF HATTIE HOGAN

No. 7627DC641

(Filed 2 March 1977)

1. **Appeal and Error § 9— commitment to mental health facility — appeal not moot**

Appeal of a person involuntarily committed to a mental health care facility was not moot although the commitment period had expired.

2. **Insane Persons § 1— report of absent physician — denial of confrontation and cross-examination**

In a proceeding for involuntary commitment to a mental health care facility, the admission of a written report signed and sworn to by a physician who was not present at the hearing denied respondent her right to confront and cross-examine the physician. G.S. 122-58.7(e).

3. **Insane Persons § 1— mental illness — imminent danger — preoccupation with religion**

A finding that respondent was "preoccupied with religious subjects" furnished no support for the court's ultimate finding either that respondent was mentally ill or that she was imminently dangerous to herself or others.

4. **Insane Persons § 1— imminent danger to self or others — insufficiency of findings**

While findings that respondent had delusions as to the extent of the danger posed by the Ku Klux Klan, that she misinterpreted stimuli, and that she was out of touch with reality may have furnished support for the court's ultimate finding that respondent was mentally ill, they furnished no support for the court's alternate finding that she was inebriate or for the court's ultimate finding that she was imminently dangerous to herself or others.

5. **Insane Persons § 1— imminent danger to self or others — insufficiency of testimony**

A physician's testimony that he arrived at the opinion that respondent was imminently dangerous to herself or others because he felt that her persistence in trying to convert someone on the street might cause that person to resist the idea, so that "they could become physically aggressive toward her" did not support the court's finding that respondent was imminently dangerous to herself or others.

APPEAL by respondent from *Bulwinkle, Judge.* Order entered 15 April 1976 in District Court, GASTON County. Heard in the Court of Appeals 13 January 1977.

On 12 April 1976, A. W. Michalak, an officer of the Gastonia Police Department, appeared before a magistrate and swore to a petition for involuntary commitment against respondent, Hattie Hogan, alleging that respondent was a mentally ill or inebriate person who was imminently dangerous to herself or others. The facts upon which this opinion was based were stated in the petition to be that respondent:

> "Gets upon the public streets of the City of Gastonia, blocks people from walking, preaching loud words, refuses to leave after being directed by Gastonia City Police, is in a mentally ill state of mind and is imminently dangerous to herself and others and petitioner says she needs medical treatment."

Based on this petition, the magistrate found that there were reasonable grounds to believe that the facts alleged in the petition were true and that respondent was probably mentally ill or inebriate and imminently dangerous to herself or others. Accordingly, the magistrate issued a custody order authorizing law enforcement personnel to take respondent into custody for examination by a qualified physician in accord with the provisions of G.S. 122-58.4. Pursuant to this order, respondent was taken into custody and was examined by Dr. Zack Russ, Jr., a

psychiatrist at the Gaston County Mental Health Clinic. Dr. Russ found respondent to be mentally ill and imminently dangerous to herself or others, and he recommended she be committed to Broughton Hospital. She was taken to Broughton Hospital, where she was examined on the afternoon of 12 April 1976 by Dr. William P. Robeson, who recommended hospital treatment.

On 15 April 1976 the hearing prescribed by G.S. 122-58.7 was held in district court. Over objection of respondent's counsel, the State introduced as its only evidence the written report signed and sworn to by Dr. Robeson which was based on his examination of respondent made at Broughton Hospital on the afternoon of 12 April 1976.

Respondent presented as her only witness Dr. Russ, who testified that he had examined respondent on 12 April 1976 and that he found respondent

> "to be religiously preoccupied; she had ideas of persecution; delusions of grandeur. She was quite evasive and tangential in her responses. She had poor impulse control and her judgment and insight were impaired. I thought she could not take care of herself because of her impaired judgment, and that she needed to be hospitalized for her own care and protection."

On being asked why he had concluded respondent was a danger to herself and others, Dr. Russ replied:

> "I thought because of her impaired judgment and lack of insight, and from her own statements, her persistence in trying to preach on the streets even without a license, and the fact she had gone to the City Hall for a license and they had refused to give her one—and she couldn't understand it—why they wouldn't. That were she to persist in this type of behavior that it would be detrimental to her welfare.
>
> . . . "[W]ith her attitude that she was expressing at that time, if she persisted in trying to convert someone on the street and they would resist the idea, they could become physically aggressive towards her.
>
> * * *
>
> I didn't get any indication that she was aggressively motivated in that sense of being physically violent."

The court made findings as follows:

"That the Respondent has delusions of danger imposed by the Klu Klux Klan (sic) for the nation as a whole and the world; That she is preoccupied with religious subjects; That she misinterprets stimuli; That she is out of touch with reality."

Based on these findings of fact, the court concluded "as a matter of law" that the respondent was "mentally ill or inebriate, and imminently dangerous to herself or others," and ordered her committed to Broughton Hospital for a period not to exceed 90 days.

From this order, respondent appealed.

Attorney General Edmisten by Associate Attorney Isaac T. Avery III for the State.

Assistant Public Defender Larry B. Langson for respondent appellant.

PARKER, Judge.

[1] Included in the record is a certificate addressed to the clerk of superior court of Gaston County and signed by the Chief of Medical Services at Broughton Hosptial which states that respondent was no longer in need of hospitalization at that facility and accordingly was being unconditionally discharged on 23 April 1976. Although it thus appears that respondent has been released, her appeal is not moot. *In re Hatley,* 291 N.C. 693, 231 S.E. 2d 633 (1977); *In re Crouch,* 28 N.C. App. 354, 221 S.E. 2d 74 (1976); *In re Mostella,* 25 N.C. App. 666, 215 S.E. 2d 790 (1975); *In re Carter,* 25 N.C. App. 442, 213 S.E. 2d 409 (1975).

[2] Respondent assigns error to the admission into evidence over her objection of the written report signed and sworn to by Dr. Robeson, the physician who examined respondent at Broughton Hospital. G.S. 122-58.7(e) provides that "[c]ertified copies of reports and findings of qualified physicians and medical records of the mental health facility are admissible in evidence, but the respondent's right to confront and cross-examine witnesses shall not be denied." Here, Dr. Robeson did not appear at the hearing, and respondent was clearly denied her right to confront and cross-examine him. *In re Benton,* 26 N.C.

App. 294, 215 S.E. 2d 792 (1975). Denial of this right would at least entitle respondent to a new hearing. We do not order a new hearing, however, because more serious defects in these proceedings require reversal of the order from which appeal has been taken.

G.S. 122-58.7(i) provides as follows:

> "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings."

This statutory mandate requires as a condition to a valid commitment order that the district court find two distinct facts: first, that the respondent is mentally ill or inebriate, as those words are defined in G.S. 122-36; and second, that the respondent is imminently dangerous to himself or others. *In re Carter, supra.* Whether a person is mentally ill or inebriate and whether he is imminently dangerous to himself or others, present questions of fact. In the order appealed from in the present case the court purported to make these determinations as "matters of law." We will ignore the incorrect designation and treat the court's conclusions as findings of the ultimate facts required by G.S. 122-58.7(i). The questions for our determination then become (1) whether the court's ultimate findings are indeed supported by the "facts" which the court recorded in its order as supporting its findings, and (2) whether in any event there was competent evidence to support the court's findings.

[3, 4] Directing our attention to the first question, the finding that respondent was "preoccupied with religious subjects" hardly furnishes support for an ultimate finding either that she was mentally ill or that she was imminently dangerous to herself or others. The remaining facts which the court recorded as supporting its ultimate findings, that respondent had delusions as to the extent of the danger posed by the Ku Klux Klan, that she misinterpreted stimuli, and that she was out of touch with reality, may furnish some support for the ultimate finding that she was mentally ill as those words are defined in G.S. 122-36. They furnish no support for the court's alternative finding that she was inebriate. (Indeed, there is no evidence in this record which even suggests that respondent was ever an inebriate.) More importantly, none of the facts recorded

by the court in its order furnish any support for its ultimate finding that respondent was imminently dangerous to herself or others. Thus, one of the two essential findings required for a valid commitment order is without any support from the facts recorded in the court's order.

[5] Turning our attention to the second question, whether, quite apart from the facts recorded in the court's order, there was any competent evidence from which the court could have found the essential ultimate facts required for a valid commitment order, we find that the only competent evidence presented at the hearing bearing on the question whether respondent was imminently dangerous to herself or others was contained in the testimony of Dr. Russ. Although Dr. Russ signed a statement that in his opinion respondent was imminently dangerous to herself or others, at the hearing he testified that he "didn't get any indication that she was aggressively motivated in that sense of being physically violent." Indeed, it is abundantly clear from his testimony given at the hearing that he arrived at his opinion that respondent was imminently dangerous to herself or others solely because he felt that her persistence in trying to convert someone on the street might cause that person to resist the idea, so that "they could become physically aggressive toward her." If so, it would seem more appropriate to commit her aggressor rather than the respondent. In any event, we are unable to find in this record any competent evidence to support the court's finding that respondent was imminently dangerous to herself or others. Absent that evidence,

The order appealed from is

Reversed.

Judges MARTIN and ARNOLD concur.

LEWIS CLARKE ASSOCIATES v. GEORGE P. TOBLER

No. 7610SC666

(Filed 2 March 1977)

1. **Rules of Civil Procedure § 4— out-of-state defendant — return receipt — signature by one other than defendant**

The provision of G.S. 1A-1, Rule 4(j)(9)(b), providing that service of process upon an out-of-state defendant will be complete when copies of the summons and complaint are "delivered to the addressee" contemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee.

2. **Rules of Civil Procedure § 4; Process § 9— out-of-state defendant — service of process properly effected**

The trial court was correct in concluding that service of process was properly effected on the out-of-state defendant pursuant to G.S. 1A-1, Rule 4(j)(9)(b) since the return receipt, signed by a person at defendant's address on behalf of defendant, together with the affidavit of plaintiff's attorney averring that he sent a copy of the summons and complaint to the defendant, return receipt requested, showed sufficient compliance with Rule 4(j)(9)(b) to raise a rebuttable presumption of valid service, and defendant made no attempt to rebut this presumption by showing he did not receive copies of the summons and complaint.

3. **Rules of Civil Procedure § 55— sum certain sought — failure of defendant to appear — authority of clerk to enter judgment**

In plaintiff's action to recover $66,680.53 allegedly due on three promissory notes, plaintiff's claim for relief, which was for less than the face amount of the promissory notes, established a "sum certain" within the meaning of G.S. 1A-1, Rule 55(b)(1), and the clerk had authority in this case to enter a final judgment.

APPEAL by defendant from *Godwin, Judge.* Order entered 26 May 1976 in Superior Court, WAKE County. Heard in Court of Appeals 19 January 1977.

Plaintiff, Lewis Clarke Associates, with its principal office in Wake County, North Carolina, instituted this action against the defendant, George P. Tobler, a resident of New York, to recover $66,680.53 allegedly due on three promissory notes. Service of process was had on the defendant in New York on 9 September 1975 pursuant to the provisions of G.S. 1A-1, Rule 4(j)(9)(b).

On 10 October 1975 the Clerk of Superior Court, on motion of the plaintiff, entered a default judgment against the defendant in the principal sum of $66,680.53, pursuant to the provisions of G.S. 1A-1, Rule 55.

On 13 May 1976 the defendant, pursuant to the provisions of G.S. 1A-1, Rule 60(b)(4) moved to be relieved from the final judgment entered by the clerk on 10 October 1975 on the grounds that the judgment was void.

On 26 May 1976 defendant's motion to be relieved from final judgment was considered on the grounds that: (1) service of process by registered mail pursuant to the provisions of Rule 4(j)(9)(b) was invalid, and (2) the clerk had no authority to enter a final judgment because plaintiff's claim was not for a sum certain within the meaning of Rule 55(b)(1). From an order denying his motion, defendant appealed.

Pinna, Skvarla & Wyrick by Samuel T. Wyrick III for plaintiff-appellee.

Seay, Rouse, Sherrill, Johnson and Rosser by Henry T. Rosser for defendant-appellant.

HEDRICK, Judge.

Defendant first contends that the court had no jurisdiction to enter the judgment because of a lack of valid service of process. Service of process was had upon the defendant in New York pursuant to G.S. 1A-1, Rule 4(j)(9)(b), which in pertinent part provides for service upon an out-of-state defendant as follows:

> "Registered or certified mail.—Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee . . . . "

The return receipt in this case is as follows:

> "1. The following service is requested:
>
> Show to whom and date delivered $.15

2. ARTICLE ADDRESSED TO:

Mr. George P. Tobler
139 East Main Street
Smithtown, Long Island
New York, NY 11787

3. ARTICLE DESCRIPTION:

REGISTERED NO. 22163

I have received the article described above.

SIGNATURE S/GPT by ES

4. DATE OF DELIVERY 9-9-75

5. ADDRESS (Complete only if requested)
Box 608"

Defendant argues that service of process was invalid because the copies of the summons and complaint were not delivered to the addressee personally, but were delivered to "ES."

Resolution of this question requires an interpretation of Rule 4(j)(9)(b), which states service of process will be complete when copies of the summons and complaint are "delivered to the addressee."

In 49 N.C. L. Rev. 235 (1971), Professor Louis, principal author of Rule 4(j)(9), points out that the postal department provides two types of registered or certified mail, return receipt requested. If the customer desires that the registered or certified mail be delivered to the "addressee only," he must pay an additional fee for such service, and in such an event, the return receipt must be signed personally by the addressee. Otherwise, the mail may be delivered to and the return receipt signed by a person of reasonable age and discretion at the addressee's address. "The fiction of agency which has been adopted by the post office, is one often employed by the courts in accepting a receipt signed by another as proof of service by registered mail. Annot., 95 A.L.R. 2d 1033, 1050 (1964). The agency is, however, assumed from the relationship between the addressee and the person signing rather than proved." *Id.* at 255, n. 101.

[1] The North Carolina legislature obviously recognized the distinction between the two types of service because in providing for service by registered or certified mail on a natural per-

son in Rule 4(j) (1) (c), it used the expression " . . . delivering to the addressee only." Indeed Professor Louis expressly states that Rule 4(j) (9) (b) does not require personal delivery to the addressee. 49 N.C. L. Rev. at 255-256. Thus, the provision in Rule 4(j) (9) (b) providing that service of process will be complete when copies of the summons and complaint are "delivered to the addressee," contemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee.

A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service. *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356 (1964); *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239 (1957).

A reasonable inference to be drawn from the receipts in this case is that the summons and complaint were delivered to a person at the defendant's address whose initials are "ES," and that "ES" received the summons and complaint on behalf of the defendant George P. Tobler. It can be assumed that "ES" was a person of reasonable age and discretion authorized to receive registered mail and sign the receipt for the defendant, George P. Tobler.

[2] We are of the opinion that in this case the return receipt, together with the affidavit of plaintiff's attorney averring that defendant could not be found within this State and that he sent a copy of the summons and complaint to the defendant by registered mail, return receipt requested, shows sufficient compliance with Rule 4(j) (9) (b) to raise a rebuttable presumption of valid service. Defendant has made no attempt to rebut this presumption by showing he did not receive copies of the summons and complaint. We hold, therefore, that the court was correct in concluding that service of process was "properly effected on defendant pursuant to Rule 4(j) (9) (b) of the North Carolina Rules of Civil Procedure."

[3] Finally defendant contends the court erred in denying his motion to be relieved from the final judgment, for that the clerk had no authority in this case to enter a final judgment. Defendant argues that since the total amount of the promissory notes which were attached to plaintiff's complaint is different from the amount prayed for in the complaint, the claim is not

for a "sum certain," and the clerk had no authority to enter a final judgment. G.S. 1A-1, Rule 55(b)(1), in pertinent part provides:

> "*Judgment.* Judgment by default may be entered as follows:
>
> (1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain."

Obviously plaintiff's claim for relief, which was for less than the face amount of the promissory notes, established a "sum certain" within the meaning of Rule 55(b)(1), and the clerk had authority under the circumstances of this case to enter the final judgment.

The order denying defendant's motion to be relieved from final judgment is

Affirmed.

Judges VAUGHN and CLARK concur.

JOHN WILLIAM GIBBS, LUTHER M. CREEL AND S. T. HENDERSON, CO-TRUSTEES OF THE BERTHA FREY FOUNDATION v. WILLIAM OSGOOD DUKE, SR.

No. 7626SC731

(Filed 2 March 1977)

1. Appeal and Error § 29— absence of excluded testimony in record — harmless error

The exclusion of testimony cannot be held prejudicial where the record fails to show what the witnesses would have testified if permitted to do so and appellant made no request that the testimony be included in the record. G.S. 1A-1, Rule 43(c).

2. Rules of Civil Procedure § 50— directed verdict motion — waiver by presenting evidence

By offering his own evidence, defendant waived his Rule 50 motion for a directed verdict made at the close of plaintiffs' evidence.

3. Rules of Civil Procedure § 50— motion for judgment n.o.v. — necessity for directed verdict motion at close of evidence

The trial court may not entertain a motion for judgment n.o.v. unless the movant had previously moved for a directed verdict at the close of all the evidence. G.S. 1A-1, Rule 50(b)(1).

APPEAL by defendant from *Graham, Judge.* Order entered 25 May 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 February 1977.

This is a civil action instituted by the plaintiffs and filed on 1 May 1975. Plaintiffs offered evidence tending to show that prior to 1971 the Bertha Frey Foundation, of which they are trustees, owned apartment 120 at the Tropicana, a co-operative apartment complex. On 5 May 1971 the Foundation sold the apartment to Dr. William Jones, and he executed and delivered a note to the Foundation on that date for $14,000, the balance of the purchase price. In 1973 the defendant, William O. Duke, Sr., purchased the apartment from Dr. Jones, and on or about 26 September 1973, he wrote a letter to the plaintiffs stating that he was assuming the financial responsibility for the remaining balance of the promissory note originally executed by Dr. Jones, which at that time had an unpaid balance of $13,289. Plaintiffs' evidence then shows that the defendant made the monthly payments through 2 September 1974; that he has not made any payment since then; and that the unpaid balance was $12,960.53 as of September 1974.

The defendant offered evidence tending to show that he agreed to assume liability on Jones' note and would begin making payments in October 1973; that on 16 November 1973 he met with John West, a now deceased former trustee of the Foundation, and paid West $12,000 in cash; that he later wrote a letter to West in which he stated his understanding to be that the two had agreed that the $12,000 cash payment plus monthly installments of $108 until September 1974 would completely satisfy the indebtedness and financial obligation of the defendant; that he continued making payments until September 1974; and that the note is now paid in full.

The plaintiffs contend that the $12,000 cash payment was never received.

This matter was tried before a jury which found that the defendant was still indebted to the plaintiffs for $12,960.53, and judgment was entered accordingly.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr. and Richard W. Wilson, for the plaintiffs.

William H. Elam, for the defendant.

MARTIN, Judge.

The defendant first contends that the trial court committed reversible error by refusing to admit testimony regarding conversations between a witness and a trustee of the Bertha Frey Foundation, now deceased, and testimony regarding conversations between the defendant and that same trustee. At trial, the defendant attempted to elicit testimony from one of the plaintiffs' witnesses, Peggy Byers, in reference to a telephone call that she supposedly received from one of the Foundation's trustees, John West, concerning the payment by defendant of a sum of money on his financial obligation to the plaintiffs. The defendant also attempted to introduce evidence of discussions and conversations that he himself had had with Mr. West. In both instances, the trial court sustained the plaintiffs' objections and refused to allow the witnesses to answer.

[1] In order for us to answer the defendant's first contention, it is only necessary to consider G.S. 1A-1, Rule 43(c) which provides in part as follows:

> "In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court *on request of the examining attorney* shall order a record made of the answer the witness would have given." (Emphasis added.)

In this Court's interpretation of this rule, it has been stated:

> " 'It is elemental that the exclusion of the testimony cannot be held prejudicial on appeal unless the appellant shows what the witness would have testified if permitted to do so.' (Citation omitted.) Further, the record before us does not show any request made pursuant to Rule 43(c) of our

Rules of Civil Procedure that a record be made of the answers which the witness would have given. Therefore, no prejudicial error has been made to appear. . . . " *Spinella v. Pearce,* 12 N.C. App. 121, 122, 182 S.E. 2d 620, 621 (1971).

In the case at bar, the record reveals that the defendant failed to include the answers to the questions posed to Mrs. Byers and to the defendant. Moreover, the record reveals that he failed to request that the answers be included in the record. The defendant, having failed to include the answers in the record and having failed to make a request that the answers be included, as required by G.S. 1A-1, Rule 43(c), has not made it appear that such exclusion was prejudicial. This assignment of error is therefore overruled.

[2] By defendant's second assignment of error, he contends that the trial court committed reversible error in denying his motion for a directed verdict at the conclusion of plaintiff's evidence. He argues that there was insufficient evidence to justify a verdict for the plaintiffs and that a directed verdict should therefore have been granted. An examination of the record reveals, however, that after the court rejected the defendant's motion for a directed verdict, he then proceeded to offer his own evidence and did not thereafter renew his motion. By offering his own evidence, the defendant waived his Rule 50 motion for a directed verdict made at the close of plaintiffs' evidence and cannot claim error of its denial on appeal. *Overman v. Products Co.,* 30 N.C. App. 516, 227 S.E. 2d 159 (1976); see *Woodard v. Marshall,* 14 N.C. App. 67, 187 S.E. 2d 430 (1972); Wright and Miller, Federal Practice and Procedure: Civil § 2534. This assignment of error is therefore without merit.

[1] In his third assignment of error, the defendant argues that the trial court erred in denying the admission of testimony by defendant's witness, C. E. Hulsey, concerning the defendant's character, reputation, and credit record. We have reviewed the record, and, once again find that the defendant failed to set forth, in the record, the answers the witness would have given had he been allowed to testify, and he failed to make a request that the responses be included as required by G.S. 1A-1, Rule 43(c). The exclusion of such testimony cannot be deemed prejudicial to the defendant. See *State v. Forehand,* 17 N.C. App. 287, 194 S.E. 2d 157 (1973), *cert. den.* 283 N.C.

107, 194 S.E. 2d 635 (1973). This assignment of error is therefore overruled.

[3] Finally, the defendant contends that the trial court erred in denying his motion for judgment notwithstanding the verdict. The defendant moved for a directed verdict at the close of plaintiffs' evidence but we note, however, that the record does not reveal that he made such a motion at the close of *all* the evidence. In 5A Moore's Federal Practice § 50.08 it is stated:

> " . . . [A] motion for judgment n.o.v. may be entertained only if the movant has made a motion for a directed verdict *at the close of all the evidence.* (Emphasis added.) Hence a defendant who fails to move for a directed verdict at the close of all the evidence, or a plaintiff who similarly fails to move for a directed verdict at the close of all the evidence cannot present to the trial court a question as to the legal sufficiency of the evidence to support a verdict for his opponent by a motion for judgment non obstante verdicto, or raise the question on appeal."

It has been similarly held by this Court that a motion for judgment *non obstante verdicto* does not meet the requirements of G.S. 1A-1, Rule 50(b) (1) unless the moving party previously moved for a directed verdict at the close of *all* the evidence. *Dean v. Nash,* 12 N.C. App. 661, 184 S.E. 2d 521 (1971).

In the case at bar, the defendant moved for judgment *non obstante verdicto* but he failed to move for a directed verdict at the close of all the evidence. We therefore hold that his motion did not meet the requirements of G.S. 1A-1, Rule 50(b) (1) and hence could not be entertained by the trial court.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. RAY THOMAS HAGLER

No. 7626SC711

(Filed 2 March 1977)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— possession of recently stolen property — sufficiency of evidence**

In a prosecution for breaking and entering and larceny, the fact that defendant lived in the same rooming house as the victim and that defendant was in possession of the victim's personal appliances very soon after they were taken from the apartment were circumstances sufficient to permit the jury to conclude that defendant was the thief.

2. **Arrest and Bail § 6— assaulting police officer — instructions — lawful or unlawful entry by officer — rights of defendant**

Defendant is entitled to a new trial on the charge of assaulting a police officer while in the performance of his duties where the State's evidence tended to show that defendant pulled a loaded pistol on the officer when he tried to arrest defendant but defendant's evidence tended to show that officers entered defendant's motel room without warning and arrested him, since the trial court's instructions ignored the question as to whether the officer's entry into defendant's motel room was legal or illegal, and the jury should have been instructed as to defendant's rights if the entry was illegal.

APPEAL by defendant from *Thornburg, Judge.* Judgments entered 31 March 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 February 1977.

Defendant was indicted for breaking and entering, larceny and assault with a firearm on a law enforcement officer in the performance of his duty.

The State's evidence with reference to the felonious breaking and entering and larceny charges tends to show the following: Raymond Taylor, who lived in a rooming house in Charlotte, suffered a heart attack on 23 October 1975. Taylor was away from his apartment from 23 October 1975 to 29 October 1975. When he returned on 29 October 1975, he found that the locks had been changed and that his landlord had left a key for him with his neighbor across the hall. Taylor found that his television, stereo, clock radio and antenna were missing from his apartment. He had not given anyone permission to enter his apartment or remove any of the items. He reported the theft to the police. The items which were stolen from Taylor were valued at more than $200.00.

Defendant lived in an upstairs apartment in the same house. He knew Taylor and had been in his apartment. Charles Bass testified that on 28 October 1975, the defendant came into his brother's store and brought a television, stereo component system and an antenna and tried to sell them to Bass. The following day, Bass bought them and defendant gave him a receipt. Taylor identified those items as the ones that had been stolen from his apartment. The handwriting on the receipt given Bass by defendant was stipulated to be that of defendant.

Defendant offered no evidence in connection with the charges of breaking and entering and larceny.

On 20 November 1975, Officer Crump of the Charlotte Police Department arrested defendant in a motel room in Charlotte. After the officer told defendant that he had a warrant for his arrest, defendant stuck a Colt .38 revolver against the officer's stomach. The pistol was loaded. The officer wrestled the pistol from defendant and took him to jail.

The jury found defendant guilty on all three of the charges. Judgments were entered imposing consecutive prison sentences of ten years for the breaking and entering, ten years for the felonious larceny and five years for the felonious assault.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Public Defender Michael S. Scofield, by Assistant Public Defenders James Fitzgerald and Mark A. Michael, for defendant appellant.

VAUGHN, Judge.

[1] Defendant argues that the evidence was insufficient to take the case to the jury. The argument is without merit.

> "It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances—the time between the theft and the possession, the type of property involved, and its legitimate availability in the community." *State v. Raynes,* 272 N.C. 488, 158 S.E. 2d 351.

Defendant lived in the house where the victim lived. His possession of the victim's personal appliances so soon after

they were taken from the apartment are circumstances sufficient to permit the jury to conclude that he was the thief. We find no error in defendant's trial on the charges of felonious breaking and entering and larceny.

The only assignment of error in connection with the trial on the charge of assault with a firearm upon a law enforcement officer while the officer was in the performance of his duties is directed to the judge's charge to the jury.

The State's evidence tended to show the following: A uniformed officer of the Charlotte Police Department, accompanied by three other uniformed law enforcement officers, went to the door of the motel room occupied by defendant at about 7:00 a.m. The officer had a warrant for defendant's arrest. He knocked on the door of the motel room and defendant came to the window, pulled the drapes back and looked out. The drapes were then closed and the officer knocked again and said, "Police. Open the door." The officer knocked a third time and the door opened. "It was not locked. It was just standing ajar." The officer saw defendant standing by the bed. He said, "Police, I have a warrant for your arrest" and then walked over to defendant. Defendant then turned and stuck a loaded pistol against the officer's stomach. The officer managed to grab the pistol and twist it out of defendant's hands. Defendant was then handcuffed and taken into custody.

Defendant offered evidence tending to show the following: He and his wife were in bed in the motel room. William C. McCauley was sharing the motel room with defendant and defendant's wife. McCauley had got out of bed and was making a cup of coffee. McCauley had not heard anyone knock on the door or anyone say anything prior to the time, that as he put it, "the door hit the wall" and the officers came in and arrested defendant. Defendant's wife testified that she heard nothing prior to the time the officers were in the room taking defendant into custody. Defendant did not testify.

[2] In *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897, officers entered defendant's home to take custody of a minor pursuant to a juvenile court order. Defendant Sparrow struck the officer while they were taking the minor into custody and was convicted of obstructing an officer in the performance of

his duties. The evidence was conflicting as to the circumstances of the officers' entry into the house. The Court reasoned:

> "Officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office." *State v. Sparrow,* 276 N.C. 499, 512, 173 S.E. 2d 897.

The Court said:

> "The crucial question then is whether the officers entered the Sparrow home legally. If, as Maness testified, entry was made after the officers knocked on the front door and received an invitation to come in, their entry and presence were legal. If, as the evidence for the Sparrows tended to show, the officers entered, both from the front and from the back, without knocking, without declaring their identity, authority and mission, and without receiving an invitation to come in, their entry and presence were illegal.
>
> The court's instructions did not submit this factual controversy for determination by the jury. There were no instructions bearing upon the rights of the Sparrows if the entry by the officers was illegal. In charging the jury in respect to Marvin's case, the court gave this mandate:
>
> > '[I]f the State has satisfied you . . . beyond a reasonable doubt that on or about the 5th day of May, 1969 . . . the defendant Marvin Ray Sparrow did resist, delay or obstruct an officer, to wit, Mr. Maness, D. M. Maness, in the performance of a duty, that he, Mr. Maness, or Officer Maness, was on a duty, that is, a police duty, and that that duty constituted the service of a process on Karen Torpey, and that he was obstructed or delayed or resisted from carrying out this duty by the defendant Marvin Ray Sparrow, then it would be your duty to find Marvin Ray Sparrow guilty on this charge of resisting, as it's been characterized, interfering with an officer in the performance of his duty.'

Thus, the court's instructions ignored the crucial question, whether the entry by the officers was legal or illegal. The jury should have been instructed as to the rights of Marvin

if the entry was illegal. Error in this respect was prejudicial and sufficient to entitle Marvin to a new trial." *State v. Sparrow, supra,* at p. 513.

The relevant portion of the charge in the case before us lacks the same instruction said to be crucial in *Sparrow.*

In the light of *Sparrow,* we must hold that defendant is entitled to a new trial on the charge of assaulting the officer while in the performance of his duties. We note that the relevant statute, G.S. 15A-401, now provides, in part, as follows:

"(e) Entry on Private Premises or Vehicle; Use of Force.—

(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

* * *

c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life."

In defendant's trial on the charges of felonious breaking and entering and larceny, we find

No error.

On the charge of assault with a firearm on a law enforcement officer while in the performance of his duties, there must be a

New trial.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF THE SUSPENSION OF THE RIGHT TO PRACTICE LAW OF WILLIAM CORNELIUS PALMER

No. 7625SC1001

(Filed 2 March 1977)

Attorney and Client § 10— judicial disbarment — necessity for notice and time to prepare defense

The trial court, at the conclusion of a manslaughter case in which respondent attorney represented the defendant, erred in holding a hearing on the disbarment of the attorney based on the attorney's conduct in the manslaughter case without giving the attorney notice of the purpose of the hearing and reasonable time to prepare his defense.

To review proceedings before *Thornburg, Judge.* Order entered 28 October 1976, Superior Court, CATAWBA County. Heard in the Court of Appeals 10 February 1977.

Respondent was trial attorney for Kenneth Darrell Edmisten who was charged with manslaughter and leaving the scene of an accident. These cases were consolidated for trial with *State v. Oliver.* Oliver had been charged with the same two offenses, and all offenses grew out of a collision between a truck occupied by Edmisten and Oliver with an automobile. Both defendants entered pleas of not guilty to all charges. Defendant Oliver gave a statement to the police in which he said that he was driving the truck at the time of the collision and that he had had several drinks of whiskey prior thereto. This statement was available to counsel for Edmisten. During the course of the trial, Oliver, through his counsel, attempted to negotiate a plea for which he would be given a probationary sentence. This attempt was unsuccessful. Before the State could attempt to introduce Oliver's statement in evidence, Oliver advised his counsel that the statement he had given was not true and that Edmisten had actually been driving the car. His counsel immediately advised the court that Oliver had told him that his statement was not true; that shortly after the accident he and Edmisten had agreed that, because Edmisten had a prior record, he, Oliver, would accept the primary blame and say that he was driving at the time of the collision. After his disclosure, he entered a plea of guilty of aiding and abetting in involuntary manslaughter. Oliver then testified that both he and Edmisten ran from the scene of the accident and that while they were running Edmisten asked him to say that he, Oliver, was driving be-

cause " . . . he could not afford to say that he (Edmisten) was because they would probably send him off" because he had been in trouble before when he was younger. Oliver agreed to accept the responsibility for driving. They decided to give themselves up, and did so, and were taken to the hospital. Edmisten told Oliver that he had told his attorney (respondent herein) about the agreement. Oliver further testified that after the court had recessed for the night the afternoon before, "Mr. Edmisten told me that Mr. Palmer told him that this thing don't look good for me and he didn't want me to take it all by myself and so he said that if it all came to worse or looked like it was going bad for me that Mr. Palmer would say that Mr. Edmisten was the driver." He further testified that Edmisten said that Mr. Palmer told him "[t]hat if everything was to be put on me, that he would get up and say that Mr. Edmisten was driving and it was all that was said." He did not say at what point in the trial this would occur. The trial continued to its conclusion, the jury was instructed, and left the courtroom for its deliberations.

At that time the court and the district attorney advised Edmisten that he would be required to testify under oath " . . . as to his association with his counsel, Mr. Palmer, and the events which occurred, statements which were made and understandings between he (sic) and his attorney . . . " , and that he would be given complete immunity. Edmisten did so testify and his testimony, briefly summarized was: that he had an agreement with Oliver shortly after the accident that Oliver would say he (Oliver) was driving; that on the night of the accident he told his attorney, Palmer (respondent herein) about the agreement, and that, in fact, he was the driver; that he wanted Palmer to find out what Oliver had actually said to the police; that later that night he learned that Oliver had accepted the primary blame; that Palmer was there at that time; that after the trial started he told Palmer that he " . . . could not see Roger (Oliver) taking the blame for something that I done." Palmer asked him if he wanted to go through with it and he answered that he didn't know. Palmer explained to him that if he kept his mouth shut, at a certain point in the trial the only person left in the trial would be Oliver and after that time either Edmisten or Palmer could stand up and tell that Edmisten was driving and not Oliver.

Palmer cross-examined Edmisten who reiterated what he had said on direct; i.e., as to a plea of guilty, "You said that it would be better after I got acquitted or whatever, then to come up and say that." He did, however, agree that his counsel had told him he ought not to let Oliver take the blame for the crime when he might not be guilty.

The court then asked Mr. Palmer if he wanted to say anything under oath about his relationship with his client. Mr. Palmer declined.

Whereupon, the court entered an order finding facts and concluding that Mr. Palmer had intentionally and wilfully violated the North Carolina State Bar Code of Professional Responsibility and enumerated the particular canons violated, and suspending Mr. Palmer for an indefinite period of time from the practice of law in the State of North Carolina.

Upon various petitions, motions, and orders of this Court, the record of the proceedings has been brought to this Court for review.

Attorney General Edmisten, by Special Deputy Attorney General James Blackburn, for the State petitioner.

Robert A. Melott for respondent.

MORRIS, Judge.

While it appears clearly that the facts found are supported by the evidence and the facts support the judgment, we are, nevertheless, met at the threshold with a question of due process. The record is barren of any notice of any kind to respondent that the court intended to hold a hearing to determine whether he should be disbarred.

The General Assembly has provided a statutory method of disciplinary action or disbarment of attorneys. G.S. 84-23; G.S. 84-28, *et seq.* However, nothing contained in these statutes " . . . shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." G.S. 84-36. Nevertheless, " . . . it is not after the manner of our courts, however, to deprive a lawyer, any more than anyone else, of his constitutional guaranties or to revoke his license without due process of law. (Citations omitted.)" *In re West,* 212 N.C. 189, 193, 193 S.E. 134, 136 (1937).

Indeed, our Supreme Court has said that the granting of a license to practice a profession is a right conferred by administrative act and the license is a property right. The deprivation of that right is " . . . a judicial act requiring due process." *In re Burton,* 257 N.C. 534, 543, 126 S.E. 2d 581, 588 (1962). The general law with respect to judicial disbarment is succinctly stated in *In re Burton, Id.* at 544, 126 S.E. 2d at 588-89:

> " . . . Where an attorney is on trial, charged with a criminal offense involving moral turpitude and amounting to a felony, and pleads guilty, or is convicted, or pleads *nolo contendere* with agreement that he will surrender his license, the court conducting the criminal trial has authority to disbar him summarily without further proceedings, and on appeal the Supreme Court may do likewise upon motion of the Attorney General. (Citations omitted.) But where the attorney pleads guilty or is convicted in another court, or the conduct complained of is not related to litigation pending before the court investigating attorney's alleged misconduct, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney of the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, an attorney should be given full opportunity to be heard and permitted to have counsel for his defense. Where issues of fact are raised the court may appoint a committee to investigate and make report. (Citations omitted.)"

Here, respondent was not on trial for a criminal offense. The conduct complained of is clearly "related to litigation pending before the court investigating the attorney's alleged misconduct." While we do not say that respondent was entitled to a sworn written complaint and a show cause order granting him time to prepare his defense, we do hold that respondent was entitled to notice of the purpose of the hearing held and reasonable time to prepare his defense, if any he had. This is true in spite of the fact that it must have clearly appeared to respondent that the purpose of the court in requiring Edmisten to testify was to inquire further into respondent's conduct and relationship with his client particularly in view of Oliver's testimony during the trial and despite whether respondent knew that Edmisten had been granted immunity. Satisfaction of

the requirement of due process necessitated notice. Nor can we say that the court's asking respondent if he wanted to say anything under oath afforded respondent the opportunity to be heard. *See In re Ruffalo*, 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222, *reh. den.*, 391 U.S. 961, 20 L.Ed. 2d 874, 88 S.Ct. 1833 (1968).

For the reasons stated, the judgment must be vacated and the matter remanded for hearing after notice.

Vacated and remanded.

Judges VAUGHN and MARTIN concur.

KELLY H. HELMS v. KOY E. DAWKINS, AND WIFE, BETTY T. DAWKINS

No. 7620SC756

(Filed 2 March 1977)

1. **Contracts § 6— contract in excess of contractor's license — owner's breach of contract — no recovery by contractor**

A general contractor within the meaning of G.S. 87-1 who has no license or who constructs a project the value of which exceeds the amount of his license may not recover for the owner's breach of the contract, or for the value of the work and services furnished or materials supplied under the contract on the theory of unjust enrichment; however, the general contractor may assert any claim he has against the owner for breach of the contract defensively as a set-off to any claim asserted against him by the owner for any breach of the contract by the owner.

2. **Contracts § 6— general contractor — distinguishing characteristic**

The principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner with respect to a portion of the project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project.

3. **Contracts § 6— contract in excess of contractor's license — summary judgment — genuine issues as to whether plaintiff was general contractor**

In an action by plaintiff to recover from defendants a commission of 10% of the total construction cost of defendants' home, the trial court erred in granting summary judgment for defendants, since the parties' written contract was ambiguous, and the evidence offered

in support of and in opposition to defendants' motion for summary judgment failed to clarify the ambiguity and establish as a fact that plaintiff was a general contractor within the meaning of G.S. 87-1.

APPEAL by plaintiff from *Gavin, Judge.* Judgment entered 3 August 1976 in Superior Court, UNION County. Heard in Court of Appeals 17 February 1977.

This is a civil action wherein the plaintiff, Kelly H. Helms, seeks to recover from the defendants, Koy E. and Betty T. Dawkins, $8,762.26, a commission of ten per cent of the total construction cost of defendants' home, and $1,028.52 "for sums paid to painters by plaintiff on behalf of the defendants." Defendants filed answer and alleged, among other things, in bar of plaintiff's claims that the plaintiff, a general contractor, had contracted to construct defendants' home where the total value of the project exceeded the limits of plaintiff's contractor's license in violation of G.S. 87-10. Defendants also filed a counterclaim against plaintiff for $23,918.20 for plaintiff's alleged breach of the contract for the construction of defendants' home.

Defendants moved for summary judgment as to plaintiff's total claim. The following facts are established by the pleadings, interrogatories, admissions and affidavits offered in support of and in opposition to defendants' motion for summary judgment:

The contract between the parties is set out in the following letter dated 30 October 1972:

"Dear Mr. Helms,

I told you sometime ago that I would write you a letter confirming our verbal contract for the building of our home.

Our understanding is that you will supervise the construction and provide all necessary labor for the building of our house in accordance with the plans prepared by Mrs. Lee but subject to our modifications from time to time with your consent. Your compensation will be payment of 10% of the cost of labor and materials required for construction including sales taxes applicable but excluding insurance, payroll taxes, licenses or fees. We have agreed that we will work together to save money on any purchase and any discounts shall accrue to our benefit. I will carry the necessary builder's risk insurance and pay for the

building permit and you will carry any necessary workmen's compensation or other insurance necessary on your employees.

If you agree that the above is proper, please sign the enclosed copy and return it to me.

I want to say again how delighted Betty and I are to have you help us.

Yours most sincerely,

Koy E. Dawkins

Enclosure

Mr. Kelly Helms
Concord Road
Monroe, N. C. 28110

I confirm that the foregoing is our agreement.

s/ KELLY HELMS"

Plaintiff's contractor's license limited him to projects having a value of $75,000 or less and the total value of defendants' home upon completion was in excess of $75,000.

From summary judgment for defendants as to plaintiff's total claim, plaintiff appealed.

Thomas D. Windsor for plaintiff appellant.

James E. Griffin for defendant appellees.

HEDRICK, Judge.

Plaintiff assigns as error summary judgment entered for defendants.

[1] It is well settled in North Carolina that a general contractor within the meaning of G.S. 87-1 who has no license or who constructs a project the value of which exceeds the amount of his license may not recover for the owner's breach of the contract, or for the value of the work and services furnished or materials supplied under the contract on the theory of unjust enrichment. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976); *Construction Co. v. Anderson*, 5

N.C. App. 12, 168 S.E. 2d 18 (1969). However, the general contractor may assert any claim he has against the owner for breach of the contract defensively as a set-off to any claim asserted against him by the owner for any breach of the contract by the owner. *Builders Supply v. Midyette, supra.*

G.S. 87-1 in pertinent part provides,

> "For the purpose of this Article, a 'general contractor' is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building . . . where the cost of the undertaking is thirty thousand dollars or more . . . . "

Citing *Fulton v. Rice,* 12 N.C. App. 669, 184 S.E. 2d 421 (1971), plaintiff insists he was not a general contractor within the meaning of G.S. 87-1 because the cost of his "undertaking" was not equal to or in excess of $30,000 but was the amount of his commission, $8,762.26. In our opinion, the cited case does not support this contention. The record here clearly establishes that the cost of the undertaking to construct defendants' home was in excess of $30,000. It does not necessarily follow, however, that the plaintiff in the present case was a general contractor within the meaning of G.S. 87-1. Not every person who undertakes to do construction work on a building is a general contractor, even though the cost of his undertaking exceeds $30,000. *Furniture Mart v. Burns, supra.*

[2] A general contractor is one who contracts "to construct any building, highway, public utilities, grading or any improvements or structure" for a "fixed price, commission, fee or wage." G.S. 87-1. While several factors must be taken into consideration in determining whether a party is a general contractor within the meaning of the contractors' licensing statutes, the principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner with respect to a portion of the project, *Vogel v. Supply Co.,* 277 N.C. 119, 177 S.E. 2d 273 (1970), or a mere employee, *Furniture Mart v. Burns, supra,* is the degree of control to be exercised by the contractor over the construction of the entire project. Ordinarily the degree of control a contractor has over the construction of a particular project is to be determined from the terms of the contract. Where the terms of the contract are ambiguous as to the degree of control to be exercised by the con-

tractor, the intention of the parties with respect thereto is to be determined as in any other case.

[3] In the present case, the written contract is ambiguous as to the degree of control plaintiff was to exercise in supervising the construction of defendants' home in accordance with the plans prepared by Mrs. Lee. Furthermore, the evidence offered in support of and in opposition to defendants' motion for summary judgment fails to clarify this ambiguity and establish as a fact that the plaintiff was a general contractor within the meaning of G.S. 87-1.

Thus, under the circumstances of this case, summary judgment for defendants was inappropriate, and the judgment appealed from is reversed and the cause remanded to the Superior Court for further proceedings.

Reversed and remanded.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. DAVID N. McDONALD

No. 7619SC623

(Filed 2 March 1977)

1. Criminal Law § 66— identification testimony — pre-trial lineup

The trial court in an armed robbery case properly denied defendant's motion to suppress eyewitness identification testimony on the ground that pre-trial identification procedures were impermissibly suggestive where the evidence supported findings by the court that defendant voluntarily and understandingly waived his right to have counsel present at the lineup at which the witnesses identified him, and that the in-court identifications were of independent origin based solely on what the witnesses saw at the time of the robbery.

2. Criminal Law § 66— lineup after arrest — inapplicability of Article 14 of G.S. Ch. 15A

Defendant's contention that in-court identification testimony should have been suppressed because the State failed to comply with the procedures of Article 14 of G.S. Ch. 15A in conducting a lineup is without merit since Article 14 has no application where defendant has already been arrested when the lineup takes place.

3. Criminal Law § 66— identification testimony — legality of arrest

There is no merit in defendant's contention that in-court identification testimony should have been suppressed because his arrest was illegal where the arresting officer had probable cause to arrest defendant without a warrant for a felony based on his knowledge that defendant had been identified from a photograph as the perpetrator of an armed robbery; furthermore, even had there been any illegality in the arrest, the identification testimony was not so directly connected with the arrest as would require application of an exclusionary rule.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 2 March 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 11 January 1977.

Defendant was indicted for armed robbery of Opal Sisk. He pled not guilty. At the trial Mrs. Sisk testified that defendant was the person who pointed a pistol at her on the night of 25 November 1975 when she was on duty at a 7-Eleven Food Store, demanded she open the cash registers, took $116.00 from the registers, and then left the store. Mrs. Sisk's sixteen year old daughter, who was in the store at the time, also identified defendant as the robber. Mrs. Lorraine Adams, a customer who left the store only minutes before the robbery occurred, identified defendant as being in the store while she was there.

Defendant testified and denied he committed the robbery. He testified that at the time the robbery occurred he was at the home of his grandparents, which was located about a mile from the store. Defendant's girl friend corroborated his alibi.

The jury found defendant guilty, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Al S. Hirsch for the State.

Max Busby and Richard F. Thurston for defendant appellant.

PARKER, Judge.

Prior to trial defendant moved to suppress the testimony of the State's eye-witnesses identifying him as the robber on the grounds: (1) pre-trial identification procedures had been impermissibly suggestive; (2) the provisions of G.S. Ch. 15A, Article 14, had not been complied with; and (3) his arrest had

been illegal. After a lengthy voir dire examination, the court entered an order making detailed findings of fact and conclusions of law on the basis of which the court denied defendant's motion. This ruling is the subject of defendant's first assignment of error. We find no error.

[1] The court's findings of fact fully support its conclusions that no impermissibly suggestive pre-trial identification procedures took place. There was ample competent evidence to support these findings of fact, and they are conclusive on this appeal. *State v. Stamey,* 6 N.C. App. 517, 170 S.E. 2d 497 (1969). The court on competent evidence found that defendant both orally and in writing waived his right to have counsel present at the pre-trial lineup which was conducted following his arrest on 28 November 1975 and at which both Mrs. Sisk and Mrs. Adams identified him. There was also competent evidence to support the court's findings and conclusions that defendant's waiver of right to presence of counsel was made by him freely, voluntarily, and understandingly, and after he had been informed of his right to have his attorney present during the lineup. Defendant was represented at the voir dire hearing by privately retained attorneys, and he does not contend on this appeal that he was indigent or unable to employ an attorney when the lineup took place. On the contrary, he testified at the voir dire examination that he tried to call his lawyer, but found he was not available. Moreover, the court's detailed findings of fact also fully support its conclusions that the in-court identification testimony of the State's witnesses Sisk and Adams was of independent origin based solely on what they observed when they saw defendant in the 7-Eleven Store on the night the robbery occurred and that their identification of defendant did not result from any pre-trial identification procedures. These findings were also fully supported by ample competent evidence. Thus, even had there been any primary illegality in the pre-trial identification procedures, and none was here shown, the witnesses' in-court identification testimony would have been admissible. *See State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971); *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507 (1970); *see also State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

[2] Defendant's contention that his motion to suppress should have been allowed because of the State's failure to observe the procedures prescribed in Article 14 of Chapter 15A of the Gen-

eral Statutes misses the mark. That Article provides an investigative procedure, not previously available in this State, for use in cases where there is reasonable grounds to *suspect* that a particular person committed an offense punishable by imprisonment for more than one year but where there is yet lacking a sufficient basis for making a lawful arrest. Article 14 of G.S. Ch. 15A has no application in a case such as the one now before us where defendant had already been arrested when the lineup procedure took place.

[3] Finally, we find no merit in defendant's contention that his motion to suppress should have been allowed because his warrantless arrest was illegal. The record reveals that defendant was arrested by Officer Carl Fite of the Rowan County Sheriff's Department. "An officer may arrest without a warrant any person who the officer has probable cause to believe . . . [h]as committed a felony." G.S. 15A-401(b)(2)a. Here, although Officer Fite had not personally participated in investigation of the robbery for which defendant was arrested, the record shows that at the time he made the arrest he knew that defendant had been identified from a photograph by one of the eye-witnesses as the man who was involved in the robbery. The arresting officer thus had probable cause to believe defendant had committed a felony. Therefore, the arrest was lawful. Moreover, even had there been any illegality in the arrest, and none was here shown, the testimony which defendant sought to suppress was not so directly connected with the arrest as would have required application of an exclusionary rule. Defendant's first assignment of error is overruled.

Defendant's second assignment of error is based on two exceptions to the court's charge to the jury. Defendant contends that in each instance the court made a misstatement in summarizing the evidence. We have carefully considered the portions of the charge to which exception was taken in the light of the evidence in the record, and when we consider the court's charge contextually, we find no prejudicial error.

There was ample evidence to justify submission of the case to the jury and to support its verdict. Defendant's motions to dismiss and to set the verdict aside as being against the evidence were properly denied.

In defendant's trial and in the judgment appealed from we find

No error.

Judges MARTIN and ARNOLD concur.

RACCOON VALLEY INVESTMENT CO., A CORPORATION v. ARTHUR H. TOLER AND WIFE, MABEL F. TOLER

No. 762SC646

(Filed 2 March 1977)

1. **Judgments § 50— no "renewal" of judgment — independent action required**

There is no procedure now recognized in this State by which a judgment may be "renewed"; rather, the only procedure now recognized by which the owner of a judgment may obtain a new judgment for the amount owing thereon is by an independent action on the prior judgment, which independent civil action must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt.

2. **Judgments § 50— action on judgment — request that judgment "be renewed" — complaint not fatally defective**

Where plaintiff properly brought an independent civil action to recover the amount of its prior judgment against defendants plus interest, and plaintiff's complaint was sufficient to give notice of the transactions and occurrences which plaintiff intended to prove to show that it was entitled to relief, the inclusion of the improper request that the former judgment "be renewed" in the prayer for relief did not render the complaint fatally defective.

APPEAL by defendants from *Cowper, Judge.* Order entered 24 May 1976 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 13 January 1977.

On 29 December 1965, plaintiff obtained a judgment for $3,656.66 against defendants in Superior Court in Beaufort County. On 23 December 1975, plaintiff instituted this action by filing complaint in which it alleged that it had obtained the 29 December 1965 judgment against the defendants, that no payments had been made thereon, and that the principal of $3,656.66 plus interest of $2,193.96 remained due and unpaid.

Plaintiff prayed that its prior judgment against defendants in the amount of $3,656.66 "be renewed, and that interest to date owing on the said judgment of record in amount of $2,193.96 be included as a part of the total judgment debt owed by the defendants to the plaintiff."

Summons and complaint in this action were served on defendants on 26 December 1975. No answer was filed, and on 27 January 1976 default was entered against defendants. On the same date, the assistant clerk of superior court signed judgment by default, in which it was adjudged that the judgment rendered 29 December 1965 for $3,656.66 with interest from 29 December 1965 be "renewed as a judgment against the defendants."

On 9 February 1976, execution was issued on the 27 January 1976 default judgment, and pursuant to that execution the sheriff, on 6 May 1976, conducted a sale of defendants' real property. On 14 May 1976 defendants filed a motion in the cause to set aside the 27 January 1976 judgment as being void and to restrain confirmation of the sheriff's sale of their property. On 24 May 1976, after a hearing, the court found that the temporary restraining order had been improvidently entered, ordered that it be dissolved, and dismissed defendants' motion in the cause. From this order, the defendants appeal.

Frazier T. Woolard for plaintiff appellee.

Carter & Ross by W. B. Carter, and LeRoy Scott for defendant appellants.

PARKER, Judge.

Defendants contend that the default judgment entered against them in this action on 27 January 1976 is void and that the court therefore erred in dismissing their motion in the cause to set it aside and in dissolving the temporary restraining order. We do not agree.

[1] In support of their contention that the 27 January 1976 judgment is void, defendants point to the language in the prayer for relief to plaintiff's complaint and in the judgment itself which speaks in terms of having the 29 December 1965 judgment "renewed," and defendants correctly point out that there is no procedure now recognized in this State by which a judgment may be "renewed." As defendants further correctly

point out, the only procedure now recognized by which the owner of a judgment may obtain a new judgment for the amount owing thereon is by an independent action on the prior judgment, which independent civil action must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt. *Reid v. Bristol,* 241 N.C. 699, 86 S.E. 2d 417 (1955). Defendants' correct statement of the law, however, does not compel their conclusion that the 27 January 1976 judgment is void.

[2] In this case, plaintiff has properly brought an independent civil action to recover the amount of its prior judgment plus interest. In its complaint in this action, plaintiff alleged the existence of its prior judgment against defendant, making specific reference to that judgment by date, amount, and docket number. Plaintiff further alleged that no payment had been made on that judgment and that the principal of $3,656.66 plus interest for a ten year period in the amount of $2,193.96, "for a total judgment debt" of $5,850.62, remained due and unpaid. These allegations in the body of plaintiff's complaint were clearly sufficiently particular to meet the requirements of G.S. 1A-1, Rule 8(a)(1) that they give notice of the transactions and occurrences which plaintiff intended to prove to show that it was entitled to relief. Just as clearly, these allegations were also sufficient to state a claim upon which relief could be granted. It is true that in its prayer for relief plaintiff prayed "that its judgment # 39111 against the defendants in the amount of $3,656.66 docketed in Book 25, page 302 records of the Clerk of Superior Court be renewed, and that interest to date owing on the said judgment of record in the amount of $2,193.96 be included as a part of the total judgment debt owed by the defendants to the plaintiff." Although the request that the former judgment "be renewed" was inappropriate, the inclusion of the inapt words in the prayer did not render the complaint fatally defective. Even under the somewhat stricter practice which prevailed prior to adoption of our present Rules of Civil Procedure, the nature of a plaintiff's action was determined by reference to the facts alleged in the body of the complaint rather than by what was contained in the prayer for relief. *Jones v. R. R.,* 193 N.C. 590, 137 S.E. 706 (1927); 1 McIntosh, N. C. Practice and Procedure 2nd, § 1111. Certainly the spirit of our new Rules does not require a stricter construction. Here, the prayer for relief to plaintiff's complaint, when

considered as a whole, makes it clear that plaintiff was seeking recovery of a money judgment in the amount of "the total judgment debt owed by the defendants to the plaintiff," including principal and accrued interest.

The default judgment which was entered on 27 January 1976, although inaptly expressed, was not void. The summons and complaint had been properly served on the defendants, they had failed to answer, and the court had jurisdiction over defendants and over the subject of the action. The judgment clearly stated the amount for which judgment was rendered and the date from which interest was to run. The inappropriate references to the renewal of the prior judgment did not render the later judgment void. To so hold would exhalt form over substance. Even our Supreme Court has on occasion spoken in terms of an action "to renew a judgment." *See Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964); *Grady v. Parker*, 230 N.C. 166, 52 S.E. 2d 273 (1949).

The order appealed from is

Affirmed.

Judges MARTIN and ARNOLD concur.

WESLEY LEE BURKETTE AND WIFE, ELIZABETH F. BURKETTE v. GEORGIA INTERNATIONAL LIFE INSURANCE COMPANY

No. 768SC628

(Filed 2 March 1977)

Insurance § 41— disability insurance — date of accident or sickness — no coverage — summary judgment proper

In an action to recover damages for wrongful breach of a contract of insurance where plaintiffs alleged that on 6 August 1973 defendant issued a policy of credit life and disability insurance naming male plaintiff as the insured, and the male plaintiff became totally disabled on 25 June 1974, the trial court properly granted summary judgment for defendant where plaintiffs admitted that the date the accident occurred or sickness began was January 1973, more than six months prior to issuance of the policy, and, by the clear terms of the policy, no coverage was provided.

Burkette v. Insurance Co.

APPEAL by plaintiffs from *Graham, Judge.* Judgment entered 22 April 1976 in Superior Court, LENOIR County. Heard in the Court of Appeals 11 January 1977.

This is a civil action to recover damages for wrongful breach of a contract of insurance.

In connection with a loan obtained 6 August 1973 from Branch Banking and Trust Company, plaintiffs purchased a policy of credit life and disability insurance, No. IL-395185, issued by defendant insurance company. The policy, dated 6 August 1973, named the male plaintiff, Wesley Lee Burkette, as the insured. It provided that the insurance company would pay benefits "if sickness originating after the date of this policy and while this policy is in force or accidental bodily injury suffered while this policy is in force, . . . shall wholly and continuously disable the Insured. . . . "

On 11 November 1975 the plaintiffs filed their complaint in this action, alleging that the male plaintiff became totally disabled within the meaning of the policy on 25 June 1974 but that defendant insurance company had wrongfully refused to make payments according to the terms of its contract.

Defendant filed answer admitting it issued the policy but denying it was liable to pay benefits under the policy. Defendant alleged that if the male plaintiff became disabled, his disability resulted from an injury which occurred on 25 January 1973 and therefore benefits were not payable under the terms of the policy. Defendant attached a copy of the policy as an exhibit to its answer.

Defendant served on plaintiffs a request for admissions in which it requested plaintiffs to admit the genuineness of a notice of claim for disability benefits dated June 1974, and signed by Wesley Lee Burkette on policy No. IL-395185. Defendant also requested that plaintiffs admit that on this notice of claim they had entered "January 1973" as the "[d]ate accident occurred or sickness began." Plaintiffs answered the defendant's request for admissions and admitted that the notice of claim for disability benefits dated June 1974, was genuine and admitted that "[o]n the notice for disability benefits dated June, 1974 plaintiff entered January 1973 as the date of the accident."

Defendant filed a motion for summary judgment, supporting this motion by the admissions of the plaintiffs and by an

affidavit of defendant's secretary which incorporated defendant's answer and its attached copy of Policy No. IL-395185. In this affidavit the affiant also stated that the only notice of claim for disability benefits filed by the male plaintiff under said policy was the notice dated June 1974, on which the male plaintiff entered January 1973, as "[d]ate accident occurred or sickness began."

Plaintiffs filed nothing in response to defendant's motion for summary judgment. The motion was allowed, and from judgment dismissing their action, plaintiffs appeal.

Turner and Harrison by Fred W. Harrison for plaintiff appellants.

Wallace, Langley, Barwick, Llewellyn & Landis by P. C. Barwick, Jr., for defendant appellee.

PARKER, Judge.

The only question presented is whether summary judgment for defendant was properly entered. We hold that it was.

No genuine issue exists between the parties as to the terms of the policy or the date it was issued. Plaintiffs alleged in their complaint that the male plaintiff became disabled within the meaning of the policy on 25 June 1974. However, in response to defendant's request for admissions, plaintiffs admitted that in June 1974, the male plaintiff had signed and had filed with the defendant insurance company a notice of claim for disability benefits in which he had stated January 1973, as the "[d]ate accident occurred or sickness began." This was six months prior to the date of the policy, and by the clear terms of the policy no coverage was provided. The affidavit of defendant's secretary, filed by defendant in support of its motion for summary judgment, states that no other claim for disability benefits under the policy was filed by the plaintiffs. The plaintiffs have filed no counteraffidavit to show the contrary.

The materials filed by the defendant in support of its motion for summary judgment show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. Plaintiffs have filed nothing to show that a genuine issue as to any material fact exists, but have chosen to rely solely upon the broad allegation in their complaint that the male plaintiff became totally disabled within

the meaning of the policy on 25 June 1974. Even if true, such an allegation would not establish coverage under the policy. It is not the date the insured becomes totally disabled, but the date his sickness originates or his accidental bodily injury occurs, which is significant in determining whether coverage exists under the policy. The only claim which they filed to obtain disability benefits under the policy shows no benefits are payable. Plaintiffs have filed nothing to show that the claim which they filed was not correct or to show that in fact the insured's sickness did originate after the date of the policy or that he suffered accidental bodily injury while the policy was in force.

Moreover, G.S. 1A-1, Rule 56(e) provides in part:

> "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 that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The motion of defendant was made and supported as provided by Rule 56. Plaintiffs did not respond. Summary judgment for defendant was appropriate.

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. DANNY LILLY

No. 7612SC721

(Filed 2 March 1977)

1. Robbery § 4— armed robbery — sufficiency of evidence

In a prosecution for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, the State's evidence was sufficient to be submitted to the jury on the armed robbery charge where it tended to show that defendant entered the victim's home and, after a short conversation, struck the victim several times; the victim picked up a crowbar and defendant took it from him and

struck him in the head with it; defendant then removed the victim's wallet, car keys and watch; defendant, with the crowbar hanging on his arm, took the victim into the kitchen and took food from the refrigerator; and defendant then left the house and drove away in the victim's car.

2. **Criminal Law § 169— failure of record to show excluded testimony**

Defendant failed to show that the exclusion of testimony was prejudicial where the record fails to show what the excluded testimony would have been had the witness been permitted to answer.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 15 April 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 February 1977.

Defendant was indicted and tried for armed robbery and assault with a deadly weapon with intent to kill inflicting serious bodily injury. The State offered evidence tending to show that John Jones, sixty-four year old prosecuting witness, was at home on 24 January 1976 when the defendant came to his door; that defendant rushed in when Jones opened the door; that the two engaged in a short conversation; and that the defendant then hit Jones several times with his fist. After the assault was in progress, Jones picked up a crowbar and the defendant snatched it from him and struck him in the head with it. Jones testified that the defendant then pulled him up and removed his wallet, his car keys, and his watch; that the defendant took Jones into the kitchen and loaded a bag of food from the refrigerator; and that during this time the defendant had the crowbar hanging on his arm. Defendant then left the house and drove away in Jones' car. As a result of the injuries inflicted by the defendant, Jones was hospitalized for four days.

Defendant offered evidence tending to show that he went to Jones' house looking for a friend, visited for a while, and went to sleep on the couch; that he was awakened by Jones' attempt to engage in oral sex with him; that he pushed Jones away and hit him; that Jones swung a crowbar at defendant and defendant hit him again; that he became frightened and picked up Jones' keys and took Jones' car in order to find his brother so they could take Jones to the hospital.

The jury found the defendant guilty of armed robbery and assault with a deadly weapon inflicting serious injury and a prison sentence of not less than twenty-five years and not more than thirty years was imposed.

Attorney General Edmisten, by Associate Attorney James E. Scarbrough, for the State.

Assistant Public Defender Pinkney J. Moses for the defendant.

MARTIN, Judge.

[1] The defendant first contends that the trial court erred in denying his motion, which was made only at the close of the State's evidence, for nonsuit of the armed robbery charge. He argues that the State's evidence does not sufficiently show that the weapon was used at the precise time the robbery occurred. Instead, he contends, the evidence indicates that both the intent to rob and the actual robbery occurred only after the assault of Jones was terminated. Thus, as his argument goes, the use of the crowbar was part of the assault charge and not a part of the armed robbery charge. We disagree.

The defendant introduced evidence in his own defense following the trial court's denial of his nonsuit motion. Our courts have uniformly established that a defendant, by introducing evidence at trial, waives his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Logan,* 25 N.C. App. 49, 212 S.E. 2d 236 (1975); G.S. 15-173. In the instant case, the defendant did not renew his motion for nonsuit at the close of all the evidence. Nevertheless, pursuant to G.S. 15-173.1, we have reviewed the sufficiency of the State's evidence and conclude that the trial court properly denied defendant's motion for nonsuit.

While the defendant contends there was no evidence to indicate that he intended to rob the victim at the time the crowbar was used in the assault, he ignores the fact that the State's evidence shows that the transactions all occurred as one continuous series of events. Numerous decisions by this Court have concluded that the exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction amounting to armed robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable. See *State v. Dunn,* 26 N.C. App. 475, 216 S.E. 2d 412 (1975); *State v. Reid,* 5 N.C. App. 424, 168 S.E. 2d 511 (1969).

Defendant's first argument also ignores the fact that the State's evidence shows that the defendant held a dangerous weapon in his hand at the time he assaulted the victim; that he still had the weapon hanging from his arm at the time he went into the kitchen to take food from the refrigerator; and that it was no longer necessary for him to use or threaten to use the weapon at the time of the robbery since he had already injured and subdued the victim. Viewing this evidence in the light most favorable to the State, as we are required to do, we conclude that there was sufficient evidence to submit the charge of armed robbery to the jury and that the trial court properly denied the defendant's motion for nonsuit as to that charge. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974).

[2] The defendant next contends that the trial court erred in sustaining the State's objection to defendant's question pertaining to the character of the victim. At trial, the defendant testified that he " . . . didn't know he [Jones] was that type of man." When asked what type of man he meant, the State objected and the objection was sustained. The record does not, however, reveal how the witness would have answered this question and, hence, we are unable to ascertain whether the court's ruling was prejudicial. *State v. Little,* 286 N.C. 185, 209 S.E. 2d 749 (1974); *State v. Nelson,* 23 N.C. App. 458, 209 S.E. 2d 355 (1974), app. dismd. 286 N.C. 340, 211 S.E. 2d 216 (1974). The defendant has therefore failed to show any prejudicial error as a result of the exclusion.

We conclude that the defendant had a fair trial free of prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. VARREN PAP LEWIS

No. 765SC704

(Filed 2 March 1977)

1. **Criminal Law § 99— comments by court — clarification — no expression of opinion**

Comments made by the trial court in a rape prosecution concerning the extent of penetration were for the purpose of clarifying the victim's testimony and did not amount to an expression of opinion in violation of G.S. 1-180.

2. **Criminal Law § 66— in-court identification of defendant — pretrial photographic identification — no taint**

Evidence was sufficient to support the trial court's findings that an in-court identification of defendant by a rape victim was based on her observation of the defendant before, during and after the alleged rape in her house and the in-court identification was not tainted by any pretrial photographic identification procedure.

3. **Criminal Law § 96— evidence withdrawn from jury — presumption that jury obeyed instruction**

Defendant was not prejudiced by an officer's statement on cross-examination where the court instructed the jury to disregard the statement, since it is presumed that the jurors followed the court's instructions.

APPEAL by defendant from *James, Judge.* Judgment entered 7 January 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 February 1977.

The defendant was indicted and tried under separate bills of indictment, proper in form, with the felonies of (1) breaking and entering and (2) second degree rape.

State's evidence tended to show that late in the afternoon of 22 August 1975 Flossie Williams Jones, who was 69 years old, was lying in bed at her home. She was almost asleep when defendant, whom she had never seen before, suddenly appeared in her bedroom. He pulled up her clothes, and Mrs. Jones wrestled with him, but he overcame her resistance and had intercourse with her against her will. Mrs. Jones was momentarily able to get away from defendant by saying that she was hungry. She then went to the kitchen, made some sandwiches for defendant, and while doing this, attempted to go out the front door but was overtaken by defendant. Later, she asked defendant to get her a drink of water, and while he was doing this,

she ran across the street to the home of a neighbor and told her that she had been raped. Mrs. Sneed, one of the neighbors, called the police while Mrs. Jones waited on the porch with Rose Baptist, another neighbor. While they were standing on the porch, Mrs. Jones and Mrs. Baptist saw defendant leave Mrs. Jones' house and walk up the street. About fifteen or twenty minutes later, the police brought defendant to the house in a police car and both Mrs. Jones and Mrs. Baptist identified him.

Defendant offered evidence tending to show that he spent the afternoon of 22 August 1975 with a group of friends at the home of Larry Bellamy. When the gathering at Bellamy's house broke up, defendant began walking home, but before he arrived at home he was arrested for the rape of Mrs. Jones. He testified that he did not rape Mrs. Jones or break into her house.

The defendant pleaded not guilty and was found guilty of both charges. The court imposed a prison sentence in each case and the defendant appealed.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Jay D. Hockenbury, for the defendant.

MARTIN, Judge.

[1] Defendant contends the court violated G.S. 1-180 by expressing an implication that the penetration element of the crime of rape had been proven. Although the statute refers to the formal instructions to the jury, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173 (1954).

On direct examination of Flossie Williams Jones, she testified as follows:

"Q. About an inch or so, you say?

OBJECTION: She didn't say an inches or anything like that.

SUSTAINED.

Q. Show me on your finger again what you showed me a while back.

A. (illustrating) About like that.

Q. How much would that be—an inch or—

OBJECTION: SUSTAINED.

COURT: Let the witness exhibit on her fingers and agree on what the amount is.

Q. Show me how far he placed his privates in that you showed me.

A. I told you—about that far.

COURT: Can it be stipulated that is approximately an inch and a half?

MR. COBB: It is all right with me, your Honor.

COURT: (to Mr. Hockenbury) Are you going to stipulate to that?

MR. HOCKENBURY: No, I am not going to stipulate to it.

COURT: Let the record show that the witness held up her finger and exhibited a point on it which she said represented the amount of penetration; and let the record show that the point she held on her finger was approximately midway of the finger.

OBJECTION: OVERRULED: EXCEPTION.

EXCEPTION NO. 1"

It appears, to this Court, that the remarks by the trial judge, which the defendant considers to have been prejudicial, merely reflect the judge's attempt to clarify a confusing series of questions and answers. The district attorney had asked certain questions concerning the amount of penetration and was unable to evoke a responsive answer. The court, in order to make things clear, was merely seeking to phrase the questions properly and clarify the witness' answers.

Looking at the record as a whole and considering all the attendant facts and circumstances disclosed by the record, we are of the opinion that the inquiry of counsel and the comments made by the judge were for the purpose of clarification and were not an expression of opinion in violation of G.S. 1-180.

Thus, there was no prejudice to defendant. See *State v. Hoyle,* 3 N.C. App. 109, 164 S.E. 2d 83 (1968).

[2] In his second assignment of error defendant contends that the court erred in admitting the in-court identification testimony by the witness Flossie Jones. He argues that the showing of photographs to Flossie Jones on 24 August after first allowing Mrs. Baptist to identify the defendant's photograph in her presence, was so suggestive that it must necessarily have tainted Flossie Jones' in-court identification testimony. We disagree.

The trial court found as a fact that the in-court identification of the defendant by Flossie Jones was based on her observation of the defendant before, during, and after the alleged rape in her house and that the in-court identification was independent of *any other* identification procedures. There is substantial evidence to support this finding and such a finding is therefore binding on this Court. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972).

[3] Finally, defendant contends the cross-examination statement of Officer Chipps, to the effect that Mrs. Jones identified defendant as the rapist during the photographic identification, is prejudicial to the defendant.

Defendant called Officer Chipps as a witness and questioned him about the 23 August lineup. On cross-examination Chipps testified: "The next day after the lineup I took both pictures to Flossie Jones at her home and asked her to look at the picture." The district attorney asked him: "What did she say after looking at it this time?" Chipps answered: "At that time she picked out the defendant as being the ...." Counsel for defendant objected at this point, and the court instructed the jury that this testimony could be considered only in corroboration of Mrs. Jones' testimony. After a conference at the bench, the court instructed the jurors to "disregard and remove from your minds any statement of this witness about what took place when he went to the home of Flossie Jones or what he took there." Conceding, *arguendo,* that the evidence was inadmissible, the jurors should be presumed to have followed the court's instructions to disregard this testimony. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974).

In the trial we find no prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN WIKE

No. 7630SC649

(Filed 2 March 1977)

1. **Homicide § 15— proof of title to land — inadmissibility in murder trial**

In a trial of defendant for the murder of his brother with whom he was having a boundary dispute and the brother's attorney, the trial court's rulings refusing to allow defendant to turn the trial into an action to prove title to the lands where the shooting occurred were proper.

2. **Criminal Law § 88— cross-examination of victim's widow — domestic difficulties**

In a homicide prosecution in which the victim's widow testified that her husband neither owned nor possessed a firearm on the date of the shooting, the trial court properly refused to allow defendant to cross-examine the widow as to whether she and the victim had been having domestic problems.

3. **Homicide § 15— conversation relating to civil litigation — incompetency in murder trial**

In a prosecution of defendant for the murder of his brother and the brother's attorney, evidence of a conversation between the deceased attorney and another attorney concerning civil litigation between defendant and his brother was irrelevant and properly excluded.

4. **Homicide § 17— testimony admissible as evidence of threat**

In a prosecution of defendant for the murder of his brother, testimony by defendant's sister that he told her he would "do like Dallas" and that Dallas, a brother of defendant, had killed another brother was competent as evidence of a prior threat against the brother defendant killed.

APPEAL by defendant from *Friday, Judge.* Judgment entered 13 March 1976 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 13 January 1977.

Defendant was tried for murder as a result of killing his brother, Thomas Wike, and his brother's lawyer, Stedman Hines.

The State's evidence tended to show that defendant and Thomas Wike had been involved in a boundary dispute for a number of years. The pair lived on a mountain road in rural Swain County. The road followed a mountain stream. Defendant lived upstream from Thomas. On 10 September 1975, Stedman Hines, Thomas and one William Gibson drove from Thomas' house and left their truck on the road near defendant's driveway. They examined the chop marks and painted blazes on trees near the road and then proceeded up a mountain between defendant's driveway and the road. None of them were armed. Hines was in front followed by Thomas with Gibson following Thomas. Defendant suddenly appeared holding a rifle. Thomas said, "Hello Johnny, what do you know?" Defendant mumbled a reply. At that time Hines reached out to shake hands and told defendant, "I'm Stedman Hines, attorney from Bryson City." Defendant replied, "You are lawyer Hines" and then shot Hines in the stomach. Gibson ran away but heard twelve or fifteen more shots. The bodies of Hines and Thomas were found near the scene of the shooting by the investigating officers. Both had died as a result of gunshot wounds.

The State also introduced physical and documentary evidence calculated to shed light on the events that occurred at the crime scene and to illustrate the testimony of its witnesses.

Defendant testified that on the day of the killings, he had gone down to the creek to shoot snakes. He heard voices on the mountainside and thought that children were up there digging ginseng on his property. He went to investigate and saw Hines, Thomas Wike and a stranger. He had known Hines for a number of years. Thomas Wike said, "What do you know?" and defendant replied, "You know it all." Thomas Wike pointed a pistol at defendant and shot at him. Defendant then returned the fire. Hines jumped back in the bushes and was not seen again. Hines, Thomas Wike and the stranger all had guns. The stranger also shot at defendant but Hines did not. Both defendant and Thomas Wike got behind trees and continued to fire at one another. Defendant shot several times. Soon everything was quiet and defendant left the scene to summon help for the others.

The jury returned verdicts of guilty of voluntary manslaughter in each of the two cases and judgments imposing prison sentences were entered.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, for the State.

Pope & Brown, P.A., by Ronald C. Brown, for defendant appellant.

VAUGHN, Judge.

[1] Defendant testified that the shooting took place on his property. The State did not introduce evidence to contradict that testimony. Nevertheless, defendant brings forward numerous exceptions because the judge would not allow him, in effect, to turn this criminal action into an action to prove his title to the lands where the shooting took place. The judge's rulings were correct and defendant's exceptions are without merit. The judge also properly instructed the jury on the law as it applies to one who, being free from fault, is attacked on his own property.

Defendant contends that the judge did not "instruct the jury concerning the law of accidental killing as it applies to self-defense." The exceptions relating to this contention are not sustained. The judge fully declared and explained the law arising on the evidence in the case. Among other things, he told the jury that if the defendant "acted properly in self-defense, he would not be guilty of any offense on which the court has or will instruct you." The court further instructed the jury that if Hines died by accident, without wrongful purpose or criminal negligence on the part of defendant, defendant would not be guilty of a crime in connection with his death.

[2] In his sixth assignment of error, defendant argues that the court improperly restricted his cross-examination of Stedman Hines' widow. On direct examination, Mrs. Hines, without objection, testified that her husband neither owned nor possessed a firearm on the date of the shootings. The couple had been married for 34 years. On cross-examination she was asked whether she and her husband lived together continuously for the six months immediately preceding that day. She responded in the affirmative. Defendant then asked her whether she and her "husband were having domestic problems during that time." The sustaining of the State's objection to that question is defendant's basis of the assignment of error. We hold that the trial judge was correct when he concluded that the question was improper.

[3] Defendant also attempted to offer evidence of a conversation that took place in the courthouse between Hines and another lawyer in connection with the civil litigation involving defendant and Thomas Wike. Defendant contends that the evidence was not properly excluded by the "Dead Man's Statute." Without regard to whether it should have been excluded under that statute, it suffices to say that the subject of the conversation was totally irrelevant to the trial of this defendant and not admissible under any theory.

[4] Defendant's sister (as did one of his brothers) testified for the State. The sister testified that she talked with defendant a few days before the killings. Defendant told her that Thomas Wike was "tearing up what he had." Defendant told her that he would, "do like Dallas" and "that would keep him off." Dallas is another brother of defendant. The sister then explained, without objection, that Dallas had killed another brother, Joe. Defendant does not argue that evidence of defendant's prior threats are inadmissible. He argues, instead, that the testimony should not have been admitted because it "does not qualify as a threat on the part of the Defendant." The weight to be given the evidence is for the jury. The jury could reasonably infer that when defendant said he was going to "do like Dallas" he was suggesting that he was going to kill his brother, as did Dallas. The assignment of error is overruled.

We have considered all of the exceptions brought forward and the argument on appeal. We find no prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. DAYLENE PAGE

No. 7610SC638

(Filed 2 March 1977)

1. Criminal Law § 21— preliminary hearing — denial no error

Due process did not require that defendant, a dentist charged with attempting to obtain property under false pretenses, be given a preliminary hearing; nor was defendant entitled to a preliminary

hearing to provide him an opportunity for discovery. Moreover, G.S. 15A-601, *et seq.*, does not require a preliminary hearing after defendant is indicted for a felony and the superior court acquires jurisdiction, as in this case.

2. **False Pretense § 2; Physicians, Surgeons and Allied Professions § 5— attempt to obtain money by false pretense — dentist defendant — criminal prosecution proper**

The prosecutor and grand jury did not err in proceeding under G.S. 14-100 and G.S. 14-3(b), which make it a felony to attempt to obtain property from another by false pretenses, rather than under G.S. 90-40 and 90-41 which define the powers of the State Board of Dental Examiners to punish administratively a dentist who fraudulently obtains fees, since nothing in Chapter 90 of the General Statutes prevents the State from seeking a felony conviction for that conduct which also happens to fall within the Board's administrative jurisdiction.

3. **Indictment and Warrant § 9— statute not stated in indictment — requirements to charge crime**

An indictment need not cite by number the pertinent statute; rather, the requirements of G.S. 15-153 are met where the indictment sets out in a plain, intelligible and explicit manner all elements of the crime charged.

4. **False Pretense § 1— obtaining money by false pretense — attempt to obtain money by false pretense — felony**

Though at the time of the events in question G.S. 14-100 only made it a felony to obtain property under false pretenses, the effect of G.S. 14-3(b) was to make any attempt to obtain property by false pretenses a felony, and the subsequent amendment of G.S. 14-100 to make the attempt to obtain property by false pretenses a felony did not give rise to the inference that, at the time of the events in question, such an attempt was only a misdemeanor.

5. **Criminal Law § 142— sentence suspended — conditions imposed — no abuse of discretion**

In a prosecution of defendant, a dentist, for attempting to obtain property by false pretense by submitting a bill to the Division of Vocational Rehabilitation of the Dept. of Human Resources for $809 as compensation for dental services which defendant purportedly falsely represented to have rendered a named client of the Division of Rehabilitation, the trial court did not abuse its discretion by conditioning defendant's suspended sentence upon his pledge not to accept patients referred to him by State agencies, since the condition was for the purpose of protecting the public fisc, the condition was reasonable, and defendant consented to it.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 3 March 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1977.

Defendant is a dentist. He was charged in a bill of indictment with attempting to obtain property under false pretenses by submitting a bill to the Division of Vocational Rehabilitation of the Department of Human Resources for $809 as compensation for dental services which defendant purportedly falsely represented to have rendered to a Mrs. Dunston, a client of the Division of Rehabilitation. Both the State and defendant introduced evidence at trial which is unnecessary to summarize here. Defendant was convicted by a jury, sentenced to two years, suspended for five years upon payment of a $2,500 fine and agreement not to perform any treatment for any client of any state agency during the probation period. Defendant appeals.

Attroney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

William E. Marshall, Jr., for defendant appellant.

ARNOLD, Judge.

[1] By his first assignment of error defendant argues that in denying his request for a preliminary hearing the court denied his right to a fair trial, and to due process, by limiting his discovery of the State's case and hindering his preparation for trial. Due process does not require a preliminary hearing in defendant's case. We find his argument unconvincing.

No authority is cited in support of defendant's position that he should have had a preliminary hearing because it would have helped him in preparing his defense. Indeed, it is not the purpose of a probable cause hearing to provide defendant an opportunity for discovery. (Discovery in Superior Court is afforded in G.S. 15A, Article 48.)

Defendant was properly indicted by the grand jury and was within the jurisdiction of the superior court, not the district court. G.S. 15A-601, *et seq.*, does not require a preliminary hearing after defendant is indicted for a felony and the superior court acquires jurisdiction. As pointed out in the Official Commentary to G.S. 15A-611(d) "it seems certain that no probable cause hearing may be held in district court once the superior court has gained jurisdiction through the return of a true bill of indictment."

[2] Defendant, in his second assignment of error, argues that his motions to dismiss and to arrest judgment should have been

granted because the indictment was defective. First, he says that the prosecutor and grand jury erred in proceeding under G.S. 14-100 and G.S. 14-3(b) which make it a felony to attempt to obtain property from another by false pretenses. Defendant contends that the grand jury should have proceeded under G.S. 90-40 and 41. Defendant is wrong.

G.S. 90-40 and 90-41 define the powers of the State Board of Dental Examiners. The Board is authorized by these sections to punish administratively a dentist who fraudulently obtains fees, but Chapter 90 of the General Statutes does not prevent the State from seeking a felony conviction for that conduct which also happens to fall within the Board's administrative jurisdiction.

[3] There is also no merit in defendant's argument that the indictment is defective because it fails to identify G.S. 14-100 and G.S. 14-3(b) by number. The indictment need not cite by number the pertinent statute. The requirements of G.S. 15-153 are met where the indictment sets forth in a plain, intelligible and explicit manner all elements of the crime charged. *State v. Hunt,* 265 N.C. 714, 144 S.E. 2d 890 (1965).

[4] Defendant next argues that the offense for which he was charged was not a felony but a misdemeanor. At the time of the events in question in this case, G.S. 14-100 only make it a felony to obtain property under false pretenses. Effective 1 October 1975, that statute was amended to provide that it is also a felony to attempt to obtain property under false pretenses. Defendant contends that this amendment shows that the legislature recognized that prior to October 1975 the *attempt* to obtain property under false pretenses was only a misdemeanor. He reasons that G.S. 14-3(b), which raises any misdemeanor to the grade of felony if the misdemeanor was done with intent to deceive and was not otherwise specifically punished, could not have applied to G.S. 14-100. If G.S. 14-3(b) had applied, according to defendant, then the amendment to G.S. 14-100 was unnecessary. We disagree. Any attempt to obtain property by false pretense necessarily is done with intent to deceive. By its plain language G.S. 14-3(b) makes any attempt to obtain property by false pretenses a felony. The plain language of G.S. 14-3(b) is more convincing that any inference to be drawn from the fact that G.S. 14-100 was amended.

[5] Finally, defendant contends that the court abused its discretion by conditioning his suspended sentence upon his pledge not to accept patients referred to him by State agencies. We fail to see any abuse of discretion in the condition imposed to protect the public fisc. It is reasonable, and it was consented to by defendant. *See State v. Mitchell,* 22 N.C. App. 663, 207 S.E. 2d 263 (1974).

No error.

Judges PARKER and MARTIN concur.

JERRY WAYNE DEAN v. BETTY CULBRETH DEAN

No. 769DC697

(Filed 2 March 1977)

1. **Divorce and Alimony § 24; Constitutional Law § 22— child custody — spiritual welfare — separation of church and state**

The evidence in a child custody proceeding supported the court's finding that defendant mother had not taken the child to church or Sunday School on a regular basis, and the court's consideration of the child's spiritual welfare in determining custody did not violate constitutional provisions relating to the separation of church and state.

2. **Divorce and Alimony § 24; Infants § 9— child custody — birth of illegitimate children — change in circumstances**

The fact that defendant mother has given birth to two illegitimate children since her divorce from plaintiff and the award of child custody to her and is rearing the illegitimate children in her home is a sufficient change in circumstances to justify a change in the custody of the child.

APPEAL by defendant from *Allen, Judge.* Judgment entered 12 March 1976 in District Court, PERSON County. Heard in the Court of Appeals 8 February 1977.

This appeal arises from a motion in the cause filed by plaintiff seeking a change in the custody of Jason Barrett Dean, five years old, born of the marriage between plaintiff and defendant.

Plaintiff and defendant were divorced on 29 June 1972. At that time, custody of Jason was awarded to defendant. On 12

June 1975 plaintiff filed a motion in the cause seeking a change in custody based on a change in circumstances. Prior to the hearing, the parties stipuated that two illegitimate children were born to defendant following her divorce from plaintiff.

At the hearing both parties presented extensive evidence. Following the hearing, the trial court made findings of fact and concluded that defendant was not a fit and proper person to have custody of Jason. From the order awarding custody to plaintiff, defendant appealed.

Daniel F. Finch and Thomas L. Currin, for plaintiff appellee.

Broughton, Broughton, McConnell & Boxley, P.A., by John D. McConnell, Jr., for defendant appellant.

BRITT, Judge.

Defendant contends that the court erred in finding and concluding that her failure to take Jason to church and Sunday School was jeopardizing his spiritual values. This contention is without merit.

[1] Defendant argues that this finding is not supported by evidence and that the court's consideration of church attendance is forbidden by the United States and North Carolina Constitutions. We disagree.

We think the finding that defendant had not taken Jason to church or Sunday School on a regular basis is adequately supported by competent evidence. Defendant detailed her weekends with her children but no mention was made of church attendance. Furthermore, a defense witness, who was a Sunday School teacher, testified that she would love to take Jason to church although she had never done so. The findings of the trial court are conclusive when supported by competent evidence. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967).

Defendant's argument that this finding violates the constitutional provisions concerning the separation of church and state is also without support. Certainly, the trial court cannot base its findings on the preferability of any particular faith or religious instruction. However, as stated in *Blackley v. Blackley,* 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974):

> "The welfare of the child is the paramount consideration which must guide the Court in exercising this discretion.

> Thus, the trial judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties. . . ."

We think the spiritual welfare of a child is a factor that may be considered by the trial court in making a custody determination. Therefore, this assignment is overruled.

The trial court also found that at the time of the original award of custody to defendant "no findings of fact were made as to the custody of the minor child." Defendant contends that this finding is error since it has no bearing at this point on the question of whether custody should remain in defendant. We fail to perceive any error in this finding by the trial court. The court's findings are supported by competent evidence and are therefore conclusive on appeal.

[2] Defendant contends that the trial court erred in finding and concluding that there had been a material change of conditions affecting the child's custody in that defendant had given birth to two illegitimate children since the original award of custody. This contention is without merit.

Defendant argues that the mere showing of the birth of two illegitimate children is not sufficient to support the conclusion that there has been a material change in circumstances. She relies on the line of cases that have held that a parent who commits adultery does not automatically, *per se*, become unfit to have custody of children. *Savage v. Savage*, 15 N.C. App. 123, 189 S.E. 2d 545, *cert. denied*, 281 N.C. 759, 191 S.E. 2d 356 (1972); *In re McCraw Children*, 3 N.C. App. 390, 165 S.E. 2d 1 (1969). We think the principle stated in those cases does not apply here and hold that the fact that defendant had given birth to two illegitimate children and was rearing them in her home, was a sufficient change in circumstances to justify a change in the custody of Jason.

Defendant's final contentions are that the court erred in concluding that she was not a fit and proper person to have custody of her child and that it would be in the best interest of Jason to place him in the custody of plaintiff. These contentions lack merit.

The welfare of the child is the polar star by which the courts must be guided in awarding custody. *In re Moore*, 8 N.C. App. 251, 174 S.E. 2d 135 (1970). In determining custody, the

court must consider all of the facts of the case and decide the issue in accordance with the best interests of the child. *Paschall v. Paschall,* 21 N.C. App. 120, 203 S.E. 2d 337 (1974). The decision to award custody of a child is properly vested in the discretion of the trial judge who has the opportunity to see the parties in person, to hear and observe the witnesses, and his decision should not be disturbed on appeal absent a clear showing of abuse of discretion. *Savage v. Savage, supra.*

Competent evidence supports each of the court's findings of fact, which, in turn, support its conclusions of law. Also, we fail to perceive any abuse of discretion in the conclusion that the best interest and welfare of Jason would be promoted by awarding his custody to plaintiff. Therefore, the order appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

CARDING SPECIALISTS (CANADA) LIMITED AND CROSROL, INC. v. GUNTER & COOKE, INC.

No. 7614SC681

(Filed 2 March 1977)

1. **Contracts § 16— contract not conditional on separate agreement**

The trial court correctly decided that defendant's obligations under the contract sued on were not conditional on the continuance of a separate licensing agreement between the parties.

2. **Contracts § 29— breach — measure of damages**

Where the parties' contract provided that the $110,000 owed by defendant to plaintiffs was payable in goods, plaintiffs ordered 525 "card drives" from defendant, but defendant failed to ship any of the goods, plaintiffs' damages amounted to the fair market value of the number of units plaintiffs were entitled to at the time they were entitled to receive them, plus interest from that time.

APPEAL by plaintiffs and defendant from *Canaday, Judge.* Judgment entered 15 January 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 January 1977.

This is the third time that one or more of the parties have appealed from orders or judgments entered in this case. The

opinions filed in connection with the two earlier appeals are reported at 12 N.C. App. 448 and 25 N.C. App. 491. Much of the factual background and procedural history of this case is set out in those opinions.

Plaintiffs' claim arises under a contract executed 23 February 1968. In pertinent part the contract is as follows:

> "1. Gunther & Cooke agrees to pay to Carding Canada as general damages for infringement of U. S. Letters Patent No. 3,003,195 the sum of $110,000, U. S. funds. The said sum shall be payable as provided in paragraph 3 hereof.
>
> 2. Carding Canada, Crosrol and any other company which is controlled by Andre Varga or his son or their personal representatives or any combination thereof (each of which is hereinafter referred to as a 'Carding Company') will be entitled to purchase from Gunther & Cooke and to sell any equipment which Gunther & Cooke manufactures and sells, except the GC 600-M System. Any Carding Company will be entitled to purchase such equipment, at the lowest mill price that applies to bulk sales in effect from time to time less a 10% O.E.M. discount. Such prices will be not less favourable to the purchaser than the prices of similar products which are available on the U. S. market.
>
> 3. Upon each purchase of equipment by a Carding Company from Gunther & Cooke under paragraph 2 hereof while all or any part of the said sum of $110,000 remains unpaid, the purchase price for such equipment shall be set off and applied against the balance of the said sum of $110,000 then owing. If a Carding Company other than Carding Canada is the purchaser, such company shall thereupon pay or credit to Carding Canada an amount equal to such purchase price.
>
> * * *
>
> 6. The right of purchase provided for in paragraph 2 hereof will continue until the said sum of $110,000 owing to Carding Canada under paragraph 1 hereof and all other amounts owing from time to time by Gunther & Cooke to Carding Canada have been paid and satisfied in full. In the event that the value of the purchases exceed the amount

owing by Gunther & Cooke to Carding Canada, normal cash terms shall be in effect unless otherwise agreed.

7. Carding Canada hereby releases Gunther & Cooke from all liability and claims of any kind whatsoever arising from any infringement or alleged infringement by Gunther & Cooke of U. S. Letters Patent No. 3,003,195 and of any other patent or invention."

The case was heard by the judge without a jury. Plaintiffs' evidence tended to show that on 22 October 1970, plaintiffs ordered 525 "card drives" from defendant with the purchase price to be credited against the $110,000 owed by defendant. Defendant failed to ship any of the goods. The judge concluded that defendant had breached the contract and awarded plaintiffs damages in the amount of $110,000 with interest from the date of the judgment. Plaintiffs and defendant appealed.

Smith, Moore, Smith, Schell & Hunter, by Beverly C. Moore and H. Miles Foy, for plaintiff appellees.

Nye, Mitchell and Bugg, by R. Roy Mitchell, Jr., and John E. Bugg, for defendant appellant.

VAUGHN, Judge.

[1] In addition to the settlement agreement wherein defendant agreed to pay damages for patent infringement, the parties also entered into another agreement wherein defendant was granted a license to manufacture equipment supposedly covered by plaintiffs' patent and wherein defendant was to pay royalties for goods manufactured and sold under that license. Defendant contends that plaintiffs' threat to terminate the licensing agreement relieves it of its obligations under the contract sued on. We conclude that the trial judge correctly decided that defendant's obligations under the agreement sued on were not conditional on the continuance of the licensing agreement. Defendant also contends that it was impossible to fill such a large order as that placed by plaintiffs and that it was obviously placed in bad faith. The judge did not err in failing to reach those conclusions. The contract between the parties set out no specific time for delivery of the goods defendant was obligated to deliver. Defendant would have, therefore, had a reasonable time to make delivery on the order. The record makes it clear that defendant made no effort to fill the order.

[2] Plaintiffs and defendant have both appealed from the damages awarded. The judge concluded (1) plaintiffs were entitled to $110,000 for the breach; (2) plaintiffs were not entitled to interest from the breach; and (3) they were not entitled to recover $11,000 in profits allegedly lost in consequence of the breach. There is some merit in the arguments of all the parties and we reverse that part of the judgment relating to the amount of damages.

The contract provided that the $110,000 "shall be payable as provided in paragraph 3 hereof." The sum was, therefore, payable only in goods. In effect, goods were bartered for the release. Plaintiffs may or may not have been entitled to receive all of the 525 units it ordered. The number of units to which plaintiffs were entitled under the barter agreement should be computed by taking the lowest mill price per unit (applicable to bulk sales and less 10%) and dividing that price into $110,000. Plaintiffs' damages would then be the fair market value of the number of units to which they were entitled at the time they were entitled to receive them, plus interest from that time.

That part of the judgment fixing damages and interest is reversed and the case is remanded.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

DANNY SPIVEY v. OAKLEY'S GENERAL CONTRACTORS, AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 769IC656

(Filed 2 March 1977)

Master and Servant § 83— workmen's compensation — settlement by employer — validity of cancellation of compensation policy — jurisdiction of Industrial Commission

Even though the employer had settled with the employee, the Industrial Commission had jurisdiction to determine whether the employer's workmen's compensation policy had been effectively cancelled before the date of the employee's injury or whether the employee's injury was still covered by the policy.

Spivey v. General Contractors

APPEAL by Nationwide Mutual Insurance Company from the North Carolina Industrial Commission. Order filed 14 May 1976. Heard in the Court of Appeals 18 January 1977.

The facts relevant to this appeal are not in dispute.

On 7 February 1974, the employee was injured in a work related accident. The carrier, Nationwide, accepted liability and paid temporary total disability benefits in the amount of $54.96. Thereafter, the carrier disclaimed liability on the risk on the grounds that its policy with the employer had been cancelled for nonpayment of premium before the accident. The employer and employee then settled the claim as between themselves and the appropriate report was filed with the Commission. Nationwide did not participate in that settlement and its liability has not been determined.

A hearing was scheduled before a deputy commissioner who concluded that the Commission did not have jurisdiction to determine the validity of the cancellation of the policy. An order was entered dismissing the proceeding. The parties stipulated, however, that subsequently all of the evidence necessary for a final determination on the merits was received by the Commission. That evidence was not brought forward and is of no concern on this appeal.

The order dismissing the proceeding for lack of jurisdiction was affirmed by the Commission and the carrier appealed.

Ramsey, Hubbard & Galloway, by Mark Galloway, for defendant appellee, Oakley's General Contractors.

Young, Moore, Henderson & Alvis, by Charles H. Young, Jr., and B. T. Henderson II, for defendant appellant, Nationwide Mutual Insurance Company.

VAUGHN, Judge.

The sole question is whether, after the employer has settled with the employee, the North Carolina Industrial Commission has jurisdiction to determine whether a policy of compensation insurance has been properly cancelled.

All questions arising under Article 1 of the North Carolina Workmen's Compensation Act shall, except as otherwise provided by the act, be determined by the Commission. G.S. 97-91.

A section of that article, G.S. 97-99, regulates the cancellation of policies issued under the article.

There can be little doubt that, prior to the time the employer settled with the employee, the Commission had jurisdiction to determine the validity of the cancellation.

> "The general rule appears to be that, when it is ancillary to the determination of the employee's right, the compensation commission has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of injury, and construction of extent of coverage. This, of course, in harmony with the conception of compensation insurance as being something more than an independent contractual matter between insurer and insured.
>
> On the other hand, when the rights of the employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack. Or it may occur when the insured and insurer have some dispute entirely between themselves about the validity or coverage of the policy or the sharing of the admitted liability. Similarly, when an action for reformation of an insurance policy was brought, but it was not alleged that any claim was pending on that policy before the compensation board, the court exercised its normal power to reform instruments, but indicated that it would not have done so if the pendency of such a claim had been pleaded." Larson, Workmen's Compensation Law, Volume 4, § 92.40.

The Supreme Court of North Carolina has held that the Commission's jurisdiction under the statute "ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 448, at p. 445. In *Greene*, the rights of the deceased employee's survivors were not contested. The dispute was between the employer and the carrier.

Jurisdiction of the Commission is not limited solely to questions arising out of an employer-employee relationship or to the determination of rights asserted by or on behalf of an injured employee. *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. 259, 174 S.E. 2d 292, *cert. den.*, 277 N.C. 117. In *Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659, neither the employer nor the two alleged carriers challenged the claimant's right to compensation. The dispute was between the employer and the alleged carriers. Each defendant concluded that one or both of the remaining defendants were liable. The Court affirmed the liability of one carrier on the basis of a temporary binder issued by that company. It remanded the case to the Commission for determination by the Commission of whether the other company had properly cancelled its insurance contract.

The employer relies on *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E. 2d 354. In that case the policy stated an effective date of 9 May 1960. The employee's injury occurred on 3 May 1960. The employer contended that the carrier had agreed to issue a policy effective 20 April 1960. The Court held that the carrier could not be liable on the policy until "the policy is reformed on the ground of mutual mistake (or otherwise) so as to provide for a policy period inclusive of May 3, 1960." *Clark v. Ice Cream Co., supra,* p. 238. The Court discussed the strictness of pleadings then required for the "equitable" remedy of reformation. It concluded that the Commission did have jurisdiction to exercise the "equitable power" to reform a compensation insurance policy.

In the case at bar, no party seeks to reform or change the express term of a contract. The question is whether the insurance policy, as written, was on the risk at the time of the injury. That question should have been resolved by the Commission in the proceeding then pending before that body.

The order dismissing the proceeding for lack of jurisdiction is reversed and the cause is remanded.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF: DONALD FLETCHER JOHNSON

No. 7626DC730

(Filed 2 March 1977)

1. **Infants § 10— adjudication of delinquency — admission of allegations — showing of voluntariness in record**

An adjudication of delinquency based on the juvenile's admission of the allegations of the petition must be set aside where the record does not affirmatively show that the admission was made understandingly and voluntarily and with an awareness of its consequences.

2. **Infants § 10— adjudication of delinquency — findings beyond a reasonable doubt**

It is the better practice for an adjudication of delinquency to recite affirmatively that the facts found by the court are found beyond a reasonable doubt.

3. **Searches and Seizures § 1— search incident to lawful arrest**

A knife seized from respondent was properly admitted in a juvenile delinquency hearing where an officer had probable cause to arrest respondent without a warrant and the search which produced the knife was incident to a lawful arrest.

APPEAL by the juvenile from *Lanning, Judge.* Juvenile order entered 8 April 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 8 February 1977.

The juvenile was charged in a petition with being a delinquent child as defined by G.S. 7A-278(2) upon two grounds: (1) that he wilfully disturbed a public school in violation of G.S. 14-273 and (2) that he unlawfully possessed and carried a large pocket knife on property owned and operated by the Charlotte-Mecklenburg Board of Education in violation of G.S. 14-269.2.

The trial judge dismissed the charge of wilfully disturbing a public school, but found that the juvenile did carry a large knife on school grounds. After reviewing a lengthy juvenile record, the trial judge ordered "that the juvenile be committed to the Division of Youth Services for an indeterminate period of time not to exceed his 18th birthday."

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Public Defender Scofield, by Assistant Public Defender Mark A. Michael, for the juvenile.

BROCK, Chief Judge.

After hearing evidence from the arresting officer, the following transpired:

> "THE COURT: I want to know at this time if the juvenile admits or denies the allegations of the Petition?
>
> "COUNSEL FOR THE JUVENILE: He admits them."

No further inquiries were made concerning the admission made by counsel.

Thereafter, in the adjudicatory phase of the proceeding, the trial judge made the following finding:

> "THE COURT FINDS that the juvenile, through counsel, in open court, admits the allegations in the Petition dated March 8, 1976, to wit: carrying a concealed weapon on school grounds. Based on the juvenile's admission THE COURT FINDS that the juvenile did in fact carry a concealed weapon on the school grounds, to wit: a large Barlow knife, and adjudicated the juvenile DELINQUENT by reason thereof."

[1] The juvenile urges that the finding based upon his admission should not be permitted to stand because there is no affirmative showing that the admission was intelligently and voluntarily made. We agree.

Such an admission is the equivalent to a plea of guilty by an adult in a criminal prosecution. This Court, in *In re Chavis* and *In re Curry* and *In re Outlaw*, 31 N.C. App. 579, 230 S.E. 2d 198 (1976), has already applied the principle of *In re Gault*, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967); *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969); *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971); and *State v. Ford*, 281 N.C. 62, 187 S.E. 2d 741 (1972), to juvenile proceedings.

In a juvenile hearing to determine delinquency, which may lead to commitment to a state institution, an admission by the juvenile of the allegations of the petition must be made with awareness of the consequences of the admission and must be made understandingly and voluntarily, and these facts must affirmatively appear in the record of the proceeding. In the record before us there is nothing to indicate the existence of any of these facts.

[2] Since there must be a new hearing, we point out that the trial judge did not indicate the quantum of proof upon which he found the fact that the juvenile carried a concealed weapon on school grounds. The proper quantum of proof in a juvenile hearing to determine delinquency is proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). Our Supreme Court has held that "the failure of the trial judge to state that he finds the facts 'beyond a reasonable doubt' is not fatal if the evidence is sufficient to support his findings by that quantum of proof . . . in the absence of record evidence that the trial judge followed some other standard, there is a permissible inference that he followed the applicable law and found the facts beyond a reasonable doubt . . . " *In re Walker,* 282 N.C. 28, 191 S.E. 2d 702 (1972). Nevertheless, as the Court pointed out in *Walker,* the sounder practice dictates that the judge's order should recite affirmatively that the facts are found beyond a reasonable doubt.

[3] The juvenile's contention that his motion to suppress the evidence of the knife should have been allowed is without merit. We hold that the officer had probable cause to arrest without a warrant. G.S. 15A-401(b)(2)b.1. The search which produced the knife was incident to lawful arrest. *State v. Jackson,* 280 N.C. 122, 185 S.E. 2d 202 (1971). The juvenile correctly concedes that the search was not too remote in either time or place.

For the failure of the record of the proceedings to show that the admission by the juvenile of the allegations of the petition was with awareness of its consequences and was understandingly and voluntarily made, there must be a new hearing.

Reversed and remanded.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHNNIE STATEN, JR.

No. 768SC714

(Filed 2 March 1977)

1. **Unlawful Assembly; Weapons and Firearms— terrorizing people with dangerous weapon — elements of offense**

The essential elements of the common law offense of intentionally going about armed with an unusual and dangerous weapon to the terror of the people are: (1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public highways of the county, (4) in a manner to cause terror to the people.

2. **Unlawful Assembly; Weapons and Firearms— terrorizing people with dangerous firearm — sufficiency of indictment**

A magistrate's order was insufficient to charge defendant with the common law offense of intentionally going about armed with an unusual and dangerous weapon to the terror of the people, since the order in no way charged defendant with the unlawful purpose of terrorizing the people of the county or with going about the public highways of the county in a manner to cause terror to the people; therefore, defendant's motion in arrest of judgment should have been allowed.

APPEAL by defendant from *Small, Judge.* Judgment entered 9 July 1976 in Superior Court, LENOIR County. Heard in the Court of Appeals 9 February 1977.

The defendant was first tried in the district court on an order issued by a magistrate, reading as follows:

> " . . . [T]he defendant named above did unlawfully, wilfully, and intentionally did arm himself with a dangerous weapon, and did go about armed with a 30 caliber semi-automatic weapon to the terror of the citizens in violation of the following law: Common law."

The defendant was convicted in district court and appealed. In superior court, he moved to dismiss the magistrate's order for the reason that it failed to charge the defendant with a crime and on the ground that an amendment could not be allowed to correct the deficiencies. After this motion was denied, the district attorney then moved to amend the magistrate's order. This motion was allowed, and the magistrate's order was amended to charge that defendant:

> " . . . [D]id unlawfully and wilfully arm himself with an unusual and dangerous weapon, to wit: .30 caliber semi-

automatic weapon for the purpose of terrifying and alarming the citizens of Lenoir County, and did go upon and about the public highway of Lenoir County in a manner as would and did cause terror and annoyance and danger to the citizens of said county, in violation of the following law: Common Law."

Defendant pleaded not guilty. He was convicted by the jury and sentenced to imprisonment. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Russell Houston III for the defendant.

MARTIN, Judge.

Defendant's assignments of error raise two questions: (1) Did the trial court err in denying the defendant's motion to dismiss the magistrate's order and in allowing the State's motion to amend said order, and, (2) did the trial court err in denying the defendant's motion for a directed verdict at the close of State's evidence and again at the close of all the evidence?

The State's evidence tends to show that on the third day of January 1976 an argument developed in a tavern between defendant, Larry Murrell, and Ronny Moore; that the fight was stopped and defendant went out to his car, which was parked behind Murrell's car, and waited; that the tavern closed about 2:30 a.m. and Murrell went to his car; that defendant got out of his car carrying a rifle and told Murrell that he was "going to get him"; that Moore then came from across the street and pointed a sawed-off shotgun at defendant; that the police then arrived and arrested Moore and defendant; that defendant's weapon was a .30 caliber semi-automatic rifle; and that there was a loaded clip in the rifle.

Defendant testified that he did not have a weapon when he got out of his car to speak with Murrell; that he saw someone running at him with a sawed-off shotgun; that he then got in his car and attempted to load his rifle; but that he was unable to do so before the man with the shotgun ordered him out of his car.

[1] In *State v. Dawson,* 272 N.C. 535, 159 S.E. 2d 1 (1968), the court enumerated the four essential elements to charge the

common law offense of intentionally going about armed with an unusual and dangerous weapon to the terror of the people, namely: (1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public highways of the county, (4) in a manner to cause terror to the people.

[2] The original magistrate's order fails to charge the last three necessary elements of the crime as required by *State v. Dawson, supra.* The original magistrate's order was insufficient since it in no way charged defendant with the unlawful purpose of terrorizing the people of the county or with going about the public highways of the county in a manner to cause terror to the people. In that the magistrate's order does not contain sufficient information to notify the defendant of the nature of the crime charged and fails to contain even a defective statement of the offense, it is fatally defective and cannot be cured by amendment and the motion for arrest of judgment should have been allowed. *State v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157 (1951); *State v. Bohannon,* 26 N.C. App. 486, 216 S.E. 2d 424 (1975); see *State v. Williams,* 1 N.C. App. 312, 161 S.E. 2d 198 (1968).

In view of our holding, we do not deem it necessary to consider the second question raised.

Judgment arrested.

Judges PARKER and ARNOLD concur.

VIOLET T. DAWKINS v. WILLIAM A. DAWKINS

No. 7610DC735

(Filed 2 March 1977)

Process § 9— nonresident defendant — proof of service by mail — necessity for affidavit

Where the nonresident defendant made a special appearance to challenge the service of process upon him by registered mail, the return receipt of registered mail, without the accompanying affidavit showing the circumstances warranting the use of service by registered mail required by G.S. 1A-1, Rule 4(j)(9)(b), was insufficient to prove service of process by mail.

Dawkins v. Dawkins

APPEAL by plaintiff from *Murray, Judge.* Order entered 4 June 1976 in District Court, WAKE County. Heard in the Court of Appeals 15 February 1977.

Plaintiff brought this action to collect support payments due her under a Deed of Separation. She attempted to serve the defendant by registered mail, return receipt requested, at his home in Pensacola, Florida. On 1 March 1976, defendant moved to quash the purported service of process on grounds that the service was defective, and that the court lacked personal jurisdiction over him. The motion was granted. Plaintiff appeals.

Blanchard, Tucker, Twiggs & Denson, by R. Paxton Badham, Jr., for plaintiff appellant.

Cockman, Aldridge & Davis, by John M. Davis, for defendant appellee.

ARNOLD, Judge.

The record on appeal includes only one document purporting to prove service of process, a return receipt for registered mail, signed by Mrs. W. A. Dawkins, acknowledging receipt at the home of William A. Dawkins in Pensacola Florida. The Rules of Appellate Procedure, Rule 9(b)(1)(iii), require that the record include "a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or . . . a stipulation . . . showing the same."

The crucial question presented by this appeal is whether the return receipt, standing alone, is proof of service of process. It is not. G.S. 1A-1, Rule 4(j)(9)(b) provides for service of process by registered mail, and in pertinent part it says:

> Any party that . . . is not an inhabitant of . . . this State . . .
>
> > (b) . . . may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served . . . . Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered or certified mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing

by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee, and (iii) that the genuine receipt or other evidence of delivery is attached. *This affidavit . . . shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him.* (Emphasis added.)"

Defendant made a special appearance to challenge the service of process upon him. In this circumstance the rule requires an affidavit containing certain information showing the circumstances which warrant the use of service by registered mail, and this affidavit constitutes proof of service of process. The language of the statute is explicit and mandatory. The return receipt of registered mail, without the accompanying affidavit which is required, is insufficient to prove service of process by mail.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR UNDER THE WILL OF CECIL PAUL MOSS AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR UNDER THE WILL OF HELEN R. MOSS v. DAVID R. MOSS, CAROLYN R. CUMMINGS, GRACE COVENANT PRESBYTERIAN CHURCH, THE BILLY GRAHAM EVANGELISTIC ASSOCIATION, THE NEW YORK THEOLOGICAL SEMINARY, THE PRESBYTERIAN HOME FOR CHILDREN OF BLACK MOUNTAIN, NORTH CAROLINA, INC., ELIDA HOMES, INC., ORTHOPEDIC HOSPITAL AND REHABILITATION CENTER, INC., BOARD OF ANNUITIES AND RELIEF OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, AND THE UNION THEOLOGICAL SEMINARY IN VIRGINIA

No. 7628SC686

(Filed 16 March 1977)

1. Wills § 28— construction

Where the intention of a testator is clearly and consistently expressed, there is no need for judicial interpretation of the will; only

where there is ambiguity or uncertainty is it proper for the court to take into consideration the established rules or canons for the construction of wills.

2. **Wills § 40— power of appointment — construction — wills of donor and donee**

The will of the donor of a power of appointment and the will of the donee of the power must be construed together.

3. **Wills § 40— power of appointment — intent of testator — exercise by devisee**

A provision in a husband's will permitting the wife to devise the principal of a marital deduction trust by "specifically referring to this power of appointment" was intended by the husband to require only that the wife distinguish between her own property and the appointive property in order that there be no inadvertent exercise of the power of appointment; and a provision of the wife's will devising property "over which I have or may have any power of appointment" was effective to exercise the power of appointment given her by the husband's will where it is evident that she was concerned only with such power of appointment since she referred to property under a power of appointment only in the event that her husband died first, and where it is obvious that each spouse knew of the contents of the other's will because the wills were drafted by the same person, were executed on the same day, were witnessed by the same people, and revealed similar concerns.

APPEAL by defendants David R. Moss, Carolyn R. Cummings and The Presbyterian Children's Home of Black Mountain, North Carolina, Inc., from *Martin (Harry C.), Judge.* Judgment entered 3 May 1976, in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 January 1977.

Plaintiff, Executor and Trustee under the wills of both Cecil Paul Moss and Helen R. Moss, brings this action to have the two wills construed and to have declared the rights of the parties defendant, beneficiaries under both wills, consisting of the two children of Cecil Paul Moss and Helen R. Moss and various charitable institutions. Both wills were executed at Asheville, North Carolina, on the same day, 12 January 1972, and the subscribing witnesses, one of whom was an attorney, were the same. Much of the language in the two wills, except for the dispositive paragraphs, is identical.

Cecil Paul Moss died 7 June 1972. His will, duly probated and not altered by codicil, is summarized, in pertinent part, except where quoted, as follows:

Items Three and Four provided that his automobile, other tangible personal property, and homeplace were devised to his wife, Helen R. Moss.

Item Five provided for the creation of two trusts. Section 1 created the first, the "wife's share," "which will equal in value the maximum marital deduction allowable." Section 2(a) provided that the income was to be paid to her for life, and Section 2(b) provided that so much of the principal as she directed in writing was to be paid to her free of trust. Section 2(d) provided that upon the death of his wife, the remaining principal was to be transferred and discharged of the trust "to such appointee or appointees of my wife (including my wife's estate) and in such amounts or proportions and upon such terms and provisions as my wife shall appoint and direct in an effective will or codicil *specifically referring to this power of appointment.*" (Emphasis added.) If this power of appointment were not "effectively exercised" by his wife, the principal remaining passed as a part of the residuary estate.

Item Five, Section 8 provided for the creation of the second trust from the remainder of the residuary estate. His wife was entitled to the net income therefrom, and, in the discretion of the trustee, to so much of the principal as she needed. Upon her death, the principal, which included the "wife's share" if she did not exercise her power of appointment, would be paid as follows: (a) the sum of $120,000.00 in cash or its equivalent, or one-half of the remainder of the residuary estate, whichever is greater to each of their two children, or issue *per stirpes;* and (b) the balance to be distributed in stated sums or percentages to named persons and charitable institutions.

Helen R. Moss died 31 December 1974. Her will, duly probated and altered by codicil of 14 December 1973 (which had no effect on the provisions in dispute herein, and merely added $15,000.00 from her personal estate to the $20,000.00 bequeathed by her husband to her brother) is summarized in pertinent part, except where quoted, as follows:

Item Three provided that if she predeceased her husband, all of her property would go to him.

Item Four provided that if her husband predeceased her, her tangible personal property would go to her children as deemed for their best interest in the discretion of the Executor,

the balance of the tangible personal property to become a part of her residuary estate.

Item Five provided that after the distribution in Item Four all the residue and remainder of her estate "including any property or estate over which I have or may have any power of appointment" would go to her trustee in trust for the following purposes: (a) one-half to the trustee in perpetuity for the Board of Annuities and Relief, Presbyterian Church, U. S., and (b) the remainder to the trustee in perpetuity for the Union Theological Seminary, Richmond, Virginia.

All parties stipulated that on 1 January 1975, the date of the death of Helen R. Moss, the marital trust created under the will of Cecil Paul Moss had a value of $229,847.64; that on the same date the personal estate of Helen R. Moss (without regard to any power of appointment) had a value of $178,621.67, consisting of a home with a value of $61,110.00, stocks and bonds with a value of $3,891.25, mortgages, notes and cash with a value of $96,140.90, and other miscellaneous property with a value of $17,479.52; and that her personal estate, after payment of debts and estate expenses amounting to $25,343.57, passed under the general residuary clause of her will. It was further stipulated that plaintiff had no knowledge of any power of appointment in Helen R. Moss other than that contained in her husband's will.

The cause was heard by the trial judge on pleadings, stipulations, briefs and arguments of counsel. Judge Harry C. Martin made findings of fact and conclusions of law, including the conclusion that *"Item Five* of the Will of Helen R. Moss effectively executed the power of appointment held by her over the marital deduction trust created by . . . the Will of Cecil Paul Moss."

The plaintiff accepted and confirmed the judgment. David R. Moss and Carolyn R. Cummings, children of testators, and The Presbyterian Children's Home of Black Mountain, North Carolina, Inc. made exceptions to and appealed from the judgment.

Redmond, Stevens, Loftin & Currie, P.A., by John W. Mason and John S. Stevens for plaintiff appellees.

Adams, Hendon & Carson, P.A., by Geo. Ward Hendon and George W. Saenger for defendant appellants, David R. Moss and Carolyn R. Cummings.

Shuford, Frue, Sluder & Best by Gary O. Sluder and Ronald D. Brondyke for defendant appellant, The Presebyterian Children's Home of Black Mountain, North Carolina, Inc.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A., by Barry B. Kempson, for defendant appellees, The Union Theological Seminary in Virginia and Board of Annuities and Relief of the Presbyterian Church in the United States.

CLARK, Judge.

This appeal raises the following issue: Did Helen R. Moss in her will, by devising the remainder of her estate "including any property or estate over which I have or may have any power of appointment," effectively execute the power of appointment given to her by her husband, Cecil Paul Moss, in his will, which required that she "appoint and direct in an effective will or codicil specifically referring to the power of appointment"?

[1, 2] The cardinal rule in interpreting and construing a will, followed in countless North Carolina cases since *Blount v. Johnston,* 5 N.C. 36 (1804), is that the intention of the maker be ascertained if possible. The intention which controls is that which is manifest, expressly or impliedly, from the language of the will. *Kale v. Forrest,* 278 N.C. 1, 178 S.E. 2d 622 (1971); *In re Will of Cobb,* 271 N.C. 307, 156 S.E. 2d 285 (1967); *Weston v. Hasty,* 264 N.C. 432, 142 S.E. 2d 23 (1965); *Dearman v. Bruns,* 11 N.C. App. 564, 181 S.E. 2d 809 (1971); 95 C.J.S. Wills § 586 (1957); 80 Am. Jur. 2d Wills § 1143 (1975). Where the intention is clearly and consistently expressed there is no need for judicial interpretation, and the court must first examine the will and, if possible, ascertain its meaning without reference to rules or canons of construction. *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334 (1953). Only where there is ambiguity or uncertainty is it proper for the court to take into consideration the established rules or canons for the construction of wills. *Rhoads v. Hughes,* 239 N.C. 534, 80 S.E. 2d 259 (1954); *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17 (1945); *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662 (1940). A will which admits of two constructions is ambiguous, for ambiguous simply means capable of being understood in more senses than one. *Moore v. Parrish,* 38 Wash. 2d 642, 228 P. 2d 142 (1951). The will of the donor of a power of appointment and the will

of the donee of the power must be construed together. *In re Price's Will,* 163 N.Y.S. 2d 34, 4 Misc. 2d 1023 (1956); *Republic Nat'l. Bank v. Frederick's,* 274 S.W. 2d 431 (Tex. Civ. App. 1954), *rev'd on other grounds* 283 S.W. 2d 39 (Tex. 1955). Joint construction is particularly appropriate in the present case since the two wills were executed on the same day before the same witnesses, one of whom was an attorney, appoint the same executor and contain very substantially identical language except for the dispositive provisions.

[3] We are called upon to construe the term in the will of Cecil Paul Moss which provided that his wife could dispose of the principal of the marital trust by "specifically" referring to the power and the term in the will of Helen R. Moss which devised any property over which she may have "any power of appointment." The word "specifically" usually means explicitly or definitely. *Laman v. McCord,* 245 Ark. 401, 432 S.W. 2d 753 (1968); *Straton v. Hodgkins,* 109 W. Va. 536, 155 S.E. 902 (1930). It does not always mean that an item be individually named, and where it is clear that the intention of the drafter is to the contrary, such narrow meaning will not be assigned. *Administrator, F.A.A. v. Robertson,* 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed. 2d 164 (1975); *California v. Richardson,* 351 F. Supp. 733 (D.C. Cal. 1972). The word "any" has a diversity of meanings, and its meaning in a particular case depends on the context or subject matter of the statute or document in which it is used. *State ex rel. Womack v. Jones,* 201 La. 637, 10 So. 2d 213 (1942). As used in a will, "any" may have one of several meanings according to the subject which it qualifies and should be construed in context with other words used in the bequest. *In re Scheyer's Estate,* 336 Mich. 645, 59 N.W. 2d 33 (1953). We conclude that the terms "specifically" and "any" as used in this context are sufficiently ambiguous to allow an examination of the circumstances surrounding the execution of the wills in addition to the four corners of the instruments. *Trust Co. v. Jones,* 210 N.C. 339, 186 S.E. 335 (1936); *Adler v. Bank,* 4 N.C. App. 600, 167 S.E. 2d 441 (1969).

The language used in the two wills reveals that the primary concern of Mr. and Mrs. Moss was the security and comfort of the surviving spouse, and secondary concerns were tax savings and charitable contributions. The dispositive provisions of the will of Mr. Moss provided that the income from both the marital deduction and the residuary trust was to go to Mrs. Moss, and

furthermore she was given the absolute and unfettered power to invade the principal of the marital deduction trust during her lifetime and the power to devise it to whomever she wished upon death. Appellants concede that she possessed a general power of appointment. Mr. Moss did not give his wife the minimum power over the marital share that he could have in order to obtain maximum tax benefits. Rather he gave her broad powers over disposition, limited only to the requirement of a specific reference in her will, which powers indicate confidence and trust in her judgment and ability to manage her property. The fact that even if the power were exercised, Mr. Moss elsewhere in his will made generous provision for his children, the other natural objects of his bounty, lends support to the conclusion that he had no intention to restrict his wife unduly in the disposition of the property subject to the power of appointment. *Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246 (1956); 7 Strong, N. C. Index, Wills § 78 (2d Ed. 1968).

The language in the will of Helen R. Moss also exhibits concern for the security of her spouse, for charitable institutions, and for minimizing the tax burden upon her estate. If she predeceased her husband, all of her property was to go to him. The single most significant feature of her will which leads to the conclusion that she intended to exercise the power of appointment created in her husband's will is the distinction that exists between the dispositive provisions if she predeceased him and those if he predeceased her. Item Three provided that if she predeceased her husband, he was to have "all of my property and estate of every kind and wheresoever situate of which I die seized and possessed." Item Five provided that if he predeceased her, she was disposing of "all the rest, residue and remainder of my property and estate, whether real, personal, or mixed, of every nature and wherever situate, *including any property or estate over which I have or may have any power of appointment.*" (Emphasis added.) The fact that Mrs. Moss made reference to property under a power only in the event that her husband died first is evidence that she was concerned only with the power created in his will, and was thereby making special reference to it. Were this boiler-plate language only, it would be included in Item Three as well. The omission in Item Three and inclusion in Item Five is evidence of the specific nature of the language in this context. The language indicates an awareness by Mrs. Moss that only if her husband predeceased

her would she possess two classes of property, (1) property under appointment and (2) her personal estate, and it demonstrates an intention to make a distinction between these two classes of property.

Circumstances attendant the execution of the wills resolve any ambiguity and compel the conclusion that the power was exercised. Both wills were executed on the same day, were witnessed by the same people, contain substantially identical language except for the dispositive provisions, and reveal similar concerns. It is reasonable to infer that the same person drafted the two wills to reflect the common interests and concerns of Mr. and Mrs. Moss, and to infer that each spouse was aware of the contents of the other's will. The fact that a donee of a power was aware of the existence of a power of appointment at the time of the execution of the donee's will is a circumstance which supports the conclusion that ambiguous language in donee's will reflects an intention to exercise the power. 62 Am. Jur. 2d, Powers of Appointment § 49 (1972). The fact that the provision will have no meaning unless it operates to exercise the power is also a circumstance which supports the conclusion that the donee thereby intended to exercise the power. 62 Am. Jur., *supra,* § 51. The size of the two classes of property under the control of Mrs. Moss supports the conclusion that it was the intention of Mr. Moss, the donor, to require only that his wife, the donee, distinguish between the two classes in her will in order that there be no inadvertent exercise of the power.

Considering the circumstances surrounding the execution of both wills and language of both wills, we conclude that it was the intent of Mr. Moss, in requiring Mrs. Moss to effectively execute the power of appointment by "specifically" referring to the power, to require that his wife in her will show her intent to devise both classes of property under her control; and we further conclude that it was the intent of Mrs. Moss to exercise the power of appointment by devising the remainder of her estate "including any property or estate over which I have or may have any power of appointment." The intent of Mr. Moss was to prevent Mrs. Moss from inadvertently exercising the power of appointment. Mrs. Moss made a distinction between her own property and the appointive property and intentionally exercised the power. See *Kirkman v. Wadsworth,* 137 N.C. 453, 49 S.E. 962 (1905).

Plaintiffs call to their aid two statutes, G.S. 31-4 and G.S. 31-43. G.S. 31-4 provides in substance and pertinent part that the failure to satisfy formal requirements imposed by the donor does not make the exercise of the power of appointment ineffective if the appointment is executed in the manner prescribed by law. G.S. 31-43 provides in substance that a general devise shall be construed to include any property which the testator may have power to appoint in any manner he may think proper unless a contrary intention of the donee testator is shown. *Trust Co. v. Hunt,* 267 N.C. 173, 148 S.E. 2d 41 (1966); *Walsh v. Friedman,* 219 N.C. 151, 13 S.E. 2d 250 (1941); *Johnston v. Knight,* 117 N.C. 122, 23 S.E. 92 (1895).

Appellants deny the applicability of these statutes, and cite in support several cases, which we have carefully examined. We do not deem it necessary to rule upon the applicability of these two statutes and cases cited in view of our conclusion that it was the intent of Mr. Moss to require only that Mrs. Moss avoid an inadvertent disposition of the appointed property by referring to the power, and that she complied with this requirement by referring to "any property . . . over which I have or may have any power of appointment."

The defendants David R. Moss and Carolyn R. Cummings also except to the findings of the trial court that The Board of Annuities and Relief and The Union Theological Seminary are qualifying charities under Section 2055 of the Internal Revenue Code of 1954, as amended. In making these findings the trial court took judicial notice of certain sections of the Internal Revenue Code. Judicial notice may be taken of the public laws of the United States and of important administrative regulations having the force of law. 1 Stansbury, N. C. Evidence § 12 (Brandis Rev. 1973); 29 Am. Jur. 2d Evidence, § 39 (1967). This assignment of error is overruled.

The judgment of the trial court is

Affirmed.

Judges VAUGHN and HEDRICK concur.

PAUL B. SCHOFIELD v. THE GREAT ATLANTIC AND PACIFIC TEA CO., INC.

No. 7626IC755

(Filed 16 March 1977)

1. **Master and Servant § 77— workmen's compensation — change of condition — maximum improvement not reached — sufficiency of evidence**

In a proceeding under the Workmen's Compensation Act in which plaintiff sought additional compensation from defendant, his employer, testimony by the doctors who treated plaintiff was sufficient to support findings of fact by the Industrial Commission that: (1) plaintiff had a change of condition for the worse and again became temporarily totally disabled on 19 July 1974, over two years after the accident giving rise to the injury; (2) plaintiff has remained temporarily disabled since that date; (3) at the time of the hearing before the Industrial Commission, which took place on 1 April 1976, plaintiff was still temporarily totally disabled; and (4) plaintiff has still not reached maximum improvement or the end of the healing period.

2. **Master and Servant § 75— workmen's compensation — medical expenses — purpose of incurring — sufficiency of evidence**

Evidence was sufficient to support the finding of the Industrial Commission that treatment obtained by plaintiff after his condition changed for the worse on 19 July 1974 was obtained with a view of tending to lessen plaintiff's period of disability, and the Commission properly concluded that defendant was responsible for the payment of all medical expenses incurred by plaintiff since 19 July 1974.

APPEAL by defendant from award of the North Carolina Industrial Commission filed 12 July 1976. Heard in the Court of Appeals 17 February 1977.

This is a proceeding under the Workmen's Compensation Act in which plaintiff seeks additional compensation from defendant, his employer.

A hearing was held by Chief Deputy Commissioner Forrest H. Shuford II at which time the parties made stipulations summarized in pertinent part as follows:

At the time of the alleged injury the parties were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; defendant was a duly qualified self-insurer under the act.

On 29 April 1972, while plaintiff was employed by defendant in a meat department of one of its stores, plaintiff sustained

an injury by accident arising out of and in the course of his employment when he twisted his knee while carrying some meat. The parties entered into an "Agreement for Compensation" on Form 21 dated 20 September 1973, and said agreement was submitted to and approved by the Industrial Commission on or about 3 October 1973. Plaintiff's average weekly wage was $188 and his weekly compensation rate was $56.

Following his accident plaintiff worked until 12 June 1972. At that time he began to miss work and draw sick pay compensation under defendant's sick pay plan; and, until 8 June 1974 he received weekly the higher amount of the sick pay compensation or workmen's compensation for temporary total disability. Over a period of 104 weeks he received $8,423. In addition to said amount defendant paid all medical expenses incurred by plaintiff and approved by the commission from the date of the accident until 1 June 1974, the amount being $4,831.95.

Plaintiff was treated by Doctors Carr and Wrenn of the Miller Clinic, Inc., in Charlotte, N. C. As a result of an examination on 9 April 1974 Dr. Carr reported:

> " . . . He certainly is totally unable to do his job as a butcher and may be permanently so. He has 50 percent permanent partial disability in his leg right now, and the prognosis for improvement is questionable or at least guarded. The diagnosis is traumatic arthritis of the left knee with traumatic osteochondrosis of the knee and chronic hypertophic synovitis of the knee. He will be back in one month to see us as a follow-up on the knee. I do not feel that total knee replacement and/or arthrodesis of the knee is indicated at all. . . . "

Dr. Carr saw plaintiff again on 5 June 1974 and did not report any change from the above quotation. Defendant concluded that plaintiff had reached his maximum improvement by 5 June 1974 and advised plaintiff that it was willing to pay permanent partial disability to him based upon Dr. Carr's rating of 50 percent of the knee, but that it was unwilling to pay any further medical expenses incurred by him.

When plaintiff failed to accept the 50 percent rating and to sign a supplemental memorandum of agreement, defendant began to reflect the compensation payments made after 8 June 1974 as payments toward the permanent partial disability to which he has become entitled under the act.

Defendant has paid to plaintiff during the period from 9 June 1974 to 26 March 1976 (94 weeks at $56 per week) the additional sum of $5,264 toward the 50 percent permanent partial disability of the leg. Defendant has not paid any medical expenses incurred by plaintiff since 8 June 1974.

Plaintiff contends (a) that he has permanent partial disability to his left leg greater than the aforesaid 50 percent rating by Dr. Carr, and (b) that defendant should be required to pay his medical expenses incurred since June 1974.

Defendant contends (a) that plaintiff reached maximum improvement by 8 June 1974; (b) that he is entitled to comsation for permanent partial disability based on Dr. Carr's 50 percent rating to his leg and no higher rating; and (c) that it is not required under the act to pay any additional medical expenses as such medical treatment did not tend to lessen his disability and was unnecessarily incurred without approval of defendant or the commission.

The hearing commissioner's findings of fact are summarized as follows:

Plaintiff reached maximum improvement from his injury by accident on 9 April 1974 at which time he was rated as having sustained a 50 percent permanent partial disability of his left leg. However, plaintiff had a change of condition for the worse and again became temporarily totally disabled on 19 July 1974. Since 19 July 1974 plaintiff has undergone additional medical and surgical treatment with a view of tending to lessen his "increased permanent disability" (changed by full commission to "period of disability").

Plaintiff developed complications following such additional treatment and "has remained temporarily total (sic) disabled since 19 July 1974." As of the time of the hearing plaintiff was still temporarily totally disabled as a result of his injury by accident and complications arising therefrom. As of the date of the hearing on 1 April 1976 plaintiff still had not reached maximum improvement or the end of the healing period.

The hearing commissioner's conclusions of law are as follows:

1. As a result of the injury by accident giving rise hereto plaintiff sustained a change of condition for the

worse as of 19 July 1974 and has not reached the end of the healing period or maximum improvement from his injury as of the date of the hearing of this case on 1 April 1976. Plaintiff is entitled to compensation for temporary total disability at the lawful rate of $56.00 per week commencing 19 July 1974. The payment of such compensation for temporary total disability should continue until plaintiff reaches maximum improvement or the end of the healing period or until he has a change of condition.

G.S. 97-29; G.S. 97-31; G.S. 97-47.

2. Defendant is responsible for the payment of all medical expenses incurred as a result of the injury by accident giving rise hereto and is responsible for the payment of any additional medical treatment which will tend to lessen plaintiff's disability. G.S. 97-25.

3. The payment of compensation made to plaintiff by defendant for the period 9 April 1974 to 19 July 1974 should be credited against compensation which may be hereafter due plaintiff for permanent partial disability of the left leg. G.S. 97-31(15) (19).

The hearing commissioner ordered, in pertinent part, that the payment of compensation to plaintiff for the period 9 April 1974 to 19 July 1974 be credited as payment to plaintiff of compensation for permanent partial disability which hereafter may be due plaintiff; that defendant pay plaintiff compensation for temporary total disability at the rate of $56 per week commencing 19 July 1974, which payment for temporary total disability shall continue until such time as plaintiff reaches maximum improvement or the end of the healing period or until he has a change of condition, but the total period covered by such compensation shall not exceed 400 weeks from the date of the accident; that defendant pay all unpaid medical expenses incurred as a result of the injury by accident when bills for same shall have been submitted to and approved by the Industrial Commission; and defendant shall be responsible for the payment of additional medical expense which shall tend to lessen plaintiff's disability.

Defendant appealed to the full commission who adopted as its own, and affirmed, the opinion and award of the hearing commissioner except for changing the words "increased permanent disability" in the findings of fact to "period of disability."

Defendant appealed to the Court of Appeals.

R. A. Collier for plaintiff appellee.

Caudle, Underwood & Kinsey, by Lloyd C. Caudle and John H. Northey III, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the findings of fact and conclusions of law that plaintiff is entitled to compensation for further temporary total disability since 19 July 1974 because he then suffered a change of condition for the worse and has not reached the end of the healing period or maximum improvement. Specifically, defendant contends that the findings (1) that plaintiff had a change of condition for the worse and again became temporarily totally disabled on 19 July 1974, (2) that he has remained temporarily disabled since that date, (3) that at the time of the hearing [1 April 1976] he was still temporarily totally disabled, and (4) that he has still not reached maximum improvement or the end of the healing period, are not supported by sufficient evidence; and that conclusion of law number 1 stated above and the order for defendant to pay compensation and medical expenses based thereon are erroneous. We find no merit in the assignment.

At the outset we begin with the principle, well established in this jurisdiction, that the Workmen's Compensation Act should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation. *Cates v. Construction Co.*, 267 N.C. 560, 148 S.E. 2d 604 (1966); *Guest v. Iron and Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950).

The heart of defendant's contention is that Dr. Carr, in the portion of his letter of 9 April 1974 quoted in the stipulations set forth above, gave plaintiff a rating of 50 percent permanent partial disability in his left leg, and there was not sufficient evidence to support a finding that plaintiff had a change of condition for the worse and again became temporarily totally disabled on 19 July 1974. This contention makes a brief review of the evidence relating to plaintiff's medical treatment necessary.

While both parties find comfort in portions of Dr. Carr's testimony, it was the perogative of the commission to find the facts from conflicting evidence. Portions of his testimony most favorable to plaintiff tended to show:

Plaintiff was referred to Dr. Carr in September 1972 by a Statesville physician who performed surgery on plaintiff's knee on 13 June 1972. In that surgical operation a loose torn cartilage was removed but the knee continued to give plaintiff trouble; fluid accumulated and plaintiff endured considerable pain. After prescribing extensive physical therapy for plaintiff and seeing him on numerous occasions over a period of some five months, Dr. Carr performed surgery on the knee on 13 February 1973. At that time Dr. Carr found that plaintiff had fragments of the medical miniscus caught up behind the condyle in a cul-de-sac, an area not seen by the original operating surgeon. Plaintiff remained in the hospital for nine days following this surgery, and from then until August 1973 he was treated as an outpatient at the hospital in Statesville with physical therapy and was seen monthly by Dr. Carr.

As of August 1973 plaintiff was still limping, suffering considerable pain when weight was put on the leg and his progress was unsatisfactory. Dr. Carr then consulted his associate Dr. Wrenn and later on they decided that further surgery, a tribial osteomoty, was advisable. They performed the operation on 6 November 1973 after which Dr. Wrenn, due to a lengthy absence by Dr. Carr, took charge of the case until April 1974.

On 9 April 1974 Dr. Carr saw plaintiff and reviewed Dr. Wrenn's notes covering the period of time Dr. Carr was absent. It was then that Dr. Carr wrote the letter rating plaintiff's permanent leg disability at 50 percent. In his testimony Dr. Carr stressed the clause that the prognosis was questionable, stating: "I did not attempt to say that he had reached his maximum point of recovery because I said permanent partial disability in his leg now and prognosis for improvement is questionable, at least partly guarded . . . . "

Dr. Carr saw plaintiff again in May 1974. Regarding this visit he described plaintiff thusly: " . . . He was worried, mentally distressed, quite depressed. He had lost 30 pounds of weight. He was still using crutches and from then on the next month, he was even worse symptomatically. He had some fluid in it, and that was removed on the 5th of June and he came

back in July." He saw plaintiff again on 10 July 1974 at which time plaintiff "certainly was not improved." He then consulted with Dr. Wrenn regarding the possibility of replacing plaintiff's knee joint with an artificial knee and at that point turned the case over to Dr. Wrenn.

Dr. Wrenn's testimony is summarized in pertinent part as follows:

He examined plaintiff in July 1974 for "reevaluation of his situation." He concluded that the only chance for plaintiff to receive relief would be to undergo a total knee replacement procedure by which the joint surfaces of the thigh bone and shin bone are removed and replaced with artificial ones. That operation was accomplished on 30 August 1974 but did not give plaintiff relief.

In December 1975 further surgery was performed at which time plaintiff's knee cap was removed after which plaintiff contracted a wound infection. He was readmitted to the hospital in February 1976 where he remained some six weeks with a knee infection. As of the date of the hearing the infection was clearing up slowly but none of the surgical procedures had produced the desired results.

With respect to plaintiff's maximum point of recovery, Dr. Wrenn stated that he did not know but "I have hope it will improve." He rated plaintiff's leg disability at 80 percent and stated that the operation in August 1974 was intended to lessen plaintiff's disability.

The findings of fact of the Industrial Commission are conclusive on appeal when they are supported by any competent evidence, even though there is evidence that would support a contrary finding. 5 Strong, N. C. Index 2d, Master and Servant, § 96, p. 484. We hold that the findings of fact challenged by this assignment are supported by sufficient evidence and that the conclusion of law and order predicated thereon are not erroneous.

[2] By its second assignment of error defendant contends the finding of fact and conclusion of law adopted by the commission that defendant is responsible for the payment of all medical expenses incurred by plaintiff since 19 July 1974, said medical treatment having been obtained by him with a view of tending

to lessen his period of disability, are not supported by sufficient evidence. This assignment is without merit.

G.S. 97-25 provides in pertinent part that "[m]edical, surgical, hospital, nursing services, medicines . . . and other treatment . . . as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, . . . shall be provided by the employer. . . . "

Defendant argues that plaintiff reached maximum improvement in April 1974 and that it was not required to furnish experimental medical treatment in the absence of evidence supporting a finding that the treatment would tend to lessen disability, and which treatment even with a good result could only bring a "hope it would lessen" plaintiff's complaint.

While reviewing in retrospect the medical treatment received by plaintiff one might conclude that he would have been better off had he received no surgical treatment after July 1974, we must consider his situation at that time. When Dr. Carr saw plaintiff in May 1974 he was mentally distressed, had lost 30 pounds and was having to use crutches. As of 10 July 1974 plaintiff was not improved. The medical testimony discloses that while physical therapy administered prior to that time considerably improved the flexibility of plaintiff's knee area, nothing that was done made it possible for plaintiff to put more than a minimum of weight on his leg. The accumulation of fluid, accompanied by considerable pain in the knee area persisted.

As stated above, Dr. Wrenn testified that while he did not *know* if the surgical operations would result in improvement, he had hopes that they would and that they were intended to lessen plaintiff's disability.

We hold that the challenged finding of fact is supported by sufficient evidence and that the commission was authorized to require defendant to pay for the additional medical treatment. G.S. 97-25.

For the reasons stated, the award appealed from is

Affirmed.

Judges HEDRICK and CLARK concur.

EMILY B. ALLRED, WIDOW OF DEWEY ALLRED, DECEASED EMPLOYEE, PLAINTIFF v. PIEDMONT WOODYARDS, INC. AND/OR SOUTHERN WOODYARDS COMPANY, EMPLOYERS AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7620IC737

(Filed 16 March 1977)

1. **Master and Servant § 49— workmen's compensation**

While the evidence in this workmen's compensation proceeding would have supported the Industrial Commission's conclusion that defendant insurer was estopped to deny that a pulpwood cutter was acting as an employee of the two defendant woodyards at the time of his death by accident while cutting pulpwood, the Commission's findings of fact were insufficient to support such conclusion, and the proceeding must be remanded for further findings of fact and conclusions of law based on the present record.

2. **Master and Servant § 71— workmen's compensation — average weekly wage**

The Industrial Commission erred in determining a pulpwood cutter's average weekly wage based on all of the proceeds of sales of pulpwood to two woodyards where the evidence showed that the cutter was assisted in his work part of the time by his two sons and that they received part of the proceeds from the sales of pulpwood for their labor.

APPEAL by defendants from award of the North Carolina Industrial Commission entered 8 July 1976. Heard in the Court of Appeals 15 February 1977.

Plaintiff instituted this proceeding under the Workmen's Compensation Act to recover death benefits from her husband's alleged employers and their insurance carrier for an injury by accident to her husband resulting in his death.

Defendants stipulated that at the time of the alleged injury by accident, 14 November 1974, which injury resulted in the death of Dewey Allred (Dewey), defendant insurance company was the compensation carrier for defendants Piedmont Woodyards, Inc. (Piedmont), and Southern Woodyards Company (Southern).

A hearing was held before Deputy Commissioner Dandelake after which he made the following "Findings of Fact":

"1. On November 14, 1974, Dewey Allred was measuring and cutting pulpwood and while measuring a tree that

was being cut, the tree fell and hit the said Dewey Allred on top of his head; that he was carried to the hospital at Pinehurst, North Carolina, and was dead on arrival; that the deceased, Dewey Allred, was a white male, seventy-one years of age and had been a pulpwood cutter for twenty years or more.

"2. That the deceased employee's widow, Emily B. Allred, testified that she was with her husband when the agreement was made that the owner of Piedmont Woodyards, Inc., take fifty cents per cord to enable his group to be covered under the Workmen's Compensation Act; that at a hearing at Carthage, North Carolina, on April 11, 1975, Mr. O. H. Lambert, Jr., owner of Southern Woodyards Company, testified under oath that he deducted fifty cents per cord from his woodcutters; that Mr. O. H. Lambert, Jr., owner of Southern Woodyards Company, is now deceased and the wife of the deceased who is now operating Southern Woodyards Company denies that she collects fifty cents per cord for workmen's compensation and contends that what she deducts is for cost of production.

"3. That Piedmont Woodyards, Inc., operated by Mr. Harrington, also deducts fifty cents per cord on all wood purchased at the yard.

"4. It is found that fifty cents per cord was deducted from money due the deceased for the above two mentioned woodyards every time wood was delivered to these woodyards and the stumpage was also deducted from money due deceased.

"5. That checks and vouchers were presented at the hearing, showing all sales and checks paid to Dewey Allred and said totals are amounts equal in dollars; that the pulpwood sold at one yard amounted to $3,898.84 and at the other yard it totaled $3,224.87.

"6. It is found by the undersigned that the deceased was an employee, jointly working for both of the above named defendant employers and the defendant insurance carrier is estopped to deny that the deceased and persons working for the deceased were acting as employees of both defendant employers and were covered by the workmen's compensation insurance paid for by the defendant employers.

"7. That the deceased's average weekly wage was $137.00; that this average weekly wage is derived from the total money paid the deceased by both Southern Woodyards Company and Piedmont Woodyards, Inc., which amounts to $7,123.71, and this amount divided by fifty-two equals $137.00, which is enough to entitle the plaintiff to the maximum compensation.

"8. That the deceased was married to Emily Bruce at Chesterfield, South Carolina, in October, 1927, and they had eleven children; that all the children that are living have reached their majority; that one son lives at home and was ten percent dependent upon his father at the time of his death; that said son was a truck driver and was injured in a wreck and is now on disability, drawing $240.00 per month from Social Security benefits."

The hearing commissioner concluded as a matter of law that defendant carrier is estopped to deny that Dewey was acting as an employee of defendants Piedmont and Southern at the time of the injury by accident which resulted in death; that the parties were subject to and bound by the provisions of the Workmen's Compensation Act and plaintiff is entitled to death benefits under said act; that Dewey's average weekly wage was $137; that on 14 November 1974 Dewey sustained an injury by accident arising out of and in the course of his employment with defendants Piedmont and Southern; and that plaintiff is entitled to compensation at the rate of $80 per week for a period of 400 weeks, beginning 14 November 1974, on account of the death of Dewey.

From an award requiring defendant insurance carrier to pay plaintiff $80 per week for 400 weeks, together with $500 funeral expenses and medical expenses, defendants appealed to the full commission.

The full commission adopted as its own and affirmed "the decision of Deputy Commissioner Dandelake in its entirety." Defendants appealed to this court.

Pittman, Staton & Betts, by Stanley W. West and William W. Staton, for plaintiff appellee.

Hedrick, Parham, Helms, Kellam & Feerick, by Richard T. Feerick and Edward L. Eatman, Jr., for defendant appellants.

BRITT, Judge.

By their first assignment of error defendants contend that the commission erred in determining that Dewey was an employee working jointly for Piedmont and Southern, in determining that defendant insurance carrier was estopped to deny that Dewey was acting as an employee of both alleged employers, and that Dewey was covered by workmen's compensation insurance allegedly paid for by defendants Piedmont and Southern.

Defendants excepted to findings of fact 2 through 7 and to each of the conclusions of law. They argue that the challenged findings of fact are not supported by the evidence, that the findings do not support the conclusions of law and that the conclusions are contrary to law.

Evidence presented at the hearing is summarized in pertinent part as follows:

Plaintiff testified: On 14 November 1974 Dewey was killed while cutting trees to sell to defendants Piedmont and Southern as pulpwood. He had been in the business of cutting trees and selling them for pulpwood for some 20 years and for 10 years preceding his death had sold only to Piedmont and Southern. Dewey owned his own truck and equipment and was not supervised by defendants Piedmont or Southern. Dewey got the timber which he sold from landowners who asked them to clear their property, would cut the timber into lengths specified by Piedmont and Southern and would sell it to them. His sons, Larry and David, helped him from time to time. When Piedmont and Southern would pay Dewey for a load of pulpwood they would deduct 50 cents per cord for workmen's compensation coverage in case anything happened to him. They would also make a deduction for the people who owned the land from which the wood was cut.

David Allred testified: He worked with Dewey, his father, "off and on" for about 1½ years prior to Dewey's death. In 1974 Mr. Harrington, Piedmont's overseer at Putnam, told him that from the proceeds of pulpwood sold by Dewey, they deducted 50 cents per cord for compensation and also deducted "stumpage" for the landowner.

Mrs. Thelma Williams Lambert testified: She is the widow of O. H. Lambert who owned Southern during and prior to

1974 and who died on 30 May 1975. She assisted her husband prior to his death and continued to operate the business following his death. The only amounts deducted from the sales of pulpwood made by Dewey were for stumpage and they did not make deductions for workmen's compensation on anybody.

Dorothy Garner testified: She is Dewey's daughter and after her father's death she talked with O. H. Lambert and heard him testify in another proceeding. On both occasions she heard him say that Dewey was "covered," that deductions (for compensation) were made from every cord of pulpwood purchased.

By consent the testimony of Clarence Joyner and O. H. Lambert, Jr., given at a previous hearing in another proceeding, was admitted. Their testimony is summarized as follows:

Clarence Joyner testified: He was the general manager of Piedmont. His company paid workmen's compensation premiums to defendant insurance company on every cord of wood purchased from the Allreds during 1974. His firm would make deductions for stumpage but the premiums for workmen's compensation were paid by the company as a part of its operating expense.

O. H. Lambert, Jr., testified: He worked with Southern for 20 years and was manager in 1974. Southern paid defendant insurance company workmen's compensation premiums on each cord of wood purchased from the Allreds. He negotiated his policy with defendant insurance company. At the request of defendant insurance company they agreed on a "per cord" premium basis as opposed to a salary basis. It was his understanding that the policy would cover "all of my employees plus the employees of any subcontractors who did not have their own workmen's compensation." By the term "subcontractor" he had in mind an individual that owned his own equipment, hired his own employees and was self-employed.

By consent the insurance policies issued by defendant insurance company to Piedmont and Southern covering the period in question were introduced. The policy issued to Southern provided coverage in North Carolina for "LOGGING OR LUMBERING — PULPWOOD EXCLUSIVELY — ALL OPERATIONS — INCLUDING DRIVERS" and on this item stated an estimated annual premium of $21,778. The policy issued to Piedmont provided

coverage for "LOGGING OR LUMBERING — PULPWOOD EXCLUSIVELY INCLUDING TRANSPORTATION OF LOGS TO MILL . . . " and on this item stated an estimated annual premium of $36,205.

Defendants argue first that the evidence showed conclusively that Dewey was self-employed; that he owned his own truck and equipment, was not supervised in the cutting of timber in any way by Piedmont or Southern, that he worked whenever he chose and could hire or fire whomever he chose; that he met all of the criteria of an independent contractor set out in *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137 (1944).

Inasmuch as the commission's decision was based primarily on the conclusion that defendant insurance company is estopped to deny that Dewey was an employee of Piedmont and Southern, we do not reach the question whether Dewey was an employee, an independent contractor or a self-employed operator. We proceed to determine whether the principle of estoppel is applicable.

In *Aldridge v. Motor Co.,* 262 N.C. 248, 251, 136 S.E. 2d 591, 593-594 (1964), in an opinion by Justice (now Chief Justice) Sharp, we find: " 'The law of estoppel applies in compensation proceedings as in all other cases.' *Biddix v. Rex Mills,* 237 N.C. 660, 665, 75 S.E. 2d 777, 781; *Ammons v. Sneeden's Sons, Inc.,* 257 N.C. 785, 127 S.E. 2d 575. 'That liability for workmen's compensation may be based on estoppel is well established.' *Smith Coal Co. v. Feltner, Ky.,* 260 S.W. 2d 398."

Pearson v. Pearson, Inc., 222 N.C. 69, 21 S.E. 2d 879 (1942), also provides guidance in this case. In *Pearson,* a workmen's compensation proceeding, the decedent was president, general manager and major shareholder of a small corporation engaged in selling and servicing automobiles. The salary of decedent was included in computing the total payroll of the corporation and for purpose of determining the amount of compensation of insurance premiums due the defendant carrier. The carrier accepted the premiums based on the payroll which included the salary of decedent and this had been the practice for several years. Decedent was killed in an automobile accident while on a mission collecting accounts. In an opinion by Justice (later Chief Justice) Devin, the court held:

" . . . While ordinarily the parties may not by agreement or conduct extend the provisions of the Workmen's Compen-

sation Act, in this case the defendants' continued and definite recognition of the relationship of the president to the corporation as that of an employee, based upon knowledge of the class of work he performed, and the acceptance of the benefits of that classification, may well be regarded as having the effect of preventing them from changing their position after loss has been sustained." *Supra* at 71-72, 21 S.E. 2d at 880-881.

[1] While the facts in the case *sub judice* differ from those in *Aldridge* and *Pearson,* we think the evidence in this case would support findings of fact that would warrant application of the principle of estoppel applied in those cases. However, the commission failed to find sufficient facts to support its conclusions of law applying the principle.

For example, in finding of fact number 2 it is stated that plaintiff and Mr. Lambert gave certain testimony, but the commission made no finding based on that testimony. We also point out that we are unable to find in the record where Mr. Lambert testified that he deducted 50 cents per cord from his woodcutters.

As a further example, while there was evidence that Piedmont and Southern paid defendant insurance company premiums equivalent to 50 cents per cord on all pulpwood purchased from the Allreds, and with respect to Southern this was done at the request of defendant insurance company, there were no findings based on that evidence.

For failure of the commission to make sufficient findings of fact to support its conclusions of law and award, the award must be vacated and the cause will be remanded to the commission for further findings of fact, conclusions of law and determination based on the record now before it.

[2] Although we are ordering this cause remanded pursuant to defendant's first assignment of error, we deem it necessary to consider and pass upon their second assignment. By this assignment, defendants contend the commission erred in determining that Dewey's average weekly wage was $137 and, based thereon, awarding plaintiff compensation at the rate of $80 per week.

G.S. 97-2(5), as applicable to this case, defines "average weekly wages" as "the earnings of the injured employee in the

employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . . "

G.S. 97-38 provides, in pertinent part, that if death results proximately from the accident and within two years thereafter, the employer shall pay, or cause to be paid, weekly payments of compensation equal to 66⅔ percent of the average weekly wages of the deceased employee at the time of the accident, but not more than $80, nor less than $20, per week, etc.

In its finding of fact number 5, the commission found that checks and vouchers were presented at the hearing showing all sales and checks paid to Dewey, and that the pulpwood sold at one yard amounted to $3,898.84 and at the other yard $3,224.87 (a total of $7,123.71). In its finding number 7, it found that Dewey's average weekly wage was $137 and made that determination by dividing $7,123.71 by 52. We hold that these findings are not supported by the evidence.

The evidence showed that Dewey was assisted in his work part of the time by his son Larry and at other times by his son David and that they received part of the proceeds from the sale of the pulpwood for their labor. While we are not persuaded by defendants' argument that the evidence establishes that the total proceeds should be divided three ways, we do think the evidence establishes that the sons received some of the proceeds. For example, the copies of Piedmont vouchers, introduced by consent, indicated that approximately $115 in checks were made payable to Larry and approximately $675 were made payable to David.

We hasten to say that in view of all the evidence presented, the commission was not compelled to find that Dewey had no interest in the proceeds of the checks made payable to his sons; but we do say that a finding that Dewey was entitled to *all* the proceeds is not supported by the evidence. We think the commission can make proper findings from the evidence in the record as to Dewey's average weekly wage.

For the reasons stated, the opinion and award appealed from are vacated and this cause is remanded to the Industrial

Commission for proper findings of fact, conclusions of law and determination based on the record now before it.

Award vacated and cause remanded.

Judges CLARK and ARNOLD concur.

MONTE M. MILLER, TRUSTEE, JOSEPH O. TAYLOR, TRUSTEE, AND VIRGINIA NATIONAL BANK v. LEMON TREE INN OF ROANOKE RAPIDS, INC., JAMES E. BRIDGMAN AND WIFE, GERALDINE R. BRIDGMAN, EDGAR C. BOWLIN AND WIFE, PEGGY O. BOWLIN, THOMAS R. JACKSON AND WIFE, ANGELA JACKSON, O. EDWIN ESVAL AND WIFE, TERESA ESVAL, GODLEY CONSTRUCTION CO., INC., WINDRED R. ERVIN, TRUSTEE, NEWSOM OIL CO., INC., LEMON TREE INN OF CHARLOTTE, INC., FITTS-CRUMPLER ELECTRIC CO., INC., AND ALLEN NEON DISPLAYS, INC., ALSO KNOWN AS ALLEN DISPLAYS, INC.

No. 766SC655

(Filed 16 March 1977)

1. **Laborers' and Materialmen's Liens § 8— action to enforce lien — necessary parties**

The law does not place upon the materialman the burden to join in the action to enforce his lien all parties who have acquired liens upon the property subsequent to the time the materialman first furnished labor and materials in order that the materialmen's lien will relate back prior to the effective dates of the other liens; rather, only the owner of the property subject to the materialmen's lien is required to be a party to an action to enforce the claim of lien. G.S. 44A-10.

2. **Laborers' and Materialmen's Liens § 9— lien on leasehold — subsequent deed of trust — priority of lien**

A materialmen's lien on a leasehold which is properly enforced so as to relate back prior to a deed of trust on the leasehold would, upon foreclosure, entitle the materialman to priority in that portion of the proceeds representing the value of the leasehold.

3. **Laborers' and Materialmen's Liens § 8— enforcement of lien — requirements of judgment**

To enforce a materialmen's lien a judgment must state the effective date of the lien and contain a general description of the property subject to the lien so that one reading the docketed judgment would have notice that it was more than a money judgment, and the judgment should direct a sale of the real property subject to the lien thereby enforced.

4. Laborers' and Materialmen's Liens §§ 8, 9— action to enforce lien — judgment insufficient — deed of trust prior to lien

Where a default judgment obtained by one defendant purportedly enforcing its materialmen's lien against another defendant provided for recovery of a certain sum with interest from 3 January 1975, but the judgment did not refer to the property which was the subject of the lien and did not relate the lien back to the date when labor and materials were first furnished at the site of the property, such judgment amounted only to a money judgment which did not relate back to 24 March 1973, the date when labor and materials were first furnished, and which thereby failed to make defendant's lien prior to plaintiffs' deed of trust executed on 9 May 1973.

APPEAL by defendant Fitts-Crumpler Electric Co., Inc., from *Fountain, Judge.* Judgment entered 5 April 1976 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 18 January 1977.

Plaintiffs are the trustees and beneficiary of a deed of trust which was executed by defendants Newsom Oil Company, Inc., (hereinafter Newsom Oil) and Lemon Tree Inn of Roanoke Rapids, Inc., (hereinafter LT-RR) who respectively were the lessor and lessee of the property (hereinafter Inn Site) subject to the deed of trust. Plaintiffs brought suit to foreclose under a judicial sale and alleged they were entitled to have the property sold free of all encumbrances except taxes and a utility easement. Defendant Fitts-Crumpler Electric Co., Inc., (hereinafter Fitts-Crumpler) alleged in its answer that it had a judgment which established a lien prior to the deed of trust held by plaintiffs.

Plaintiffs moved for a summary judgment, and offered in support the pleadings, stipulations, and an affidavit by one of plaintiffs' attorneys, to which were attached true copies of Fitts-Crumpler's claim of materialmen's lien, and pleadings and judgment in an action to enforce the lien. These documents established that there was no genuine issue concerning the following facts relevant to plaintiffs' deed of trust and Fitts-Crumpler's lien:

1. On 12 April 1973, Newsom Oil leased Inn Site to Lemon Tree Inn of Charlotte (hereinafter LT-C).

2. On 12 April 1973, LT-C assigned the lease on Inn Site to LT-RR.

3. On 9 May 1973, LT-RR and eight individual defendants executed a note for $600,000 to plaintiff Virginia National Bank, (hereinafter Bank) and as security for the note LT-RR and Newsom Oil assigned respectively the leasehold and the reversion of the Inn Site.

4. All instruments were duly recorded.

5. On 18 September 1974 Fitts-Crumpler last furnished labor and materials at the Inn Site.

6. On 21 October 1974, Fitts-Crumpler filed a claim of lien for $6,005.99, in which it alleged that it began furnishing labor and materials at the Inn Site on 24 March 1973; that the record owner of the real property subject to the lien at the time the claim was filed was Newsom Oil; and that the persons with whom it contracted to furnish the labor and materials were LT-C and LT-RR.

7. In January 1975 Fitts-Crumpler filed a complaint against Newsom Oil, LT-RR, and LT-C in which it alleged a debt of $5,405.99 for labor and materials furnished at the Inn Site and requested that the judgment be declared a lien upon the Inn Site "from and after the 3rd day of January, 1975." Newsom Oil and LT-C filed answers to the complaint; LT-RR did not answer. Plaintiffs were not parties to this action.

8. On 2 April 1975, the Clerk of the Superior Court for Northampton County entered a default judgment against LT-RR for $5,405.99 plus costs and interests from 3 January 1975. This action as to Newsom Oil and LT-C is still pending.

9. The judgment obtained by Fitts-Crumpler against LT-RR was recorded, and Fitts-Crumpler executed upon the receipts, rents and profits of LT-RR.

Plaintiffs' motion for summary judgment was granted, and the judge ordered that the sale of the Inn Site "shall be free of any claim, lien or encumbrance against the property sold by any party to this action . . . . " Fitts-Crumpler appealed.

Spruill, Trotter & Lane by James R. Trotter for plaintiff appellee.

Allsbrook, Benton, Knott, Allsbrook and Cranford by William O. White, Jr., for defendant appellant.

CLARK, Judge.

The issue upon appeal is whether the trial court erred in its conclusion of law that plaintiff Bank's deed of trust had priority in the proceeds from the judicial sale of the Inn Site over defendant Fitts-Crumpler's judgment lien against defendant LT-RR. Fitts-Crumpler has contended throughout that it perfected and enforced its materialmen's lien against LT-RR pursuant to G.S. 44A-12 and 44A-13, and that by virtue of the "relation-back" effect of G.S. 44A-10, its lien against the leasehold of LT-RR was prior to plaintiffs' deed of trust. (Fitts-Crumpler has not at any stage contended that the suit still pending against LT-C and Newsom Oil would establish a materialmen's lien prior to plaintiffs' deed of trust.)

[1] In their motion for summary judgment, plaintiffs contended that the judgment that Fitts-Crumpler obtained against LT-RR was without effect against them "for the reason that Plaintiffs were not parties to the action giving rise to the judgment alleged by said Defendant." In the brief filed in support of their motion, plaintiffs argued that liens held by parties who have not been joined in the action by a materialman to enforce his lien are never subject to the effect of G.S. 44A-10, which relates the materialmen's lien back to and makes it effective "from the time of the first furnishing of labor and materials at the site of the improvement." This argument is without merit. The law does not place upon the materialman the burden to join in the action to enforce his lien all parties who have acquired liens upon the property subsequent to the time the materialman first furnished labor and materials in order that the materialmen's lien will relate back prior to the effective dates of the other liens. Only the owner of the property subject to the materialmen's lien is required to be a party to an action to enforce the claim of lien. *Childers v. Powell,* 243 N.C. 711, 92 S.E. 2d 65 (1956); *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390 (1951); Mangum, Mechanics' Liens in North Carolina, 41 N.C. L. Rev. 173 (1963). However, it is axiomatic that a judgment cannot be binding upon persons who were not party or privy to an action. *Cline v. Olson,* 257 N.C. 110, 125 S.E. 2d 320 (1962). Plaintiffs were not parties to the action by defendant Fitts-Crumpler to enforce its materialmen's lien. Therefore, they were free to challenge the default judgment purporting to enforce Fitts-Crumpler's lien in this action to foreclose their deed of trust in order to

have the priority of the liens determined. *Childers v. Powell, supra;* G. Osborne, Mortgages, § 325 (2d Ed. 1970).

[2] In addition to arguing that Fitts-Crumpler's judgment against LT-RR cannot be effective to establish a materialmen's lien prior to their deed of trust for the reason that they were not parties to the action in which that judgment was obtained, plaintiffs argue that even assuming that the materialmen's lien was enforced by this judgment and related back under G.S. 44A-10 to a point in time prior to their deed of trust, the deed of trust would still entitle them to priority in the proceeds from the foreclosure. Plaintiffs reason that since their deed of trust extends both to the reversion and the leasehold of the Inn Site, while Fitts-Crumpler's lien extends only to the leasehold, therefore, their lien on the reversion is superior to both liens on the leasehold and entitles them to priority in the proceeds. This argument is also without merit. Plaintiffs are foreclosing on both the leasehold and the reversion. A leasehold and a reversion are separate estates in the same property. 49 Am. Jur. 2d, Landlord and Tenant § 82 (1970). In the absence of a covenant to the contrary, both lessor and lessee have the right to sell or mortgage separately their estate. *Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634 (1953); 49 Am. Jur. 2d, *supra,* § 398. A materialmen's lien on a leasehold which is properly enforced so as to relate back prior to a deed of trust on the leasehold would, upon foreclosure, entitle the materialman to priority in that portion of the proceeds representing the value of the leasehold. *Assurance Society v. Basnight, supra;* Osborne, *supra,* § 321.

As noted in the statement of facts, the pleadings and judgment in the action in which Fitts-Crumpler purportedly enforced its materialmen's lien against LT-RR were offered by plaintiffs in support of their motion for summary judgment. Fitts-Crumpler's complaint asked that any judgment obtained be declared a lien upon the Inn Site only from 3 January 1975. The default judgment, signed by the Clerk of the Superior Court, did not refer to the Inn Site and did not relate the lien back to the date when labor and materials were first furnished at the Inn Site. It provided for the recovery of $5,405.99 with interest only from 3 January 1975.

[3, 4] Fitts-Crumpler argues that G.S. 44A-10 relates the lien back. G.S. 44A-11 provides that the materialmen's lien shall be

perfected as of the time set forth in G.S. 44A-10 upon filing a claim of lien pursuant to G.S. 44A-12 and that the lien may be *enforced* pursuant to G.S. 44A-13. To enforce a materialmen's lien the judgment must state the effective date of the lien and contain a general description of the property subject to the lien so that one reading the docketed judgment would have notice that it was more than a money judgment. *McMillan v. Williams,* 109 N.C. 252, 13 S.E. 764 (1891); *Boyle v. Robbins,* 71 N.C. 130 (1874). Moreover, G.S. 44A-13(b) requires that the judgment "shall direct a sale of the real property subject to the lien thereby enforced." In *H & B Co. v. Hammond,* 17 N.C. App. 534, 195 S.E. 2d 58 (1973), the court held that a docketed default judgment which did not declare itself to be a specific lien on any real property and did not direct sale of any real property was only a general lien against the defendant's real property in the county in which the judgment was docketed. The default judgment obtained against LT-RR in the present case also fails to meet these requirements, and the time established in G.S. 44A-13(a) for enforcing the lien against LT-RR has expired. We conclude that the judgment obtained against LT-RR is only a money judgment, which upon docketing established an ordinary judgment lien, and that Fitts-Crumpler's materialmen's lien has been discharged under G.S. 44A-16(3) since the time for enforcing the lien has expired.

Defendant Fitts-Crumpler has raised constitutional arguments which presume that its lien was perfected and enforced in accordance with the law. Since we conclude that the lien was not so perfected and enforced, it is unnecessary to address these arguments.

It appearing that there is no genuine issue of fact and that plaintiffs are entitled to judgment as a matter of law, the judgment of the trial court is

Affirmed.

Judges VAUGHN and HEDRICK concur.

STUDENT BAR ASSOCIATION BOARD OF GOVERNORS, OF THE SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; CAROLYN McALLASTER; CATHERINE REID; LAURA BANKS; JOHN MEUSER; ANN WALL; AND PAUL MONES v. ROBERT BYRD, DEAN OF THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW AT CHAPEL HILL, IN HIS OFFICIAL CAPACITY; FEREBEE TAYLOR, CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, IN HIS OFFICIAL CAPACITY; WILLIAM L. FRIDAY, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; WALTER R. DAVIS, CHAIRMAN, BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, IN HIS OFFICIAL CAPACITY; WILLIAM A. DEES, JR., CHAIRMAN OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; AND THE UNIVERSITY OF NORTH CAROLINA

No. 7515SC668

(Filed 16 March 1977)

State § 1.5—open meetings law — meetings of U.N.C. Law School faculty

Since the faculty of the School of Law of the University of North Carolina is a State funded committee or group which has been delegated the authority not only to deliberate but also to conduct the "people's business" related to the operation of the law school, the official meetings of the faculty are required by G.S. 143-318.2 to be open to the public.

Judge HEDRICK dissents.

APPEAL by defendants from *Preston, Judge.* Judgment entered 18 June 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 19 January 1977.

On 6 April 1976, plaintiffs filed a verified complaint seeking to enjoin defendants from allowing the official meetings of the Faculty of the School of Law of the University of North Carolina to be closed to members of the public.

A hearing on plaintiffs' motion for a prehearing injunction was apparently conducted on 30 April 1976. The court issued a preliminary injunction on 4 June 1976.

Defendants failed to answer or other responsive pleadings in denial of any of the allegations of the complaint.

On 18 June 1976, the judge, after reciting that he had been advised that none of the parties had anything further to offer relative to the case, entered judgment making the injunction permanent.

Loflin & Loflin, by Thomas F. Loflin III and Carolyn McAllaster, for plaintiff appellees.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., for defendant appellants.

VAUGHN, Judge.

Defendants have failed to deny any of the allegations of the complaint. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in a responsive pleading." Rule 8(d) N.C. Rules of Civil Procedure. Those rules provide that there "*shall* be a complaint and an *answer*." Rule 7, *supra*.

Defendants have not taken exceptions to any of the court's findings of fact and neither requested that other facts be found nor excepted to the court's failure to find additional facts. Consequently, none of the evidence is brought forward.

We are called upon, therefore, to decide the case on the basis of plaintiffs' complaint and the judgment.

The General Assembly has declared it to be the public policy of this State that hearings, deliberations and actions of the commissions, committees, boards, councils and other governing and governmental bodies, which administer the legislative and executive functions of the State and its political subdivisions, shall be conducted openly. G.S. 143-318.1.

This policy is further implemented by the following legislative mandate:

> "All official meetings open to the public.—All official meetings of the governing and governmental bodies of this State and its political subdivisions, including all State, county, city and municipal commissions, committees, boards, authorities, and councils and any subdivision, subcommittee, or other subsidiary or component part thereof 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. And every meeting, assembly, or gathering together at any time or place of a majority of the members of such governing or governmental body for the purpose of conducting hearings, participating in deliberations or voting upon or otherwise transacting the public

> business within the jurisdiction, real or apparent, of said body shall constitute an official meeting, but any social meeting or other informal assembly or gathering together of the members of any such body shall not constitute an official meeting unless called or held to evade the spirit and purposes of this Article." G.S. 143-318.2.

Certain agencies or groups are expressly exempted from the operation of the act. G.S. 143-318.4. Other agencies or groups, though not expressly exempted from the act, are permitted to conduct closed sessions for particular purposes. For example, the act provides:

> " . . . Nor shall this Article be construed to prevent any board of education or governing body of any public educational institution, or any committee or officer thereof, from hearing, considering and deciding disciplinary cases involving students in closed sessions." G.S. 143-318.3(b).

The organizational structure of the University of North Carolina is set out in Article 1 of Chapter 116 of the General Statutes. That chapter creates a Board of Governors with the responsibility for, among other things, "the general determination, control, supervision, management and governance" of all of the affairs of the 16 constituent institutions of the University. G.S. 116-11(2). The Board is specifically required to determine the functions, educational activities and academic programs of the University. G.S. 116-11(3). It is specifically required to set enrollment levels. G.S. 116-11(8). The Board is given the authority to delegate any part of its authority over the affairs of any institution to the Board of Trustees of a constituent institution or, through the President of the University, to the Chancellors of the institutions. G.S. 116-11(13). The Board must appoint a President who is authorized to appoint such advisory committees as deemed necessary. G.S. 116-14.

Each of the constituent institutions of the University is served by a Board of Trustees that acts as advisor to the Board of Governors and to the Chancellor of each of the institutions. Each Board of Trustees has such powers as it may be delegated by the Board of Governors. G.S. 116-33. The Chancellor of each institution, subject to the policies prescribed by the Board of Governors and the Board of Trustees, makes recommendations for the appointment of personnel and development of educational programs for that institution. The Chancellor is the administra-

tive head of the institution and exercises complete executive authority therein and is subject to the direction of the President. He is responsible for carrying out policies of the Board of Governors and Board of Trustees. It is his duty to keep the President, and through him, the Board of Governors fully informed concerning the operation of the institution. G.S. 116-34.

The parties stipulated that all parties were properly before the court. Fourteen of the allegations of the complaint relate to the identification of those parties.

All factual matters alleged in the complaint must be taken as true. Plaintiffs allege that it is the policy of defendants to bar members of the public from official meetings of the Faculty of the School of Law of the University of North Carolina at Chapel Hill. Plaintiffs, members of the general public, have been refused admission to those meetings. If, therefore, official meetings of that body fall within the meaning of G.S. 143-318.2, the judgment must be affirmed.

Plaintiffs alleged "The Law School Faculty of the University of North Carolina at Chapel Hill School of Law, represented by Defendant Byrd, is the governing body of the said school of law and has lawful authority to act as a body politic and in the public interest."

Consideration of the organizational structure of the University, to which we have referred, discloses that the Board of Governors has been designated by the General Assembly as the ultimate governing body of the University and any constituent institution or division thereof. The Board, however, has the power, express and implied, to delegate its governing powers. On this question defendants, in their brief, make a passing reference to something they call "THE CODE of the Board of Governors." Such a document appears to have been introduced in the trial court. Defendants, however, did not elect to make it, in whole or in part, a part of the record for our consideration. Whether the Board has delegated any of its governing powers in a particular instance, is a question of fact. Defendants, by their failure to answer the quoted paragraph of the complaint appears to admit that the Law School Faculty does, in fact, govern the Law School.

Defendants except to none of the facts found by the court. They did not request the court to find other facts that could

perhaps have shed more light on the facts so found. Among other things, the court, based in part on the testimony of defendant Byrd, found:

> "(A) The law school faculty, pursuant to a recommendation . . . [sic] the admissions policy committee, makes the *final decision* with regard to the enrollment level of the law school by voting annually on the specific number of in-coming first-year students to be admitted the next fall. This decision *is not submitted to any higher authority within the University for approval.*
>
> (B) The law school faculty, *solely, approved* an *admissions formula* or 'predicated index' required to be met by a student seeking enrollment based on the applicant's undergraduate grade point average and LSAT score. The law faculty also approved the so-called 'wild card system' under which Dean Byrd controls a certain number of discretionary admissions to the first-year class. These admissions decisions were based on recommendation made to the law faculty by its Admission Policy Committee.
>
> (C) The law faculty votes on the curriculum; in particular, the faculty approved at least five new courses in the past two years. *The curriculum decisions are not subject to ratification* by any higher authority in the University.
>
> (D) The law school faculty voted to establish a system whereby each first year student would be enrolled in one small section. The research and writing component of the first year curriculum was also to be taught in this small section. This decision was *not subject to ratification by any higher authority* within the University.
>
> (E) The law faculty sets the general *rules relating to re-admissions* of students to the law school who have become academically ineligible to continue in the school of law. The individual re-admission decisions are made by the faculty re-admission committee. These rules and decisions are *not submitted to any higher university* official for approval.
>
> (F) The law faculty approves the editorial board of the *North Carolina Law Review,* as well as the eligibility

criteria for the *Law Review* Staff. This approval is not subject to review by any higher authority within the university.

(G) The Defendant Byrd, *pursuant to a recommendation by the law faculty, recommends persons to receive initial employment* contracts to teach at the School of Law. These faculty recommendations go through higher university channels for approval to the Board of Trustees and sometimes to the Board of Governors. *No one* that the law school dean has *recommended* for initial employment on the Law School Faculty *has ever been rejected* by these higher university boards since the witness Byrd has been on the law faculty beginning in 1963.

(H) The law *faculty approves* the prospective graduates for graduation from the School of Law in terms of their academic qualifications. This list is then submitted to the Registrar's office of the University. *No student* that the law *faculty approved* academically *has*, since 1963 when Defendant Byrd joined the law faculty, *been rejected* by the Registrar for reasons of academics." (Emphasis added.)

The act we consider is broad in its scope. Official meetings of "all State . . . commissions, committees, boards, authorities and councils and *any* subdivision, subcommittee or other *subsidiary* or *component part* thereof which have *or claim to have* authority to conduct hearings, *deliberate* **or** act as bodies politic and in the public interest . . . " (Emphasis added) are covered. The General Assembly, it appears, attempted to draft that section. G.S. 143-318.2 in such terms that it would cover (with a few specific exceptions) *every* meeting where *the business of the people* may be conducted. We note the broad language of that section and compare it with the narrow list of agencies exempted from the act by G.S. 143-318.4.

The facts admitted in the record before us leads a majority of the panel of judges considering the case to the following conclusion:

The Law School Faculty is, at the least, a State funded committee or group to whom the Board of Governors, President and Chancellor have in fact, if not by rule, delegated the authority not only to deliberate on but to conduct the "people's business" related to the operation of their tax supported Law School. There are undoubtedly many decisions related to the

operation of the Law School. It seems, however, that few could be of greater interest to those who pay its bills than those relating to the number of lawyers it may train, the entrance and graduation requirements and, therefore, the quality of the students whose training they subsidize, and the other policy decisions that are, in fact, being made by the Faculty group.

The General Assembly has established the policy that the people's business shall be conducted in public. That policy would be frustrated if the public is admitted only at the highest decision-making level and is excluded at the level where the real deliberation, debate and decision-making process takes place before a subordinate body.

The judgment is affirmed.

Affirmed.

Judge CLARK concurs.

Judge HEDRICK dissents.

STATE OF NORTH CAROLINA v. DONALD CRAIG KESSACK

No. 764SC757

(Filed 16 March 1977)

1. **Criminal Law §§ 145, 154— unnecessary records on appeal — cost of printing taxed against defense counsel**

Where charges against defendant were properly consolidated for trial with similar charges against two others, all three appealed, and the attorneys caused three separate records on appeal to be filed in the Court of Appeals, each of the attorneys is personally taxed with a portion of the costs of the unnecessary records.

2. **Criminal Law § 76— voir dire hearing — no evidence from defendant — denial of right to offer evidence — issue first raised on appeal**

A defendant who fails to offer evidence or otherwise indicate to the trial court that he wishes to offer evidence at a *voir dire* hearing will not be heard to complain for the first time on appeal that he was denied the right to do so.

3. **Criminal Law § 76— statement by defendant — no custodial interrogation — admissibility**

The trial court in a prosecution for possession of controlled substances did not err in allowing a police officer to testify concerning

statements made to him by defendant while defendant was in custody where the evidence on *voir dire* showed that there was no custodial interrogation but that defendant himself initiated and pursued the conversation with the officer.

4. Criminal Law § 76— incriminating statement — uncontradicted evidence on voir dire — necessity for findings of fact

Although it is the better practice for the court to find facts upon which it concludes that evidence of a confession or of an inculpatory statement is admissible, where no conflicting evidence is offered on the *voir dire* and the uncontradicted testimony establishes that evidence of the confession or of the inculpatory statement is admissible, it is not error for the judge to admit the evidence without making specific findings of fact.

5. Bill of Discovery § 6— failure to comply with discovery request — withheld evidence admissible

Though the prosecution failed to comply with G.S. 15A-907 by failing to inform defendant that it intended to use at trial a statement made to a police officer by defendant while he was in custody, the court was not thereby required to prohibit the State from introducing the evidence it had failed to disclose, nor was defendant entitled to a new trial because the court permitted introduction of such evidence.

6. Criminal Law §§ 79, 95— confession by testifying co-defendant — no limiting instruction — no error

The trial court did not err in failing to instruct the jury to consider a confession made by a testifying co-defendant, which implicated defendant, only against the confessing co-defendant, since defendant did not object to the evidence or request a limiting instruction.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 21 May 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 15 February 1977.

Defendant was found guilty of felonious possession of LSD, felonious possession of more than one-half gram of phencyclidine, felonious possession of more than one ounce of marijuana, and misdemeanor possession of phentermine. From judgment imposing prison sentences, he appealed.

Attorney General Edmisten by Special Deputy Attorney General John M. Silverstein for the State.

Lanier & Lanier by Charles S. Lanier for defendant appellant.

PARKER, Judge.

[1] The charges against defendant were properly consolidated for trial with similar charges against William Schlieger and Lloyd Schlieger, who were also found guilty. Each of these three defendants appealed. Their attorneys caused three separate records on appeal to be filed in this Court. There should have been but one. Rule 11(d), North Carolina Rules of Appellate Procedure, 287 N.C. 671, 705. Pursuant to Rule 9(b)(5) of the Rules of Appellate Procedure, each counsel will be personally taxed with a portion of the costs of the unnecessary records. *State v. Montgomery,* 291 N.C. 91, 229 S.E. 2d 572 (1976); *State v. McKenzie,* 30 N.C. App. 64, 226 S.E. 2d 385 (1976); *State v. Bryson,* 30 N.C. App. 71, 226 S.E. 2d 392 (1976). We have computed the printing costs of the unnecessary matter caused to be filed in the three cases and find the total to be $273.80. Consequently, Mr. Charles S. Lanier, counsel for Donald C. Kessack (764SC757), is taxed personally with costs in the sum of $91.27; Mr. Billy G. Sandlin, counsel for William Schlieger (764SC832), will be taxed personally with costs in the sum of $91.27; and Mr. Edward G. Bailey, counsel for Lloyd Schlieger (764SC739), will be taxed personally with costs in the sum of $91.27.

In his brief, appellant's counsel has not referred to any assignment of error or to any exception. Rule 28(b) of the Rules of Appellate Procedure specifies what should be contained in the appellant's brief. That rule provides in part as follows:

> "Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

Despite counsel's failure to comply with the Rules of Appellate Procedure, we will in this case pass upon the merits of the questions which he seeks to present for review.

The first two questions which appellant seeks to raise on this appeal concern the admission in evidence over his objection of testimony of the State's witness, Deputy Sheriff Cro-

well, concerning a conversation which he had with defendant after defendant was arrested and while he was in jail. The record reveals the following:

The State presented evidence to show that on 15 November 1975 Deputy Sheriff Crowell and other officers of the Onslow County Sheriff's Department, acting pursuant to a search warrant, searched a trailer at 316 Carlson Drive in Bellauwoods Trailer Park and searched a Mercury Montego automobile parked in the driveway at that address. Defendant was not present when the search was made. However, it was shown that he and William Schlieger rented the trailer from its owner, that defendant paid the rent on the trailer, and that the Mercury Montego automobile was registered to the defendant. The officers found a large quantity of controlled substances, including those referred to in the charges against the defendant, in the trailer and in the trunk of the Mercury automobile. The officers also found in the trailer a large amount of cash and records in defendant's handwriting which appear to reflect amounts owed by various persons on account of sales of various controlled substances. Defendant was arrested on 13 February 1976. Deputy Sheriff Crowell, as a witness for the State, testified at defendant's trial concerning the search. Crowell also testified that on one occasion he had gone to the jail after defendant had been arrested. The purpose of his visit was to speak with the person in charge of the control room at the jail. As Crowell was leaving the control room, which was in front of the bull pen where defendant was, the defendant asked him if he was Crowell. Crowell replied that he was. At that point in Crowell's testimony, defendant's attorney objected, and the court sent the jury out. In the jury's absence, the witness Crowell testified:

> "Mr. Kessack asked me if I was Crowell and I stated I was. Mr. Kessack said I hear you went to my house and I said yes, I did. He said I hear you got my money and I said yeah, I did, around twelve grand cash. He said I hear you got my car. I said yeah, I did. He then asked me. He said I heard you got some goodies in the kitchen. I said we got about three-quarters of a pound of cocaine. He said that's not cocaine and that was about the end of the conversation and I started to walk away and the Defendant told me that the only way you are going to convict me is to lie. I told the defendant that I didn't have to lie to convict him, he

had already done it himself and I walked on out of the jail."

The court then overruled defendant's objection without making express findings of fact and permitted Crowell to testify before the jury substantially as above set forth.

[2] Appellant first questions the admissibility of Crowell's testimony concerning the statements made by defendant during their conversation at the jail on the grounds that defendant was not allowed to be heard at the *voir dire* hearing and that there was no showing that the statements attributed to him were made voluntarily after he had been advised of his *Miranda* rights. At the outset, we note that the record does not support appellant's contention that he was not allowed to be heard at the *voir dire* hearing. The record does not show that defendant ever asked to be heard and was refused, that he ever offered to present evidence but was not permitted to do so, or that he ever even indicated to the trial judge in any manner that he wished to be heard or to present evidence at the *voir dire* hearing. A defendant who fails to offer evidence or otherwise indicate to the trial court that he wishes to offer evidence at a *voir dire* hearing will not be heard to complain for the first time on appeal that he was denied the right to do so.

[3, 4] The uncontradicted evidence presented at the *voir dire* hearing shows that the statements attributed to the defendant were freely and voluntarily made by him. That a defendant is in custody when he makes an inculpatory statement does not of itself render evidence concerning the statement inadmissible. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965). Here, the uncontradicted evidence presented at the *voir dire* examination also shows that there was no custodial interrogation of the defendant but that on the contrary it was the defendant, rather than the officer, who initiated and pursued the conversation. Since there was no custodial interrogation, it was not necessary for the officer to advise defendant of his *Miranda* rights. *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971). Although it is always better practice for the Court to find facts upon which it concludes that evidence of a confession or of an inculpatory statement is admissible, *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), where, as here, no conflicting evidence is offered on the *voir dire* and the uncontradicted testimony establishes that evidence of the confession or of the inculpatory state-

ment is admissible, it is not error for the judge to admit the evidence without making specific findings of fact. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975). Such findings are implied when the court admits the evidence of the confession or inculpatory statement. *State v. Whitley,* 288 N.C. 106, 215 S.E. 2d 568 (1975).

[5] Defendant next questions the admissibility of Crowell's testimony concerning defendant's statements made during the course of their conversation at the jail on the grounds that the prosecution had failed to give notice of intent to offer the statements into evidence, after defendant had made timely request for information concerning any such statements. Prior to trial defendant's counsel wrote a letter to the district attorney, pursuant to Article 48 of G.S. Ch. 15A, in which request was made that the prosecution furnish information with regard to all written, recorded, or oral statements made by defendant which the State intended to offer in evidence. The assistant district attorney responded to that request on 24 February 1976, but he did not disclose defendant's oral statement to Crowell. Deputy Sheriff Crowell testified at trial that he did not mention the conversation which he had had with the defendant to the district attorney until Monday of the week in which the trial took place. Defendant, pointing to the continuing duty to disclose imposed by G.S. 15A-907, now contends that he is entitled to a new trial because of the prosecution's failure to disclose the information promptly after the district attorney learned of its existence. Although it does appear that the prosecution failed to comply with G.S. 15A-907 in this case, it does not follow that the court was thereby required to prohibit the State from introducing the evidence which it had failed to disclose or that defendant is entitled to a new trial because the court permitted introduction of such evidence. Which of the several remedies available under G.S. 15A-910(a) should be applied in a particular case is a matter within the trial court's sound discretion. *State v. Morrow,* 31 N.C. App. 654, 230 S.E. 2d 568 (1976). Under the circumstances of this case, we find no such abuse of discretion as would justify awarding defendant a new trial.

[6] Defendant's final contention is that the court erred in failing to instruct the jury to consider a confession made by a testifying co-defendant, which implicated defendant Kessack, only against the confessing co-defendant. Since the co-defendant testified, defendant recognizes that there was no violation of his

constitutional rights to confrontation and that the rule announced in *Bruton v. U.S.* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968) and followed in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968) does not apply. Defendant's contention is that the trial court committed reversible error by failing to give the limiting instruction, citing the following from *State v. Lynch,* 266 N.C. 584, 588, 146 S.E. 2d 677, 680 (1966):

> "Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when,* the trial judge instructs the jury that the confession so offered is admitted in evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s)."

Defendant's contention, however, is directed to a matter which is simply not presented on the present record. When the codefendant, Lloyd Schlieger, testified in this case, defendant's counsel objected to a question by the prosecuting attorney concerning a statement made by Lloyd Schlieger on the night of his arrest to Deputy Sheriff Crowell. This objection was overruled, and Schlieger then answered and denied making any statement. Defendant excepted to the overruling of his objection, and that exception is the sole exception on which defendant seeks to base his present contention. Later, the State recalled Crowell as a rebuttal witness. Crowell testified that on the night he arrested Lloyd Schlieger and after he advised Schlieger of his constitutional rights, Schlieger told him that all the narcotics which had been seized, "the money and everything," belonged to Donald Kessack, and that on one occasion Kessack had paid him one hundred dollars to deliver a large amount of money to some man in Philadelphia. No objection was interposed by defendant's counsel to this testimony by Crowell and no request was made that the jury be instructed that Lloyd Schlieger's statements were being admitted in evidence only against him but were not evidence and were not to be considered by the jury in any way in determining the charges against defendant Kessack. In the absence of any objection to the evidence and in the absence of any request for a limiting in-

struction, admission of the evidence without the limiting instruction did not constitute reversible error.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, TWO WAY RADIO OF CAROLINA, INC. (PROTESTANT), AND TARHEEL ASSOCIATION OF RADIO-TELEPHONE SYSTEMS, INC. (INTERVENORS) v. WILLIAM D. SIMPSON, "RADIO COMMON CARRIER SERVICE"

No. 7610UC750

(Filed 16 March 1977)

Utilities Commission § 7— radio communications service for doctors — public utility

A medical doctor who provided radio communications services to ten doctors in his county for compensation was engaged in the operation of a "public" utility within the meaning of G.S. 62-3(23)a.6 where he served almost one-half of the radio communications market in the county.

APPEAL by defendant from order of North Carolina Utilities Commission entered 26 April 1976. Heard in the Court of Appeals 16 February 1977.

William D. Simpson, applicant, is a physician and a member of the Cleveland County Medical Society. He owns and operates Professional Answering Service, a telephone answering service, and also a radio paging service which notifies some of his answering service subscribers whenever a telephone message has been received. For this purpose, Dr. Simpson owns a radio transmitter, licensed by the Federal Communications Commission, and ten receiving units. Seven of these are "walkie-talkies" and three are "beepers." Dr. Simpson uses one unit; he rents the others to individual members of the Cleveland County Medical Society, in consideration for which he receives each month an amount equal to the amortized cost of his equipment. Dr. Simpson holds a limited license from the FCC which prevents him from operating more than ten receivers. Accord-

ingly, he could not expand his service without first obtaining a new license.

Two-Way Radio of Carolina, Inc. (Two-Way Radio), the protestant in this action, pursuant to G.S. 62-110, *et seq.*, holds the radio common carrier certificate of convenience and necessity for Cleveland County. Two-Way Radio serves twelve customers in the county.

On 20 February 1975, Dr. Simpson filed an application with the North Carolina Utilities Commission requesting a hearing to determine whether or not he was engaged in the operation of a public utility within the meaning of North Carolina General Statutes 62-3(23)a.6 and 62-119. At the hearing, the examiner construed the application as a request for exemption from regulation, and he recommended a denial. The Commission also denied Simpson's request.

Dr. Simpson's evidence at the hearing tends to show that his service is a hobby stemming from his love of radios and gadgets. He limits his service to ten doctors who are all members of his county medical society. A temporary loan of equipment to someone who was not a doctor seems not to have been for any consideration and was terminated before this hearing began.

Evidence by Two-Way Radio and intervenors tends to show that radio paging services are used primarily by persons in certain professions. Doctors are probably the most common subcribers. Realtors and builders constitute much of the market. A few subscribers seemingly fall outside of any class. There was testimony that a loss of medical personnel from this market could drive up rates for these persons and perhaps ruin their businesses.

The Utilities Commission found that Dr. Simpson operated his paging service, without a certificate of convenience and necessity, as an adjunct to Professional Answering Service. Though he knew that Two-Way Radio held the certificate of convenience and necessity, and though Two-Way Radio was willing and able to serve all who applied to it, Dr. Simpson offered his service to the public for compensation. This service was identical to and in competition with that offered by Two-Way Radio. In line with these findings, the Commission concluded as a matter of law that Dr. Simpson's service was offered

to the public within the meaning of G.S. 62-3(23)a.6 and G.S. 62-119. Dr. Simpson's request for an exemption was denied, and he was ordered to cease and desist from offering his paging service. He appealed.

Utilities Commission Attorney Edward B. Hipp and Assistant Commission Attorney Theodore C. Brown, Jr., for plaintiff appellee.

Reynolds & Howard, by E. Cader Howard, for protestant appellees.

Hamrick, Mauney & Flowers, by Joe Mauney and Fred A. Flowers, for defendant appellant.

ARNOLD, Judge.

By this appeal the following question is presented for review: Is the applicant, a medical doctor, whose communication service consisting of seven two-way radios, three "beeper" radio devices, and one base station, and providing service only to ten other members of the County Medical Society, engaged in the operation of a public utility.

The North Carolina General Assembly has enacted statutes to define and regulate public utilities. Among them are G.S. 62-3(23) and G.S. 62-119, pertinent to this appeal. G.S. 62-119 provides that a "radio common carrier" is every person "owning, operating or managing a business of providing or offering a service for hire to the public of one-way or two-way radio or radio telephone communications. . . . " A broader definition of a public utility, contained in G.S. 62-3(23)a.6, includes a person "[c]onveying or transmitting messages or communications by . . . any . . . means of transmission, where such service is offered to the public for compensation."

Dr. Simpson contends that his service is not a public utility within the statutory definitions, and that he is therefore not subject to regulation by the Utilities Commission. In order to decide whether this service is a public utility the meaning of the word "public" as used in G.S. 62-3(23) and G.S. 62-119 must be interpreted. "Public," is not defined in the statutes although the word "public" is used throughout Chapter 62 relating to Public Utilities.

Words must be given their ordinary meanings, argues Dr. Simpson, and he defines "public" as "all" the members of the community, or at least "all who apply" for the service. He is not willing to offer his service to all who apply, but instead his service is limited to a highly restricted class of people. Dr. Simpson insists, therefore, that his service is not provided or offered "to the public."

In support of his position, Dr. Simpson cites the following language from *Utilities Commission v. Carolina Telephone & Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966):

> "One offers service to the 'public' within the meaning of [G.S. 62-3(23)a.6] when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. For example, the operator of a single vehicle within a single community may be a common carrier." *Id.* at 268.

Unfortunately, the Supreme Court in that case did not address the question raised here due to Dr. Simpson's limited offer of service. In *Carolina Telephone & Telegraph Co.* the common carrier was offering services to all who cared to apply.

Nothing else appearing, it is true that words used in statutes are to be given ordinary and natural meanings. It is equally true, however, that words and phrases in statutes are to be construed as part of the whole and given that meaning which accomplishes the legislature's purpose and comports with its public policy. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). Our General Assembly has decided that companies or persons providing two-way radio communications for the public perform a service which is within the public interest. G.S. 62-119, *et seq.* It concluded that in this field of service the public is better served by a regulated monopoly than by competing carriers. *Utilities Commission v. Carolina Telephone & Telegraph Co., supra,* at 271.

In *Carolina Telephone & Telegraph Co.* it was held that an offering to a limited geographical area is a public offering and thus within the definition of a public utility. Cases in other jurisdictions have held that an offering to a particular group or class is still "public" if a significant part of the public ob-

tains the service offered or provided. The United States Supreme Court, in *Terminal Taxicab Co., Inc. v. District of Columbia,* 241 U.S. 252, 60 L.Ed. 984, 36 S.Ct. 583 (1916), held that a taxicab company was a common carrier offering its services for the public's use even though most of its service was, by contract, limited to the patrons of several hotels and a railway station. "The [taxicab] service affects so considerable a fraction of the public that it is public. . . . " *Id.* at 255.

The New York courts reached the same result. In *Surface Transportation Corp. v. Reservoir Bus Lines,* 271 App. Div. 556, 67 N.Y.S. 2d 135 (1946), it was held that a bus company was "operated for the use and convenience of the public" (within the meaning of the pertinent statute) even though its services were restricted to the residents of particular apartment houses. "Within the limits of its functions defendant is available to everyone who desires to use its facilities. . . . Its service affect so considerable a fraction of the public in the afore-mentioned area that it is public. . . . " *Id.* at 560.

Evidence offered by Two-Way Radio of Carolina, protestant herein, indicated that medical personnel account for a high percentage of those who currently use this service. Three different proprietors of radio communications systems testified that 24%, 29.5% and 92% of their respective customers are in the medical profession. Testimony from these witnesses indicated that the loss of their present medical customers would be very detrimental.

Even though Dr. Simpson's service is offered only to doctors in his county, and his service extends to the limit of his facilities, still he serves almost one-half the market in that county. If professionals and businessmen who now comprise most of the consuming public, such as doctors, realtors and builders as shown by evidence in the record, are free to establish their own radio communications services it could have a detrimental effect on radio common carriers, like the protestant and the intervenors, which are regulated. Such radio common carriers could be forced out of business. The few remaining customers who do not fall within the restricted class of, for example, doctors, realtors or builders, would then be without service. This would be contrary to the purpose and policy of the legislature which has decided two-way radio service is of sufficient public interest to warrant regulation.

The fact that Dr. Simpson's service is limited to only ten doctors in Cleveland County does not control. Two-Way Radio serves only twelve customers in Cleveland County, none of whom are doctors. Such a significant portion of the consuming market is served by Dr. Simpson's service that it is "public" within the meaning of G.S. 62-3(23)a.6. It is a public utility and thus subject to regulation by the Utilities Commission.

For the reasons stated, the order appealed from is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

ROBERT F. WATERS v. QUALIFIED PERSONNEL, INC.

No. 7618SC698

(Filed 16 March 1977)

1. **Rules of Civil Procedure § 60— summary judgment — inadequate notice — appearance by counsel not attorney of record — motion to set aside**

A superior court judge could not set aside another judge's summary judgment order under G.S. 1A-1, Rule 60(b)(4) on the ground that plaintiff had received inadequate notice of the hearing and such defect was not waived where an attorney who was not the attorney of record appeared and argued the motion for plaintiff, since the order was not void but was, at most, erroneous; nor could the summary judgment order, if erroneous, be set aside under the provision of G.S. 1A-1, Rule 60(b)(6) permitting relief from a judgment for "any other reason justifying relief from the operation of the judgment."

2. **Rules of Civil Procedure § 10— conditional appeal — alternative basis for supporting order**

In this appeal by defendant from an order setting aside a summary judgment order, plaintiff's purported "conditional" appeal from the summary judgment order under G.S. 1A-1, Rule 10(d) is not allowed where plaintiff does not suggest an alternate reason for supporting the order appealed from but seeks the opportunity to attack the summary judgment order.

APPEAL by defendant from *Long, Judge*. Order entered 24 May 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 February 1977.

On 12 March 1975 plaintiff filed suit for the balance due on a note purportedly made by defendant in his favor. Plaintiff's complaint was signed by Attorney Lawrence Egerton, Jr. On 19 May 1975 defendant answered, and on 5 June 1975 plaintiff filed motion for summary judgment. This motion was also signed by Attorney Egerton.

On 26 June 1975 plaintiff's deposition was taken, and at this deposition plaintiff was represented by Attorney Kent Lively. (Mr. Lively and Mr. Egerton were not members of the same firm.) Mr. Lively participated in the questioning and advised plaintiff not to answer certain questions raised at the deposition. On 6 August 1975 defendant moved, pursuant to G.S. 1A-1, Rule 37, for sanctions against plaintiff for his refusal to answer the questions.

Nothing happened in the matter for several months, and on 24 February 1976 defendant filed its own motion for summary judgment. Affidavits in support of the motion were filed 3 March 1976, and both the motion and affidavits were served on plaintiff through his attorney, Mr. Egerton.

Defendant's motion for sanctions under Rule 37 was placed on the 8 March 1976 calendar of superior court. Attorney Egerton was not present in court, but Attorney Lively was present and actively represented the plaintiff. On this same date, 8 March 1976, Attorney Lively filed a reply to defendant's motion for summary judgment. The reply was prepared and signed by Attorney Egerton.

At the 8 March 1976 hearing, Judge McConnell also considered defendant's motion for summary judgment. There was no objection by plaintiff at this time, and defendant's attorney, and Attorney Lively representing plaintiff, both argued defendant's motion for summary judgment. Judge McConnell granted summary judgment to defendant.

On 11 March 1976 plaintiff moved before Judge McConnell to set aside the summary judgment on grounds, first, that the March 8 hearing was held less than ten days after receiving notice in violation of G.S. 1A-1, Rule 56(c); and, second, that the March 8 hearing was only for the purpose of considering defendant's motion for sanctions (and not the motion for summary judgment).

Judge McConnell found that while the motion for summary judgment had been properly calendared and fully argued he was of the opinion that there was a question as to whether plaintiff had been represented by his counsel of record. A hearing was ordered by Judge McConnell to determine "who is counsel of record for the plaintiff" and to also hear "plaintiff's motion to set aside the judgment." This hearing was set for 29 March 1976, but, for reasons not apparent in the record, it was not heard until 17 May 1976, by Judge Long.

In his order of 24 May 1976 Judge Long found that the summary judgment for defendant which Judge McConnell had entered was void *ab initio*. Judge Long found that plaintiff had not received adequate notice of the hearing, and that since plaintiff's counsel of record was not present plaintiff had not waived this defect. The summary judgment entered by Judge McConnell for defendant was set aside.

Defendant appeals from Judge Long's order of 24 May 1976, purporting to set aside the summary judgment in its favor entered 8 March 1976 by Judge McConnell.

Alspaugh, Rivenbark & Lively, by James B. Rivenbark, and Lawrence Egerton, Jr., for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey & Hill, by William L. Stocks and R. Thompson Wright, for defendant appellant.

ARNOLD, Judge.

The rule is well settled in North Carolina that, "[o]ne superior court judge cannot modify an order of another superior court judge, even if based upon an erroneous application of legal principles." *Public Service Co. v. Lovin*, 9 N.C. App. 709, 711, 177 S.E. 2d 448 (1970). This statement is in accord with *Green v. Charlotte Chemical Laboratory, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961), wherein our Supreme Court said that one judge's "order or judgment which affects some substantial right claimed by a party may not be modified or vacated by another judge on the ground that it is erroneous." *Id.* at 693.

[1] This is not to say that a superior court judge never has authority to change the result reached by another superior court judge. A new judge can hear a party's motion for rehearing to set aside a judgment, provided that such is proper and authorized by G.S. 1A-1, Rule 60. *Capital Corporation v. Enter-*

prises, Inc., 10 N.C. App. 519, 179 S.E. 2d 190 (1971). Rule 60, entitled Relief from Judgment or Order, lists a number of grounds for granting relief from a judgment. All relate to what could be loosely called matters of fact. They include mistake, fraud, newly discovered evidence, and satisfaction and release. Two others are arguably applicable here. Rule 60(b)(4) allows relief from a judgment which is void. Judge Long concluded that Judge McConnell's earlier judgment was void *ab initio*. That conclusion is wrong. Both parties were always within the jurisdiction of the court. The court, in the person of Judge McConnell, had the power to adjudicate the rights, duties and liabilities of the parties as they arose out of matters within the pleadings. Judge McConnell's judgment may have been erroneous (and as to this we express no opinion), but it certainly was not void.

The other possible ground for setting aside the summary judgment is provided by Rule 60(b)(6) which permits relief from a judgment for "[a]ny other reason justifying relief from the operation of the judgment." This rule is not so broad as it first appears. As William A. Shuford says in North Carolina Civil Practice and Procedure, "Motions under 60(b)(6), however, are not to be used as a substitute for appeal, and an erroneous judgment cannot be attacked under this clause." *Id.*, § 60-11; *Young v. State Farm Mutual Auto. Ins. Co.*, 267 N.C. 339, 148 S.E. 2d 226 (1966); *In re Brown*, 23 N.C. App. 109, 208 S.E. 2d 282 (1974). Even if Judge McConnell erred in answering the question of whether inadequate notice under Rule 56 is waived where an attorney, other than one who signs the pleadings, appears with the client at the hearing, and with knowledge of the attorney of record, argues the motion without objection to the inadequate notice (and again, we express no opinion on this), still plaintiff's only remedy from Judge McConnell's entry of summary judgment was by appeal to this Court.

[2] The plaintiff has also attempted to file a "conditional" appeal from Judge McConnell's summary judgment. Plaintiff relies on Rule 10(d), Rules of Appellate Procedure, but his reliance is misplaced. Rule 10(d) permits an appellee, without taking appeal, to cross-assign as error an act or omission of the trial court "which deprived the appellee of *an alternative basis in law for supporting the judgment* [*or*] *order* . . . from which appeal has been taken." (Emphasis added.) Plaintiff does not

suggest an alternative reason for supporting Judge Long's order; he asks, instead, for the opportunity to attack Judge McConnell's judgment. He is too late. Rule 10(d) does not permit this. The "conditional" appeal is not allowed, and the order appealed from is

Reversed.

Judges PARKER and MARTIN concur.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL. v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 7610SC687

(Filed 16 March 1977)

Insurance § 1; Injunctions § 11— insurance regulations — injunction pending trial — new regulations containing those enjoined — injunction without new hearing

Where the superior court in May 1974 restrained the enforcement of regulations issued by the Commissioner of Insurance relating to the handling of claims arising out of motor vehicle accidents pending final judicial review of the regulations, no trial on the merits has been held, and the Commissioner of Insurance on 30 January 1976 filed with the Attorney General as part of the North Carolina Administrative Code a "new" set of rules which included substantially the same provisions as the previously enjoined regulations, the superior court properly enjoined enforcement of portions of the "new" regulations which were the same as the old regulations pending judicial review without the "new" regulations having first been attacked in a "new" hearing before the Commissioner of Insurance.

APPEAL by respondent, Commissioner of Insurance, from *Godwin, Judge.* Orders entered 25 March 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 20 January 1977.

Young, Moore, Henderson & Alvis, by R. Michael Strickland; Sanford, Cannon, Adams & McCullough, by Charles C. Meeker; Broughton, Broughton, McConnell & Boxley, by J. Melville Broughton, Jr.; Maupin, Taylor & Ellis, P.A., by W. W.

Taylor, Jr.; Smith, Anderson, Blount & Mitchell, by Henry A. Mitchell, Jr.; Teague, Johnson, Patterson, Dilthey & Clay, by Grady S. Patterson, Jr., attorneys for petitioner appellees.

Hunter & Wharton, by John V. Hunter III and V. Lane Wharton, Jr., for defendant appellant.

VAUGHN, Judge.

On 15 March 1974, the respondent, Commissioner of Insurance, issued an order promulgating a set of rules entitled "Regulation 51—Rules and Regulations for Insurance Companies, Adjusters and Motor Vehicle Damage Appraisers." Numerous companies (appellees here), contending that they were aggrieved by the regulation, filed petitions seeking judicial review of the regulation and asking that enforcement of the regulation be enjoined pending that review, as is provided for by G.S. 59-9.3. The first petition for review was served on the Commissioner on or about 17 April 1974. By 15 May 1974, the court had issued orders in all of the cases. The orders stayed the effectiveness of the Commissioner's orders pending final judicial review of the orders and ordered the Commissioner "to take no further steps of any kind to enforce or implement said order or said Rules and Regulations or to require or induce insurance companies writing motor vehicle insurance in the State of North Carolina to submit to such regulations or to take any steps in preparation for operation under such regulations." All of the cases were ordered consolidated for trial.

G.S. 58-9.3(b) requires the Commissioner to, within 30 days after service of a copy of a petition for review, file with the clerk of court a transcript of the proceedings before him. Although the petition for review was served on 17 April 1974, the Commissioner did not file the transcript until 3 January 1975. No application for an extension of time within which to file the transcript was ever made. Neither the Commissioner nor the petitioners appear to have made any effort to get the case set for trial on the merits and, therefore, the enforcement of the Commissioner's orders has been restrained since 15 May 1974. The Commissioner has not petitioned for appellate review of the orders restraining enforcement of the ordinance. [In 1974 and, again, in 1975, bills were introduced in the General Assembly that contained provisions almost identical to "Regulation 51." Neither bill was enacted by the General Assembly.]

On 30 January 1976, the Commissioner filed a "new" set of rules with the Attorney General. These rules have been designated as "Title II of the North Carolina Administrative Code." A substantial part of the provisions of "Regulation 51," the implementation of which had been enjoined, was incorporated in the Commissioner's "new" rules. The new rules were given an effective date of 1 February 1976.

On 27 February 1976, petitioners moved for permission to file supplemental pleadings in the cases pending in the Superior Court. They also sought to restrain the Commissioner from enforcing those certain sections of the "new" rules which contained substantially the same provisions as "Regulation 51," the implementation of which had been previously enjoined.

The court allowed petitioners to file the supplementary petitions for judicial review. The court found that many of the "new" rules contained substantially the same provisions as those that the Commissioner had been restrained from enforcing. The court then enjoined the Commissioner from attempting to implement those parts of the "new" rules pending judicial review. It is from this order that the Commissioner has appealed.

In May, 1974, the Commissioner was restrained from enforcing the provisions of "Regulation 51" pending judicial review as provided by statute. Since that time the case has been allowed to lie dormant without any effort to proceed to a judicial determination of the validity of the provisions of the regulations. On appeal the Commissioner argues that he "does not consider Regulation 51 to be still effective." He says that it "is gone and could not be resurrected in its prior form . . . ." He says that the action pending in the Superior Court is "practically as well as technically moot." We note, in passing, that the Superior Court does not appear to have been so advised. On appeal, the Commissioner concedes that many of the provisions of the new regulations "are direct lineal descendants of portions of Regulation 51; other provisions are substantially similar or are adopted verbatim from Regulation 51."

He argues, however, that these "new" rules must be attacked in a "new" hearing before the Commissioner before the court can restrain their enforcement pending judicial review. We find that position untenable. In "Regulation 51" the Commissioner would have required petitioners to perform certain

acts and would have proscribed them from certain other acts. The court restrained him from implementing those requirements. In the "new" rules the Commissioner attempted, substantially, to impose the very same requirements that the court (in a temporary order from which he never sought relief) had restrained him from imposing. The Commissioner, if aggrieved by the order, was at liberty to proceed through the courts as by law provided. He was not at liberty to ignore the order by imposing, under a different title, the rules he had been forbidden to impose. In substance, the orders from which the Commissioner now appeals amounts to little more than affirmation by the court of the orders it entered in May, 1974. The orders from which the Commissioner appeals are affirmed.

At such time as this case may come on for hearing in the Superior Court, the trial judge should take note of the substantive changes that have been made in the applicable statutes during the time the case has been allowed to languish.

The Administrative Procedures Act, Chapter 150A of the General Statutes, now regulates rule-making by administrative agencies. The chapter was enacted in 1973 but did not become effective until 1 February 1976. One of the reasons for the delay between enactment and effective date was to allow the agencies ample time to revise existing rules (under the then authorized procedures) and, as revised, file them with the Secretary of State so that, upon the effective date of the new act, they could be filed with the Attorney General and, consequently, became immediately effective after filing under the new act. After the rules are filed with the Attorney General, it becomes his duty to revise the form and arrangement of the rules (but not change their substance), as provided by G.S. 150A-61 and then make public and publish the rules as provided by G.S. 150A-62, 63. Revision of the form of the rules does not change their effective date or require the agency to readopt them. G.S. 150A-61.

All agency rules in lawful existence prior to 1 February 1976, become effective upon filing with the Attorney General in accordance with the new act. G.S. 150A-59(c). No agency rule adopted before 1 February 1976 was in lawful existence at that time unless a copy thereof had been filed with the Secretary of State. G.S. 143-197. No proposed rule, not in lawful existence before 1 February 1976, "is valid unless adopted in substantial compliance with" the new act. G.S. 150A-9. Substantial compli-

ance with the new act, among other things, requires notice and the opportunity to be heard, as provided by G.S. 150A-12, *before* the adoption of a rule.

Affirmed.

Judges HEDRICK and CLARK concur.

ROBERT H. SEABORN v. ANNA R. SEABORN

No. 7610DC768

(Filed 16 March 1977)

Divorce and Alimony § 19— consent judgment — alimony and property settlement — motion for increase in alimony

The support and property settlement provisions of a consent judgment entered in an absolute divorce action were separable, and the wife could obtain a modification of the amount of permanent alimony ordered by the judgment upon a showing of changed circumstances; therefore, the trial court erred in denying the wife's motion for an increase in alimony on the ground that the consent judgment constituted a final settlement of the amount of alimony.

APPEAL by defendant from *Greene, Judge.* Order entered 12 May 1976 in District Court, WAKE County. Heard in the Court of Appeals 8 March 1977.

In May of 1969 defendant in the present action filed for divorce *a mensa et thoro* from plaintiff on the ground that he had abandoned her. A judgment was entered in that case whereby plaintiff was ordered to pay defendant $80.00 a month in support payments. On 1 July 1971 plaintiff instituted an action for absolute divorce based on one year's separation. On 9 December 1971 a judgment was entered granting the absolute divorce. Four days later a consent judgment was entered in the cause, the pertinent parts of which stated:

> " . . . counsel for the plaintiff and the defendant represented in open Court that the plaintiff and the defendant have agreed upon a full and final settlement of all matters in controversy between them including all of their respective legal and equitable property rights of every nature and kind, and an increase of the monthly payments from

Eighty Dollars ($80.00) to One Hundred Fifty Dollars ($150.00) per month, it is, by consent, ORDERED, ADJUDGED and DECREED:

"1. That said Judgment appearing in 68 CVD 1170 be and it is hereby amended so as to increase the monthly payments provided therein from Eighty Dollars ($80.00) per month to One Hundred Fifty Dollars ($150.00) per month, which said payments the said Robert H. Seaborn has agreed to pay monthly during the natural life of Anna R. Seaborn or until she remarries, the first payment of One Hundred Fifty Dollars ($150.00) to be made on the 1st day of January, 1972."

Also as provisions "2" and "3" of the consent judgment, plaintiff deeded to defendant his interest in one piece of real property owned jointly by them, and she deeded her interest in a second jointly-owned lot to him.

The present controversy arose when defendant filed a motion in the cause on 13 April 1976 seeking arrearages in monthly support payments and also a modification of the consent judgment to increase support payments due to material changes in circumstances. At the hearing on the motion both parties presented evidence. Defendant's testimony tended to show that she had not received support payments for March and April of 1976. Her testimony further tended to show that she had, since 1971, a history of mental health problems that culminated in nervous collapse, for which she was hospitalized in May 1973. Since that time she has been under continual mental care for a psychotic nervous disorder. At the time of the divorce in 1971 she was employed as a waitress earning $600.00 a month over and above the monthly support payments of the plaintiff. Since her collapse, she has been unable to return to work and has been receiving full disability Social Security benefits. These benefits, along with her support payments, amount to a $306.00 monthly income, some $400.00 a month less than her income prior to the 1973 collapse.

Plaintiff's testimony tended to show that he had deposited checks for the March and April support payments in the mail. His testimony further tended to show that he owned a pharmacy from which he earned approximately $150.00 a week.

In its order the court stated as findings of fact those items testified to by both parties. It approved a settlement of the two

disputed support payments and denied defendant's motion for an increase in support on the grounds that the consent judgment in the final divorce action constituted a "full and final settlement of all matters in controversy between the plaintiff and the defendant, both legal and equitable property rights of every nature and kind." From this order defendant appeals.

Douglass & Barham, by Clyde A. Douglass II for the plaintiff.

Thomas L. Barringer for the defendant.

BROCK, Chief Judge.

Plaintiff contends and the trial court so found, that the consent judgment constituted a full and final settlement of all matters between the parties. As such, the entire judgment is immune from further judicial modification. We disagree.

Modification is improper in a consent judgment which completely settles all property and marital rights between the parties "and which does not award alimony within the accepted definition of that term." *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240 (1964). In the present case alimony within the accepted definition of the term was awarded. The consent judgment recited the prior history of the matter stating that the defendant was awarded "alimony in the sum of Eighty Dollars ($80.00) per month" in a previous action, 68CVD1170.

The consent judgment thereafter ordered, in the first provision, that the judgment in 68CVD1170, ordering the $80.00 a month alimony, be amended to increase monthly payments to $150.00. In the second and third provisions the parties reciprocally transferred their interests in two parcels of real property.

> " . . . [A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case." *Id.* at 70, 136 S.E. 2d at 243.

In the consent judgment in question, the support provision and property settlement provision are separable. Since the judgment was entered on 13 December 1971, G.S. 50-16.9(a)

applies. Under that statute the defendant may obtain a modification of the order for permanent alimony upon a showing of changed circumstances, even though the order was by consent. *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971).

Even under *Bunn v. Bunn, supra,* which was decided prior to the enactment of G.S. 50-16.9(a), the amount of support payments is susceptible to court-ordered modification. Here the court ordered, adjudged, and decreed, albeit by consent, that the plaintiff increase his monthly support payments from $80.00 to $150.00. By making such order in the consent judgment, the court has gone beyond mere approval of the payments so as to adopt the agreement of the parties as its own determination of their respective rights and obligations. *Id.; see also Parker v. Parker,* 13 N.C. App. 616, 186 S.E. 2d 607 (1972). Such a judgment "being an order of the court, may be modified . . . at any time changed conditions make a modification right and proper." *Bunn v. Bunn, supra* at 69, 136 S.E. 2d at 243.

Since the court's order in this case denying defendant's motion for an increase in payments is based on the erroneous ruling that the consent judgment constituted a final settlement of the amount of alimony, said order is reversed. The cause is remanded for further proceedings to determine whether or not a change of conditions has occurred and whether or not an increase in alimony payments is warranted.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

BORG-WARNER ACCEPTANCE CORPORATION v. EDWARD J. DAVID

No. 7612SC665

(Filed 16 March 1977)

Landlord and Tenant § 5— lease of personal property

An agreement in which plaintiff agreed to lease to a corporation equipment, appliances and furniture for use in its apartment building was a true lease, not a security agreement subject to the filing requirements of the Uniform Commercial Code, where the instrument on its face is designated a lease in which plaintiff is named as lessor

and the corporation is named as a lessee; it is for a fixed term of 60 months and specifies the monthly rental payments; the instrument provides that title to the equipment remains in the lessor, that the equipment remains personal property even though attached to realty, that the lessee agrees to keep the property in good repair at its expense, that repairs or accessories become a component part of the equipment and immediately vest in the lessor, and that the lessee shall ship the leased equipment to the lessor on expiration of the rental period; and the instrument gives the lessee no right to renew the lease, to extend its term, or to purchase the leased property. Therefore, the plaintiff, not the defendant who purchased the apartment building from the corporation, is the owner of the items covered by the lease.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 22 March 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 19 January 1977.

Civil action to recover possession of personal property. Plaintiff alleged it leased the property to J. L. Key Properties, Inc., (Key, Inc.) for a term of five years by lease dated 10 November 1972; that Key, Inc., purported to transfer the property to defendant in January 1973 but continued to make monthly lease payments through December 1973; that in February 1974 defendant notified plaintiff that he considered himself to be the owner of the leased property; and that defendant refused to pay the lease payments or to surrender possession of the leased property. A copy of the lease dated 10 November 1972 was attached as an exhibit to the complaint.

Defendant filed answer in which he alleged that the lease was not a true lease but was a security agreement subject to the filing requirements of the Uniform Commercial Code.

The case was tried without a jury. Only plaintiff presented evidence. The court entered judgment making findings of fact which, insofar as pertinent to this appeal, show the following:

In 1972 Key, Inc., owned an apartment building in Fayetteville. In order to acquire equipment, appliances, and furniture for use in its building, Key, Inc., arranged with plaintiff for plaintiff to purchase specified items of equipment, appliances, and furniture, and then to lease these to Key, Inc. On 10 November 1972 the commercial lease involved herein was executed. This instrument described all of the property covered by three prior leases plus additional new property. Without knowledge of these leasing agreements, defendant purchased the apartment

building and the contents from Key, Inc., on 28 December 1972. Key, Inc., continued to make the monthly payments due to plaintiff under the 10 November 1972 agreement until 11 January 1974, after which no further payments were made. Plaintiff then for the first time learned that defendant had acquired the apartment building premises. Plaintiff demanded payment in accordance with the terms of the lease agreement, but defendant refused to make payment or to surrender the property. The court found that the fair market value of the property in defendant's possession which was covered by the lease agreement was $14,148.61.

On these findings of fact, the court concluded as a matter of law "[t]hat Plaintiff is and was throughout the lease period the owner of the items of personal property covered by the agreements between plaintiff and Key, Inc., and that said agreements between Plaintiff and Key, Inc. are valid leases of personal property and not security agreements." The court adjudged that plaintiff recover possession of the personal property in defendant's possession with 6% interest on its fair market value from 11 January 1974. From this judgment, defendant appeals.

Tally & Tally by John C. Tally for plaintiff appellee.

Downing, David, Vallery & Maxwell by Edward J. David for defendant appellant.

PARKER, Judge.

The determinative question is whether the trial court was correct in its conclusion that the 10 November 1972 agreement was a lease rather than a security agreement. We hold that it was.

The instrument on its face is designated a lease in which plaintiff is named as lessor and Key, Inc., is named as lessee. It is for a fixed term of 60 months and specifies the amount of the monthly rental payments to be made by the lessee to the lessor. In addition, the instrument contains the following provisions: no title or right in the equipment passes to lessee except the rights expressly granted; the equipment "shall always remain and be deemed personal property even though attached to realty"; the lessee agrees to keep the leased property "in first class condition and repair" at lessee's expense, and all "repairs

or accessories made to or placed in or upon said equipment shall become a component part thereof and title thereto shall be immediately vested in Lessor and shall be included under the terms" of the lease; on expiration of the rental period or other termination of the lease the leased equipment is to be shipped to lessor at lessee's expense. More importantly, nowhere in the instrument is the lessee given any right to renew the lease, to extend its term, or to purchase the leased property. Such an arrangement is a valid lease and not a security agreement. *In re Wright Homes, Inc.*, 279 F. Supp. 598 (M.D. N.C. 1968); *see Leasing Corp. v. Hall*, 264 N.C. 110, 141 S.E. 2d 30 (1965).

In his brief defendant contends that even if the instrument be considered a lease rather than a security agreement, he is entitled to prevail since the leased property was so attached to the realty that he was entitled to assume it was part thereof when he purchased the apartment building. We do not pass on this contention, since it is not raised by the record. No evidence was presented to show the manner, if any, in which the leased property was attached to the realty, and the trial court properly made no findings in this regard. Defendant neither requested any such findings nor did he take exception to any of the findings of fact which were made. Indeed, the only exception in the entire record is the one directed to the signing and entry of the judgment. This presents for appellate review only the question whether the judgment is supported by the findings of fact and the conclusions of law which were made. Rule 10(a), Rules of Appellate Procedure; *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E. 2d 116 (1968). We hold that it was.

Affirmed.

Judges MARTIN and ARNOLD concur.

JAMES W. SMITH v. EDWARD L. POWELL, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA

No. 765SC723

(Filed 16 March 1977)

Automobiles § 122— public highway — driving under bridge within right-of-way lines

Petitioner was operating his vehicle on a public highway when he was arrested for drunken driving where he was operating the vehicle under a bridge between the right-of-way lines of a U. S. highway, G.S. 20-4.01(13); therefore, the Division of Motor Vehicles properly revoked petitioner's driver's license because of his refusal to submit to a breathalyzer test after his arrest.

Judge CLARK dissenting.

APPEAL by respondent from *James, Judge.* Judgment entered 8 April 1976 in Superior Court, NEW HANOVER County. Heard in Court of Appeals 10 February 1977.

In this proceeding, petitioner, James W. Smith, filed a petition in the Superior Court pursuant to the provisions of G.S. 20-16.2(e) for a trial *de novo* from the order of the Division of Motor Vehicles suspending his driver's license for six months pursuant to G.S. 20-16.2(d) for willful refusal to submit to a breathalyzer test. The following facts are not in controversy:

On 2 October 1975 at approximately 6:25 p.m. New Hanover County Deputy Sheriff C. E. Willis observed the petitioner operating a motor vehicle underneath the bridge by which U. S. Highways 74-76 cross the Intercoastal Waterway in New Hanover County. The area beneath the bridge is used by some members of the general public to launch small boats into the water without the express or implied consent of the State of North Carolina. Deputy Sheriff Willis had reasonable grounds to believe that petitioner was operating a motor vehicle under the influence of intoxicating liquor and arrested him for violating G.S. 20-138. At the time of his arrest petitioner was requested by Deputy Sheriff Willis and by a qualified breathalyzer operator to submit to a breathalyzer test and was informed of his rights under G.S. 20-16.2(a), but petitioner willfully refused to submit to the test. Subsequently the Division of Motor Vehicles revoked petitioner's license for six months pursuant to G.S. 20-16.2(d). Petitioner asked for a trial *de novo* in Superior

Court pursuant to G.S. 20-16.2(e). At trial the judge found the facts as set out above and based thereon made the following pertinent conclusion of law:

> "While the Court agrees that there may technically be some merit in the argument that the area beneath the bridge is within the right-of-way of Highways 74-76, the Court concludes as a practical matter that the Petitioner's car was not on a highway as that term is used in North Carolina General Statute 20-16.2, and that the arresting officer did not have reasonable grounds to believe that the Petitioner was or had been operating said vehicle on a highway while under the influence of alcohol."

From an order reversing the respondent's revocation of petitioner's driver's license, respondent appealed.

Cherry and Wall by James J. Wall for petitioner appellee.

Attorney General Edmisten by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray for respondent appellant.

HEDRICK, Judge.

The respondent contends that the uncontroverted facts do not support the conclusion that petitioner was not operating a motor vehicle on a highway within the meaning of G.S. 20-16.2 at the time of his arrest. G.S. 20-4.01(13) defines a highway for the purpose of Chapter 20 as, "The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic."

The uncontroverted findings of fact clearly establish that petitioner at the time of his arrest was operating a motor vehicle between the right-of-way lines of a "way or place" a portion of which is open to the public as a matter of right for vehicular traffic, as U. S. Highways 74-76. We hold the trial court erred in concluding that petitioner was not operating a motor vehicle at the time of his arrest on a highway within the meaning of G.S. 20-16.2.

In *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 232, 182 S.E. 2d 553, 558 (1971), Justice (now Chief Justice) Sharp wrote, "If, under the facts found by the judge, the

statute [G.S. 20-16.2(d)] requires the suspension or revocation of petitioner's license 'the order of the department entered in conformity with the facts found must be affirmed.' " (Citations omitted.)

In the present case the findings of fact dictate the conclusion that petitioner was operating his automobile at the time of his arrest on a highway within the meaning of G.S. 20-16.2(d). Accordingly, the judgment appealed from is reversed, and the proceeding is remanded to the Superior Court for the entry of an order affirming respondent's order revoking petitioner's license.

Reversed and remanded.

Judge BRITT concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The area within the right-of-way under the bridge was never intended for vehicular traffic and has never been maintained by the State for that purpose. In my opinion no part of the right-of-way under the bridge was "open to the public as a matter of right for the purposes of vehicular traffic," as provided by G.S. 20-4.01. The long arm of the law should not be so elasticized as to reach under a bridge in an area which was not intended for vehicular traffic. I vote to affirm the judgment of the trial court.

JOHN L. TURNER v. ATLANTIC MORTGAGE AND INVESTMENT COMPANY

No. 7621SC710

(Filed 16 March 1977)

1. Contracts § 27— earning commissions — purchase of stock — oral contract — sufficiency of evidence

Evidence was sufficient to support the jury's finding that, pursuant to an oral agreement between plaintiff and the shareholders of defendant company, plaintiff was entitled to earn commissions which could then, in turn, be used to buy shares in defendant company, and

that plaintiff was entitled to sue for the commissions earned and forego the stock.

2. **Contracts § 13; Uniform Commercial Code § 64— payment of commissions — purchase of stock — divisible contract**

Where the contract between the parties entitled plaintiff to earn commissions which could then be used to buy shares in defendant company, the contract was divisible into two related, but not interdependent, promises: (1) to pay plaintiff commissions in consideration of fees generated, and (2) to sell plaintiff shares in consideration for, and in proportion to, the commissions already earned and the number of years spent working for defendant. Since the contract was divisible and the promise to pay commissions could be enforced separately from the promise to sell stock in exchange for the commissions, the statute of frauds, G.S. 25-8-319(a), did not apply.

3. **Contracts § 4— fees previously generated — commissions subsequently paid — consideration**

In an action by plaintiff to recover the amount of commissions he allegedly earned as a mortgage banker for defendant, or, in the alternative, stock in defendant company to which he was allegedly entitled pursuant to an oral contract, defendant's contention that plaintiff gave no consideration for so much of his commissions as were based on fees generated during the fiscal year preceding the negotiation of plaintiff's commission and stock agreement is without merit, since plaintiff was not promised commissions in consideration of past services, but instead, in consideration of his promise to continue working and to perform future services, he was promised additional compensation calculated as commissions on fees previously generated by plaintiff.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 14 May 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 February 1977.

The defendant, Atlantic Mortgage and Investment Company (Atlantic), is a mortgage brokerage company, and J. P. Lauffer, Jr., President, and Thomas W. Wharton, Executive Vice President, are its sole shareholders. On or about 1 April 1972, Lauffer and Wharton hired the plaintiff, John L. Turner, as a mortgage banker. His duties were to arrange mortgage loans between builders and lenders for which services Atlantic received commissions equal to one percent of the amount of the loans. When Turner joined Atlantic he had no experience in mortgage banking, but during the time he was with the corporation, between April 1972 and September 1974, he was promoted to vice president, and his compensation rose to a straight salary of $27,500. In addition, plaintiff alleges that in August

1973, he and Atlantic negotiated an oral agreement whereby plaintiff was to receive a total of 20% of the outstanding shares in Atlantic over the period 1973-1976, at the rate of no more than 5% each year. The exact amount was tied to the amount of commissions earned each year by plaintiff.

In September 1974, Atlantic discharged plaintiff without ever having given him the shares allegedly owed to him. Plaintiff sued to recover the amount of the commissions he allegedly earned, $53,300.00, or, in the alternative, the stock which was to be his. At the end of the trial he elected to take the commissions instead of the stock. The jury awarded plaintiff $50,000. Atlantic appeals. Such other facts as are necessary will appear in the opinion.

Deal, Hutchins and Minor, by William K. Davis, for plaintiff appellee.

Hatfield and Allman, by Weston P. Hatfield, James E. Humphreys, Jr., and R. Bradford Leggett, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the court erred by failing to find that the alleged contract was barred by the statute of frauds, G.S. 25-8-319, because it was a contract for the sale of securities. It argues that the alleged contract was not an employment contract but a contract for the sale of stock. Defendant's position is that the "commissions" were not earned by plaintiff, nor did they accrue to him, but instead these "commissions" were credits, calculated according to a formula based on fees which plaintiff generated which were intended as the measure of the amount of stock plaintiff was to receive at the end of each year.

The jury answered "yes" to the following issue: "Did the defendant enter into an agreement with the plaintiff, as alleged in the complaint?" The agreement as set out in the complaint is as follows:

> "IV. On or about August, 1973, the defendant . . . in consideration of plaintiff's promise and agreement to continue working with the defendant as a mortgage banker and to concentrate on furthering the defendant's business . . . contracted, agreed and promised that plaintiff would have the *option* to purchase five percent (5%) of the shares of

the stock of the defendant in each of the years 1973, 1974, 1975, and 1976, for a total of twenty percent (20%), at the purchase price of $23,000.00 for each five percent (5%), *with commissions earned* by plaintiff during defendant's corresponding fiscal years to be applied toward the purchase price of the stock." (Emphasis added.)

[1] It was determined by the jury then that the oral agreement as alleged in the complaint is the contract between the parties. That agreement provided that if plaintiff continued to work for defendant he would have the option to apply commissions earned (and not other funds) to the purchase of Atlantic stock. Earning the commissions is a condition precedent to the purchase of the stock, but the commissions are also compensation for services rendered by plaintiff. If evidence supports the jury's finding concerning the agreement, plaintiff had the option to recover either the commissions earned or to purchase the stock with the commissions. Plaintiff elected to take the commissions, and that was the only remedy presented to the jury.

Defendant raised the question of whether the jury's findings were supported by the evidence by moving for a directed verdict and judgment *non obstante veredicto*. Denial of the motions was proper since evidence in the light most favorable to plaintiff supports the findings. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903 (1972).

According to plaintiff's testimony, he reached an agreement with Lauffer and Wharton, acting as officers and directors of Atlantic, whereby he would be paid commissions which, in turn, would be used to buy shares in Atlantic. The agreement was a compromise. According to Turner, he wanted " . . . to have an opportunity to buy stock in the company . . . . " Lauffer and Wharton, however, wanted to pay him a "straight commission so that [he] could earn lots of money"; they wanted him " . . . to take the commissions out rather than leave them in the company to buy stock. . . . " Turner told Lauffer and Wharton that " . . . the only way [he] could be truly satisfied . . . would be to have the stock. . . . " He told them that if a satisfactory arrangement could not be reached, he would probably leave. Accordingly, they agreed upon the proposal " . . . of a commission and stock purchase." As Turner described it in his testimony, "What this was was that as I earned in commis-

sions sufficient dollars to buy stock, then those commissions would be applied toward the purchase of stock [and] allow me to buy 5% per year over a four year period totaling 20% . . . . I was to have a commission and to use those commissions to buy stock."

On cross examination of Mr. Turner, Atlantic attempted to show that the commissions were not really earnings but only a measure of the quantity of stock to be transferred. Under cross examination, Mr. Turner said:

> " . . . The commissions I was earning were all to go toward buying the stock in Atlantic Mortgage.
>
> "As to whether that was the sole purpose of the arrangement, that was my purpose for the commissions. It was not the sole purpose at all. The commissions were—it was my desire that the commissions earned buy stock and any extra [be held until the next year to offset possible shortages]. Nothing was said about the situation which would arise if there was any money left over after the stock had been purchased.
>
> "As to whether it is a fact that I never had any reason to believe that I would ever get any money in cash for these commissions, that is not correct. That was not the discussion. The commissions earned were a way that I could earn stock that I was buying."

In addition Mr. Turner also told the jury that Mssrs. Lauffer and Wharton several times assured him that his stock certificates, representing his first 5% interest, were being transferred to him. They also introduced him to others as a part owner of the company.

Of course, the evidence above is not all of the evidence, but it clearly supports the jury's finding that the contract was as alleged in the complaint. It reveals that Mr. Turner was entitled to earn commissions which could then, in turn, be used to buy shares in Atlantic. It shows that—nothing else appearing—Mr. Turner was entitled to sue for the commissions earned and forego the stock. He brought such a suit, and the jury looked favorably upon it.

[2] Defendant also contends that even if an agreement between the parties was reached it was an "entire" contract and

not "divisible." Atlantic argues that the contract has to be enforced as a whole or not at all. Plaintiff, it says, cannot elect to collect his commissions instead of the stock. The only remedy, according to the defendant, is enforcement of the ultimate promise to transfer stock. 3 N.C. Index 3d, Contracts, § 13; 17 Am. Jur. 2d, Contracts, § 324. Atlantic contends, moreover, that because the contract is entire it is ultimately a contract for the sale of securities and unenforceable under the statute of frauds, G.S. 25-8-319(a), since it is not written.

Our Supreme Court has said:

> "A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all parts, material provisions, and the consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. . . . [S]o . . . when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole . . . , and buyer to pay the whole price. . . .
>
> "On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other. . . . Hence, an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains intact."

Wooten v. Walters, 110 N.C. 251, 254, 14 S.E. 734 (1892), *quoted in Lumber Co. v. Builders, Inc.,* 270 N.C. 337, 341, 154 S.E. 2d 665 (1967).

The contract, as found by the jury, is divisible and not entire. In consideration for remaining with Atlantic plaintiff received commissions calculated on the basis of the preceding year's fees. This commission in turn was to be consideration for the purchase of no more than five percent of defendant's stock. By continuing to work plaintiff was also to continue accruing commissions, and upon completion of a year's work he acquired the right to spend his commissions to purchase another five percent of defendant's stock. This was to continue, under the agreement, through 1976.

The contract is divisible into two related, but not interdependent, promises: (1) to pay Turner commissions in consideration of fees generated; and (2) to sell Turner shares in consideration for, and in proportion to, the commissions already earned, and the number of years spent working for Atlantic. This is not the situation where a lump sum is promised in consideration for machinery and necessary attachments. *See, McLawhon v. Briley,* 234 N.C. 394, 67 S.E. 2d 285 (1951). Nor is this the situation present in *Neal v. Wachovia Bank & Trust Company,* 224 N.C. 103, 29 S.E. 2d 206 (1944), cited by Atlantic, where, in consideration for services rendered, a person promised to devise either his house or its value to his benefactors. In both these cases, a single consideration supported all the promises. Further, the promises—for machinery and additional necessary equipment, for a house or its value—are closely related. These contracts are entire. But in the case at bar, the fact that the payment of commissions is a necessary step for the transfer of shares does not make indivisible the promises to do each. The fact that Turner wanted the stock and was willing to use his commissions as a means of acquiring the stock does not make the contract entire.

Since the contract is divisible and the promise to pay commissions can be enforced separately from the promise to sell stock in exchange for the commissions, the statute of frauds, G.S. 25-8-319(a), does not apply.

[3] Defendant maintains, also, that, as a matter of law, plaintiff gave no consideration for so much of his commissions as are based on fees generated during fiscal year 1973. The work for 1973 was done, fees were collected by defendant, and plaintiff's salary was paid before plaintiff negotiated his commission and stock agreement with Lauffer and Wharton. Therefore, defendant contends, commissions paid on the basis of fees already generated have only a past consideration to support them. This argument is unpersuasive. Plaintiff's employment contract with defendant was terminable at will. He was not promised commissions in consideration of past services, but instead, in consideration of his promise to continue working and perform future services, he was promised additional compensation calculated as commissions on fees previously generated by plaintiff. *See* 1 Williston on Contracts (3d ed.), §§ 134 and 137A; Restatement of Contracts, §§ 76 and 83. The promise to pay plaintiff commissions on fees previously generated was con-

sideration for future services to be rendered, and not for past services.

Defendant brings forth other assignments of error and arguments which have been carefully considered. No prejudicial error is found.

No error.

Judges PARKER and MARTIN concur.

DORIS WELLS WEBBER v. CHARLES RONALD WEBBER

No. 7626DC742

(Filed 16 March 1977)

1. **Divorce and Alimony §§ 1, 20— out of state divorce — no in personam jurisdiction of dependent spouse — alimony available to dependent spouse**

Defendant's contention that the N. C. District Court had no authority to enter a judgment awarding plaintiff alimony since when the award was made defendant had already obtained a valid judgment of divorce in Georgia is without merit because it ignores G.S. 50-11(d) which provides that a divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained does not impair the right of the dependent spouse to alimony as provided by the laws of N. C.

2. **Divorce and Alimony § 1— Georgia divorce action — wife in N. C. — no in personam jurisdiction — wife's right to alimony not impaired**

Plaintiff, who was a resident of N. C., did not make a general appearance in defendant's divorce action instituted in Georgia where plaintiff's attorney "negotiated" with defendant's attorney for title to the parties' house and automobile in exchange for plaintiff's agreement not to contest the Georgia divorce action; therefore, the Georgia court never obtained *in personam* jurisdiction over the plaintiff, and G.S. 50-11(d) was applicable in this case to preserve plaintiff's right to seek alimony in N. C.

3. **Divorce and Alimony § 20— divorce decree — child support and alimony claim — no estoppel**

Plaintiff was not estopped from asserting claims to alimony or child support by reason of her conduct subsequent to a divorce decree rendered in defendant's action in a Georgia court, since plaintiff used no benefits conferred by the decree.

4. Estoppel § 4— equitable estoppel — agreement not to contest divorce action — action for alimony and child support not barred

Since equitable estoppel arises only when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another 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, plaintiff was not equitably estopped from bringing this action for alimony and child support where plaintiff's only representation to defendant was that she would not contest his divorce action in Georgia if defendant would convey the parties' home and automobile to her, plaintiff did not contest the Georgia action, and in the present action she was simply asserting her right to alimony and child support.

APPEAL by defendant from *Brown, Judge.* Order entered 8 June 1976 in District Court, MECKLENBURG County. Heard in Court of Appeals 15 February 1977.

On 16 February 1976 plaintiff, Doris Wells Webber, filed a complaint seeking a divorce from bed and board, permanent alimony, child custody and support, alimony *pendente lite*, and counsel fees. Defendant, Charles Ronald Webber, a resident of Georgia, was personally served with a copy of the summons and complaint on 23 April 1976 in Mecklenburg County. On 20 May 1976 defendant filed a motion to dismiss on the ground that he had already obtained a divorce from plaintiff in Georgia on 19 April 1976, and therefore the North Carolina Court lacked jurisdiction. Defendant also contended in his motion that the portions of the Georgia divorce decree awarding child support and alimony to plaintiff were binding upon the court and plaintiff because plaintiff made an appearance in the Georgia action through her attorney by authorizing him to negotiate with defendant's attorney in order to acquire title to the parties' house and automobile in exchange for plaintiff's agreement not to contest the Georgia divorce action. Attached to defendant's motion is a copy of the divorce petition filed by defendant in the Georgia court also on 16 February 1976. It indicates service upon plaintiff by publication and states that defendant makes no claim to any interest in the house or automobile owned by the parties. Also attached to the motion are two letters dated 23 March and 15 April 1976 from plaintiff's attorney to defendant's attorney requesting defendant to execute a quitclaim deed for the house and a power of attorney authorizing plaintiff to transfer title to the car based upon defendant's statements in his complaint that he claimed no interest in such assets. In

the letter of 23 March 1976 plaintiff's attorney stated, "Unless I have received the deed and power of attorney, both properly executed, by Friday, April 2, 1976, answer will be filed in Mr. Webber's divorce action and all other action will be taken to keep a divorce judgment from being entered. If the deed and power of attorney are received in proper order, no answer will be filed." Plaintiff stipulated that the letters were sent with her authority and consent. The Georgia divorce decree entered on 19 April 1976 awarded plaintiff child support of $100 per month and alimony of $360 per month for six months.

The court denied defendant's motion to dismiss, and at the hearing plaintiff testified that defendant abandoned her on 3 August 1975; that the minor child is 9 years old and resides with her; that expenses for herself and the child equal $945 per month; and that she earns $335 per month in a full-time job. Defendant testified that he earns approximately $1,300 per month excluding deductions for insurance; that his expenses equal $964 per month; and that he signed quitclaim deeds in favor of plaintiff for the house and car as a result of the correspondence with her attorney.

The court found that plaintiff "made no appearance in the Georgia divorce action and sought no relief from the Georgia Court . . . " ; that plaintiff is a dependent spouse and defendant is a supporting spouse; that plaintiff is fit to have custody; and that on 3 August 1975 defendant abandoned plaintiff without just cause or provocation. The court concluded that the Georgia decree is not *res judicata* as to plaintiff's claims, and that by the provisions of G.S. 50-11(d) plaintiff may maintain the present action for alimony. The court awarded plaintiff custody of the minor child, $415 per month child support, $175 per month alimony *pendente lite,* and counsel fees.

Defendant appealed.

William O. Austin for plaintiff appellee.

Curtis and Millsaps by Joe P. Millsaps for defendant appellant.

HEDRICK, Judge.

[1] Defendant first argues that the North Carolina District Court had no authority to enter the judgment awarding plaintiff alimony since when the award was made defendant had

already obtained a valid judgment of divorce in Georgia. This argument is untenable because it ignores G.S. 50-11(d) which provides,

> "A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State."

[2] Next defendant contends that G.S. 50-11(d) is inapplicable and that the judgment of the Georgia Court is *res judicata* as to all matters dealt with by that court because personal jurisdiction was obtained over the plaintiff. Defendant argues that personal jurisdiction was obtained over plaintiff because she made a "general appearance" in the Georgia proceeding when plaintiff's attorney, with her consent and authority, "negotiated" with defendant's attorney to obtain a quitclaim deed to the residence in North Carolina and a power of attorney to transfer the title of the automobile to plaintiff.

"A general appearance is one where the defendant either enters an appearance in a proceeding *in personam* without limiting the purposes for which he appears or where he asks for relief which the court can give only if it has jurisdiction over him." 1 Lee, North Carolina Family Law § 98, at 377 (3rd ed. 1963). It is obvious, therefore, that the plaintiff did not make a general appearance in the Georgia action.

[3] Citing 1 Lee, North Carolina Family Law § 98 (3rd ed. 1963), defendant next asserts that the court erred "in failing to find that plaintiff is estopped from asserting further claims to alimony or child support." Professor Lee states the rule upon which defendant relies as follows: "One seeking relief from a divorce decree, either domestic or foreign, may, by reason of his conduct subsequent to the rendition of the decree, be estopped from attacking it. A person cannot attack a divorce decree after using the benefits which it confers." *Id.* at 388 (footnote omitted). In the present case plaintiff has not used any benefit conferred under the Georgia divorce decree, and has taken no action subsequent to the rendition of the decree that would estop her from claiming alimony or child support. Indeed plaintiff brought her action for alimony on the very day that defendant's proceeding was commenced in Georgia.

[4] Neither is plaintiff barred from maintaining the North Carolina action for alimony and child support by the doctrine of "equitable estoppel." "Equitable estoppel is defined as 'the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another 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.'" *In re Bank v. Winder*, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929) (Citation omitted).

In the present action plaintiff represented to the defendant that she would not contest the Georgia divorce if he would convey the house and car to her. Plaintiff has not contested the Georgia divorce. In the present action she is simply asserting her right to alimony and child support. We hold plaintiff is not estopped from maintaining the present action.

Defendant by assignments of error 11 and 18, based upon exceptions 14 and 21, contends the court erred in finding and concluding that the defendant abandoned plaintiff and because of such abandonment plaintiff is entitled to alimony *pendente lite*. Defendant argues that the conclusion is not supported by the findings of fact and that the findings are not supported by the evidence. Suffice it to say the record is replete with evidence supporting the judge's finding of fact that the defendant abandoned the plaintiff, and this finding supports the conclusion that the plaintiff is entitled to alimony *pendente lite*. These assignments of error have no merit.

Assignments of error 7-10, 12-13, 19-22, and 24-31 raise questions already discussed and are without merit.

Finally, based on assignment of error 1, defendant asserts the trial court erred in asking certain questions of the defendant regarding the proceedings in Georgia. The information sought by the questions challenged by this exception was rele-

vant and material to the numerous jurisdictional questions raised by the defendant. This assignment of error has no merit.

The order appealed from is

Affirmed.

Judges BRITT and CLARK concur.

T. E. BLANTON AND WIFE, SADIE H. BLANTON v. LINDSEY V. MANESS AND WIFE, NANCY G. MANESS

No. 768SC671

(Filed 17 March 1977)

Judgments § 37— action for damages for breach of contract — prior action to enforce contract — identity of issues — res judicata

Plaintiffs' action for a money judgment for damages resulting from defendants' alleged breach of a contract between the parties was barred by plaintiffs' prior action to obtain a money judgment based on a judicial enforcement of the contract which resulted in a judgment for defendants, since both actions involved the same parties, the same subject matter which was the parties' contract, and the same issue which was whether defendants had wrongfully failed to pay plaintiffs any sums which the contract obligated them to pay.

APPEAL by plaintiffs from *Small, Judge.* Judgment entered 18 May 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 January 1977.

On 24 June 1968 plaintiffs and defendants signed a written contract by which they agreed that plaintiffs were entitled to 20 per cent of all sums due defendants under a contract dated 17 June 1968 between defendants and North Carolina Lime, Inc., (Lime, Inc.) which plaintiffs had been instrumental in negotiating. In January 1970 plaintiffs brought a civil action against defendants in the District Court in Jones County. In their complaint in that action plaintiffs alleged that defendants had paid their obligation under the 24 June 1968 contract until about 1 July 1969, but that defendants had made a new contract with Lime, Inc., under which Lime, Inc., was obligated to make further payments to defendants, and that plaintiffs were entitled to receive 20 per cent of all such payments. Plaintiffs prayed for judgment against defendants for $3,300.00, which

plaintiff alleged was 20 per cent of the amounts which Lime, Inc., had paid defendants under the new contract, and for an order directing defendants to pay plaintiffs 20 per cent of future payments made to them by Lime, Inc. Defendants filed answer in the Jones County action in which they alleged that on 1 January 1969 they had entered into a new contract with Lime, Inc., by the terms of which their previous contract with Lime, Inc., dated 17 June 1968 was rescinded and became null and void, and that since execution of said new contract defendants were no longer obligated to make any payments to defendants. By agreement of the parties the Jones County action was heard by the court without a jury. On 25 April 1974 the District Court entered judgment in that action making findings of fact on the basis of which the Court concluded:

> " . . . that the contract dated January 1, 1969 between North Carolina Lime, Inc. and the defendants Maness annulled and voided the contract previously existing between them dated June 17, 1968 and the contract between the plaintiffs Blanton and the defendants Maness dated June 24, 1968 does not require the payment of any sums received by the defendants Maness under the terms of the contract dated January 1, 1969 or any subsequent contract."

On its findings and conclusions, the District Court adjudged that plaintiffs recover nothing of defendants. Plaintiffs gave notice of appeal to this Court but failed to perfect their appeal, and their appeal was dismissed. Plaintiffs' subsequent petitions for certiorari were denied.

On 3 September 1975 plaintiffs brought the present action against defendants in the Superior Court of Wayne County. In their complaint in this action, plaintiffs alleged that defendants made and delivered to them the contract dated 24 June 1968, that defendants paid their obligations thereunder until about 1 July 1969, that on 7 August 1969 defendants made a new contract with Lime, Inc., and that immediately thereafter defendants ceased making payments to plaintiffs under the contract between them dated 24 June 1968. Plaintiffs alleged that defendants had willfully breached their 24 June 1968 contract with plaintiffs, and they prayed for judgment "[t]hat the defendants be required to account to them for 20% of the value of all lime mined from their property since July 1, 1969 to this date and that they have and recover said sum as damages in

addition to the sum of One Million Dollars ($1,000,000.00) for future damages all by reason of the wrongful breach of the contract existing between these parties."

Defendants filed answer denying they had breached their contract with plaintiffs and pleading the judgment entered in the Jones County action as *res judicata*. Defendants also moved for summary judgment on the grounds that plaintiffs were conclusively estopped from maintaining this action by the prior judgment entered in the Jones County action, supporting their motion by filing a copy of the record in the Jones County case. The court allowed the motion and dismissed plaintiffs' action. Plaintiffs appealed.

Turner and Harrison by Fred W. Harrison for plaintiff appellants.

Douglas P. Connor for defendant appellees.

PARKER, Judge.

The sole question for our determination is whether the court erred in dismissing plaintiffs' action on the ground of *res judicata*. We hold that it did not.

"*Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action." *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E. 2d 799, 804 (1973). "It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to parties and privies, in all actions involving the same matter." *Bryant v. Shields*, 220 N.C. 628, 634, 18 S.E. 2d 157, 161 (1942). "Ordinarily, the plea of *res judicata* may be maintained only where there is an identity of parties, of subject matter and of issues." *Kleibor v. Rogers*, 265 N.C. 304, 307, 144 S.E. 2d 27, 30 (1965).

Here, there was identity of parties, the plaintiffs and defendants in the present action being plaintiffs and defendants in the prior action. The subject matter of both actions was the same, a written contract between the parties dated 24 June 1968 which required defendants to make certain payments to plaintiffs. The complaints filed in both actions contain many of the same allegations, including the allegation that since 1 July 1969 defendants have failed to make the required money

payments pursuant to the terms of that contract. That the plaintiffs sought in the prior action to obtain a money judgment based on a judicial enforcement of the contract, while in this action plaintiffs seek a money judgment for damages resulting from defendants alleged breach of the contract, provides a distinction without a difference. The ultimate issue in both actions was the same, whether defendants had wrongfully failed to pay any sums which the 1968 contract obligated them to pay. Implicit in the court's conclusion in the prior judgment that the contract did not require defendants to make any further payments to plaintiffs was that the contract had not been breached by defendants' refusal to make such payments. The rule of *res judicata* " . . . prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific finding may have been made in reference thereto. If the record of the former trial shows the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." *Craver v. Spaugh,* 227 N.C. 129, 132, 41 S.E. 2d 82, 84 (1947).

Final judgment adverse to plaintiffs was entered in this matter in the prior action. Such judgment is *res judicata* and bars the present action. Summary judgment was properly granted for defendants.

Affirmed.

Judges MARTIN and ARNOLD concur.

LINWOOD EARL CARTER v. GEORGIA LIFE AND HEALTH INSURANCE COMPANY

No. 768DC707

(Filed 16 March 1977)

Insurance § 43.1; Limitation of Actions § 4— claim for hospital expenses — calculation of period of limitation

In an action to recover hospital room expenses from defendant under two insurance policies, the period of limitation ran from the time written proof of loss was furnished in accordance with the requirements of the policies plus the sixty days during which the policies prohibited a claimant from filing suit; however, plaintiff in this

action was not entitled to the benefit of the sixty-day period in calculating the period of limitations since he failed to show that his proof of loss filed more than 90 days after termination of the period for which defendant was liable was furnished in accordance with the requirements of the policies.

APPEAL by plaintiff from *Exum, Judge.* Judgment entered 19 March 1976 in District Court, WAYNE County. Heard in the Court of Appeals 9 February 1977.

Plaintiff brought suit to recover hospital room expenses from defendant under two insurance policies. Plaintiff entered the hospital on 24 April 1972 and was discharged on 29 May 1972. He furnished proof of loss to defendant on 18 September 1972. In October defendant informed plaintiff that it would not pay his claim.

Plaintiff filed his complaint in this action on 26 September 1975. On 5 March 1976, defendant moved for summary judgment. Copies of the two insurance policies in question and plaintiff's proof of loss form were received into evidence at the hearing on the motion. The following two clauses, identical in each policy, are relevant on appeal:

> *Proofs of Loss*—Written proof of loss must be furnished to the Company at its said office within ninety days after the termination of the period for which the Company is liable. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required."
>
> "*Legal Actions*—No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished."

In the present case, the parties have stipulated that the period for which defendant is allegedly liable terminated on 29 May 1972, and that the written proof of loss filed by plain-

tiff on 18 September 1972 was not within the ninety-day requirement of the policy. Thus the ninety-day part of the "Proofs of Loss" clause is of no concern in this action. Plaintiff offered no reason to justify his failure to file within the ninety-day period set forth in the "Proofs of Loss" clause.

The court granted summary judgment for defendant on the ground that the action was not filed within the period of limitations set forth in the insurance contracts.

Plaintiff appeals.

Barnes, Braswell & Haithcock, P.A., by Michael A. Ellis for plaintiff appellant.

Taylor, Allen, Warren & Kerr by Robert D. Walker, Jr. for defendant appellee.

CLARK, Judge.

The issue upon appeal is whether the trial court was correct in concluding that plaintiff's claim was barred by the three-year period of limitation contained in the insurance contracts. Defendant contends that the period runs from the end of the ninety-day period to file proof of loss, in this case from 27 August 1972, and that when plaintiff filed his complaint on 26 September 1975, the period had run. Plaintiff contends that the period runs from the time written proof of loss is furnished, plus the sixty days during which the policies prohibit a claimant from filing suit, in this case from 18 November 1972.

It is apparent that unless plaintiff prevails on the argument that the sixty-day period must be taken into account, his claim will be barred irrespective of whether the period of limitations runs from the end of the ninety-day period, 27 August 1972, or the date proof was in fact furnished, 18 September 1972, since in either event the three-year period would have run when he filed suit on 26 September 1975. The initial question then is whether plaintiff is entitled to have the sixty-day period providing immunity from suit added to "the time written proof of loss is required to be furnished" in computing the date which begins the running of the period of limitations.

There is a sharp split on whether clauses which postpone the right to sue also postpone the date from which a period of limitations runs. 44 Am. Jur. 2d, Insurance, § 1911 (1969).

North Carolina is among the jurisdictions which construe a clause postponing suit in conjunction with a clause establishing a period of limitations so as to postpone the running of the period of limitations. *Heilig v. Insurance Company,* 152 N.C. 358, 67 S.E. 927 (1910).

However, the "legal actions" clause provides that the right to sue is postponed only when "written proof of loss has been furnished in accordance with the requirements of this policy." Upon defendant's plea of limitations, the burden is on the plaintiff to show that the action was instituted within the prescribed period. *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784 (1961). In the present case, if plaintiff wanted the benefit of the sixty-day period in calculating the period of limitations, the burden was on him to show the existence of an issue as to whether the proof of loss he submitted on 18 September 1972 "was furnished in accordance with the requirements" of the policies.

We conclude that no adequate showing was made. The "Proofs of Loss" clause provides that proof of loss may be furnished after ninety days only "if it was not reasonably possible to give proof" within that period. In response to the motion for summary judgment, plaintiff rested upon his pleadings, which do not allege any reason for the delay in furnishing written proof of loss. G.S. 1A-1, Rule 56(e) provides that the party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response . . . 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." *Millsaps v. Contracting Co.,* 14 N.C. App. 321, 188 S.E. 2d 663 (1972). The complaint, the two policies, and the proof of loss offered by defendant in support of its motion satisfied its burden of showing that no issue existed as to whether the action had been brought within the three-year period of limitations, unless plaintiff was entitled to the benefit of the sixty-day period. *Brown v. Casualty Co.,* 19 N.C. App. 391, 199 S.E. 2d 42 (1973), *aff'd,* 285 N.C. 313, 204 S.E. 2d 829 (1974).

If plaintiff wished to invoke the sixty-day period to delay the running of the period of limitations, the burden of going forward was on him to show that an issue existed as to whether his proof of loss had been furnished in compliance with the policies, in particular that there was reason for his failure to

furnish written proof of loss within the ninety-day period. Since defendant carried his burden of showing a lack of a triable issue of fact on the plea of limitations, summary judgment in his behalf was appropriate.

The judgment is

Affirmed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. MACON GIBSON

No. 7612SC772

(Filed 16 March 1977)

1. **Criminal Law §§ 21, 84— pretrial motion to suppress evidence — constitutionality of statute**

G.S. 15A-977 providing that a motion to suppress evidence in superior court made before trial must be in writing, state the grounds upon which it is made and be accompanied by an affidavit containing facts supporting the motion is not unconstitutional in that requiring the affidavit amounts to compelling a defendant to be a witness against himself; nor does the statute violate the Code of Professional Responsibility, Canon 4, by requiring an attorney to reveal information told to him in confidence by his client; nor does the statute conflict with G.S. 8-54 which says that a defendant is a competent witness in a criminal trial only if he takes the stand at his own request; nor does the statute violate due process by shifting the burden of proof to the defendant.

2. **Searches and Seizures § 3— search warrant — supporting affidavit — showing of probable cause**

Information contained in a police officer's affidavit supporting his application for a search warrant was sufficient to establish probable cause where the information consisted of (1) an identification of defendant, his residence and the contraband in his possession at his residence; (2) an explanation of the way in which the informant learned these facts; and (3) a declaration that on a recent previous occasion the informant gave the affiant information which proved to be true.

APPEAL by defendant from *Herring, Judge*. Judgment entered 4 May 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 8 March 1977.

On 24 September 1974, law officers searched defendant's home pursuant to a search warrant, and there they discovered heroin. Defendant moved to suppress this evidence. A *voir dire* hearing was held and evidence taken; defendant's motion was denied. From a conviction of possession of heroin defendant appealed.

Attorney General Edmisten, by Associate Attorney Patricia H. Wagner, for the State.

Blackwell, Thompson, Swaringen, Johnson & Thompson, P.A., by E. Lynn Johnson, for defendant appellant.

ARNOLD, Judge.

[1] Defendant challenges G.S. 15A-977 on four grounds. The statute provides, in part:

> "(a) A motion to suppress evidence in superior court made before trial must be in writing [and] state the grounds upon which it is made [and] be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based on personal knowledge, or upon information and belief, if the source of the information and the basis of the belief are stated . . . . "

The statute requires an affidavit, and defendant objects to this. He says that requiring the affidavit amounts to compelling him to be a witness against himself in a criminal case in violation of the Fifth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina State Constitution. Defendant argues that the statute forces him to make a delicate choice between disclosing information which might later incriminate him, and forfeiting his opportunity to suppress the evidence or, at least, receive a hearing on his motion.

Defendant cites no cases in support of his argument. His position is untenable. Defendant is not compelled to file his own affidavit or any affidavit at all. He may sometimes face a hard choice between filing the affidavit and revealing some information or standing silent and revealing nothing, but he can stand silent if he so desires. The fact that harm may follow from filing the affidavit is no different from the fact that harm may follow when a witness gives up his right to remain silent and takes the witness stand in his own defense.

Defendant's next two objections to G.S. 15A-977 are also unfounded. The statute does not violate the Code of Professional Responsibility, Canon 4; it does not require an attorney to reveal information told to him in confidence by his client. The decision to file the affidavit and attempt to suppress the evidence remains with the defendant. If he consents to disclosure, Canon 4 is not violated. Nor does G.S. 15A-977 conflict with G.S. 8-54 which says that a defendant is a competent witness in a criminal trial only if he takes the stand "at his own request." For the reason already given, G.S. 15A-977 is not contrary to G.S. 8-54.

Finally, defendant argues that G.S. 15A-977 violates due process by shifting the burden of proof to the defendant. The burden of proof is not the same as the burden of going forward with evidence. Thus, our Supreme Court held in the wake of *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), that a true evidentiary presumption, shifting to the defendant the burden of going forward with evidence, did not also shift the burden of proof and was, therefore, constitutional. *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975). The statute in question, G.S. 15A-977, does no more than shift to the defendant the burden of going forward with evidence when the State's warrants appear to be regular. The State still has the burden of proving that the evidence was lawfully obtained. Accordingly, G.S. 15A-977 is constitutional.

[2] Defendant, in his next assignment of error, argues that the information which was contained in the police officer's affidavit supporting his application for a search warrant was insufficient to establish probable cause. Probable cause to search means a reasonable ground to believe that a search of the place named will uncover the objects sought and that the objects sought will aid in the apprehension or conviction of an offender. *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. English,* 27 N.C. App. 545, 219 S.E. 2d 549 (1975). If an anonymous police informant is not shown to be reliable, his statements do not provide reasonable grounds to believe that a search would be warranted. In other words, there is no probable cause if the informant is not demonstrably reliable. *Spinelli v. U. S.,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1968); *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

The affidavit in question says, in part:

"On Monday, September 23, 1974, during the late P.M. hours [the affiant, a police officer] received true and reliable information from a true and reliable confidential source of information concerning the narcotics traffic in Cumberland County, North Carolina. The true and reliable confidential source of information is knowledgeable about the narcotics traffic in Cumberland County, North Carolina and has supplied the affiant with true and reliable information within the past five (5) days concerning the narcotics traffic and trafficers (sic) of narcotics in Cumberland County, North Carolina. . . . The true and reliable confidential source of information stated to the affiant that he was at the residence at 169 Blueberry Place, Fayetteville, North Carolina, during the P.M. hours of Monday, September 23, 1974, and that a negro male known to the true and reliable confidential source of information as Macon Gibson showed to the true and reliable confidential source of information a quantity of brown powder which Macon Gibson stated was heroin and that this heroin was for sale."

This affidavit specifically identifies the defendant, his residence, and the contraband in his possession at his residence. It explains the way in which the informant learned these facts, and it states that on a recent previous occasion the informant gave the affiant information which proved to be true. This is sufficient to meet the so-called *Aguilar* standard. *State v. Ellington,* 284 N.C. 198, 200 S.E. 2d 177 (1973); *State v. Caldwell,* 25 N.C. App. 269, 212 S.E. 2d 669 (1975); *State v. Brown,* 20 N.C. App. 413, 201 S.E. 2d 527 (1974), *app. dismissed,* 285 N.C. 87, 204 S.E. 2d 21 (1974).

All of defendant's assignments of error have been considered. There is found

No error.

Chief Judge BROCK and Judge PARKER concur.

CAROLINA RESTAURANTS, INC. v. THE CITY OF KINSTON, SIMON C. SITTERSON, JAMES W. WARD, MANSFIELD H. CREECH, DUDLEY D. FOSTER, W. C. DORTCH AND TONY MALLARD

No. 768SC882

(Filed 16 March 1977)

Constitutional Law § 12; Municipal Corporations § 29— business licenses — unbridled discretion of city council — unconstitutionality

A city ordinance giving the city council unbridled discretionary authority to grant or deny a license for the operation of a restaurant, lunch counter, pressing club, moving picture show or market in the city is unconstitutional.

APPEAL by defendants from *Cowper, Judge.* Judgment entered 30 August 1976 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 February 1976.

Plaintiff applied to the City of Kinston, pursuant to Section 14-16 of its Code of Ordinances, for a license to operate a restaurant. The property is zoned B-1 and the operation of a restaurant is a permitted use in the B-1 zone.

Defendants, at their regularly scheduled City Council meeting on 15 March 1976, after notice, held a public hearing on plaintiff's license application pursuant to Section 14-16 of its Code of Ordinances. Defendants voted to deny the application. They made no findings of fact to indicate the basis of the decision.

Plaintiff brought this action for a preliminary injunction and a permanent order restraining defendants from enforcing Section 14-16 of the Code. Plaintiff contends that the section of the Code is unconstitutional.

The parties stipulated that there were no disputed questions of fact and that only questions of law were presented to the judge for resolution. Among other things, the parties stipulated that the property is located in an area where there are existing businesses including "restaurants, laundry, drive-in restaurants, paint store, shoe store, service stations, book store, convenience stores, funeral home, boat repair shop, donut shop, banks, insurance and real estate offices."

Article II, Section 14-16 of the City Code is as follows:

"(a) Any person desiring to engage in any business, trade or vocation hereinafter enumerated in this section

shall, at least one (1) week before final action is to be taken upon his application filed with the City Clerk pursuant to Section 14-8 of this Chapter, apply in writing to the City Council for a license so to do, and must state in the application the name of the owner of the business, or if the owner thereof be a firm, the names of all the members of the firm, or if the owner be a corporation, the name of the manager of the business.

(b) The businesses or vocations to which this section applies are as follows:

(1) Restaurants

(2) Lunch counters

(3) Pressing clubs

(4) Moving picture shows

(5) Markets

(c) No license shall be granted for any business enumerated in this section unless the Council shall be satisfied that the applicant for same is of good moral character, or, if the applicant be a corporation, that the proposed manager is a man of good moral character and the place proposed for the business is a suitable place; and the Council in its discretion may refuse to grant a license for any business or vocation heretofore enumerated, and after having granted the license, the Council may revoke the same, when in its judgment the revocation will be best for the good order of the city, or when it shall be satisfied that the licensee has violated any ordinance now in force or which may hereafter be passed by the Council relating to such business; provided, that whenever the license is revoked, the ratable part of the license tax shall be returned to the person who paid the same; provided further, that any license granted for any business or vocation enumerated in this section shall not be valid at any place other than the one designated in the application; and provided further, that all places of business above mentioned shall be subject to inspection at any time by the Chief of Police or any other officer of the City. (Code 1946, Ch. 10, Sec. 14)."

After consideration of the pleadings as stipulated facts, the judge came to the following conclusions:

> "Upon consideration of the foregoing undisputed findings of fact the court concludes and adjudicates that Section 14-16 of the Kinston Code is arbitrary and capricious, and the same violates the provisions of Article 1, Section 19 of the constitution of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States of America in that it bestows unbridled discretionary power upon the City Council of the City of Kinston to grant or to refuse to grant a license to an individual, persons, associations, or corporation to engage in the business of operating a restaurant, lunch counter, pressing club, moving picture show, or market in the City of Kinston."

Judgment was then entered restraining defendants from enforcing the quoted section of the code and defendants appealed.

Pittman, Staton & Betts, by Ronald L. Perkinson, for plaintiff appellee.

Vernon H. Rochelle, for defendant appellants.

VAUGHN, Judge.

The trial judge was correct and the judgment is affirmed. The section of the code under attack is unconstitutional on its face. The ordinance *forbids* the council from granting any license until it is satisfied (1) that the applicant is of "good moral character" and (2) that the place proposed is a "suitable place" and then provides that the council in its discretion *may* refuse to grant a license for *any* business listed therein. In the absence of standards, therefore, the council could " 'deny any applicant a license for a good reason, for a bad reason, or for no reason.' In effect they were in a position to exercise their discretion arbitrarily. '[A]nd' . . . 'so far as the record shows that is the way they have exercised it. They denied a license to plaintiff without explanation . . . [I]n so doing they demonstrated the (ordinance's) offense against the due process clauses of the federal and state constitutions.' " *In re Application of Ellis*, 277 N.C. 419, 425, 426, 178 S.E. 2d 77.

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES G. LEE

No. 7612SC685

(Filed 16 March 1977)

Jury § 7— exhaustion of defendant's peremptory challenges — juror already accepted — peremptory challenge by State improper

The State may not peremptorily challenge a juror already accepted after the defendant has exhausted his peremptory challenges.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 16 March 1976, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 19 January 1977.

In a former appeal this Court ordered a new trial. The decision is reported in 28 N.C. App. 156, 220 S.E. 2d 164 (1975).

Defendant pled not guilty to the charge of armed robbery. At trial the alleged victim testified that defendant and another, armed with a shotgun, robbed him of $48.00 and then beat him. Defendant offered no evidence.

The jury found defendant guilty as charged. From judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General Robert P. Gruber for the State.

Smith, Geimer & Glusman, P.A., by William S. Geimer for defendant appellant.

CLARK, Judge.

During jury selection, juror Shutak was asked if she was acquainted with either the District Attorney or defense counsel, and she replied in the negative. The jury was empaneled and the court was recessed. On the following morning juror Shutak informed the court that she was personally acquainted with defense counsel. The court permitted the State to question this juror, and the State, over the objection of the defendant, exercised a peremptory challenge to excuse her. Smith, an auxiliary policeman of the City of Fayetteville, was called as a replacement for juror Shutak. Defendant challenged Smith for cause. The challenge was denied by the court after the juror stated that he would not be influenced by the fact that he was a police officer and that he would be fair to both sides. The defendant

had exhausted his peremptory challenges. The jury was again empaneled.

Defendant assigns as error the ruling of the trial court in allowing the State to exercise a peremptory challenge in excusing Mrs. Shutak.

The record on appeal does not disclose any facts other than those stated above relative to this assignment of error. We must assume that examination of juror Shutak did not reveal any grounds for challenge for cause, other than the stated acquaintance, and that the State did not challenge this juror for cause.

In *Dunn v. R. R.*, 131 N.C. 446, 42 S.E. 862 (1902), after the jury box was full plaintiff asked if any juror had formed and expressed an opinion that the plaintiff ought not to recover, whereupon one juror stated that from hearing the evidence from a former trial, he had formed and expressed an opinion in favor of the defendant, but that nevertheless he could try the case fairly and impartially. The trial judge found him a competent juror. The court thereupon allowed plaintiff to challenge the juror peremptorily. At that time defendant had exhausted its peremptory challenges. The defendant excepted. In ordering a new trial the court stated:

"In this there was error. . . .

> It is true a party's right is not to select but to reject a juror, and therefore no exception will lie to the rejection of a juror by the other side unless it is prejudicial to himself. But that appears here for the defendant, having exhausted his peremptory challenges in perusing the jury, when the peremptory challenge of the plaintiff was thereafter allowed the defendant was deprived of the right to challenge peremptorily the new juror put in his place. The defendant was not improvident in having exhausted its peremptory challenges in the perusal of the panel. It was not necessary for the defendant to show grounds of a challenge for cause to the new juror. It is enough that he could not challenge him peremptorily."

Several Arkansas cases, holding that the State may not peremptorily challenge a juror already accepted after the defendant has exhausted his challenges, were overruled in *Nail v. State*, 231 Ark. 70, 328 S.W. 2d 836 (1959); 47 Am. Jur. 2d, Jury, § 257, n. 18 (1969).

Though the *Dunn* decision was rendered in a civil case, and though there have been changes in jury selection procedure since 1902, we find it to be controlling. *Dunn* was quoted with approval in *Oliphant v. R. R.*, 171 N.C. 303, 88 S.E. 425 (1916).

New trial.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEON WILBURT STARLING

No. 7621SC752

(Filed 16 March 1977)

Criminal Law § 75— admission of confession — failure to show express waiver of counsel

The trial court erred in the admission of defendant's confession where the State failed to show affirmatively that defendant knowingly and intelligently waived his right to have counsel present during the questioning.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 10 June 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 February 1977.

Defendant was charged in a bill of indictment with felonious breaking or entering and felonious larceny. The jury found him guilty as charged. The two counts were consolidated for a judgment of imprisonment for a term of not less than four nor more than eight years.

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

Michael R. Greeson, Jr., and Jim D. Cooley for the defendant.

BROCK, Chief Judge.

Defendant moved to suppress the evidence of his confession. From competent evidence offered on *voir dire*, the trial judge found that defendant was advised of his rights in accordance with the *Miranda* requirements and that defendant understood

those rights. There also was competent evidence to support the trial judge's finding that defendant was offered the opportunity to call an attorney and that his statements to the officers were not coerced but were voluntarily made. However, there is no evidence in this record of an express waiver of right to counsel at the interrogation, and the trial judge made no such finding.

According to the mandate of *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), "[n]o effective waiver of the right to counsel during interrogation can be recognized *unless specifically* made after the warnings we here delineate have been given." *Id.* at 470, 16 L.Ed. 2d at 721, 86 S.Ct. at 1626 (emphasis added). "But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475, 16 L.Ed. 2d 724, 86 S.Ct. at 1628. " . . . [F]ailure to ask for a lawyer does not constitute a waiver." *Id.* at 470, 16 L.Ed. 2d at 721, 86 S.Ct. at 1626.

The foregoing principles were adhered to in *State v. White,* 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); and *State v. Head,* 28 N.C. App. 189, 220 S.E. 2d 641 (1975).

When the State "seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. (Citations omitted.) When the *voir dire* evidence regarding waiver of counsel is in conflict the trial judge *must* resolve the dispute and make express findings as to whether the defendant waived his constitutional right to have an attorney present during questioning." *State v. Biggs,* 289 N.C. 522, 531, 223 S.E. 2d 371, 377 (1976).

For the failure of the State to show affirmatively that defendant knowingly and intelligently waived his right to counsel, it was error to admit defendant's confession into evidence, and there must be a trial *de novo.*

Defendant's argument that the trial judge should have instructed the jury on the law regarding voluntary intoxication is feckless. The only evidence of intoxication was defendant's

statement on *voir dire*. No evidence of intoxication of defendant was presented before the jury.

New trial.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD GUINN

No. 7629SC720

(Filed 16 March 1977)

Criminal Law §§ 34, 86— defendant's guilt of other offenses — evidence admitted for impeachment

In a prosecution of defendant for third offense of driving under the influence, the trial court did not err in allowing defendant to be cross-examined about two prior convictions for driving under the influence which were elements of the offense charged and which defendant had admitted out of the presence of the jury, since the evidence was not introduced in support of an element of the offense charged but was instead introduced for the purpose of impeachment. G.S. 15A-928(c)(1) and (2).

APPEAL by defendant from *Lewis, Judge*. Judgment entered 22 April 1976 in Superior Court, McDOWELL County. Heard in the Court of Appeals 10 February 1977.

Defendant pled not guilty to third offense of driving under the influence. As allowed by G.S. 15A-928(c), out of the presence of the jury defendant admitted the two prior convictions. Later defendant took the stand in the presence of the jury, and upon cross-examination was asked about prior convictions for various traffic offenses, including the two prior convictions for driving under the influence to which he had previously admitted.

Defendant was found guilty as charged and appeals.

Attorney General Edmisten by Associate Attorney Catharine Biggs Arrowood for the State.

Davis & Kimel by Horace M. Kimel, Jr., for defendant appellant.

CLARK, Judge.

The sole issue upon appeal is whether it was error to allow defendant to be cross-examined about the two prior convictions which were elements of the offense and which he had admitted out of the presence of the jury.

G.S. 15A-928(c)(1) provides that

"(1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, [and] no evidence in support thereof may be adduced by the State . . . . "

G.S. 15A-928(c)(2) provides that

" . . . This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence."

Defendant contends that these provisions allow the State to cross-examine only about prior convictions for offenses other than those which are elements of the crime for which defendant is on trial. We disagree. When the defendant takes the stand, he is subject to impeachment by cross-examination as to prior convictions as is any other witness. 1 Stansbury, N. C. Evidence § 112 (Brandis Rev. 1973) and cases cited therein. G.S. 15A-928(c)(1) prohibits only the introduction of evidence of previous convictions adduced in support of an element of the offense charged. The evidence here was not adduced for that purpose, but for the purpose of impeachment. G.S. 15A-928(c)(2) reinforces this point by providing that proof of prior convictions may be introduced "when otherwise permitted under the rules of evidence." Such proof is permissible under the rule allowing impeachment of a defendant who takes the stand.

No error.

Judges BRITT and HEDRICK concur.

SIDNEY B. GAMBILL AND WIFE, MYRTLE R. GAMBILL v. W. F. BARE AND WIFE, EDITH LEE BARE

No. 7623DC771

(Filed 16 March 1977)

Mortgages and Deeds of Trust § 32— note and deed of trust — no mention of purchase money for real estate — suit on underlying debt proper

Where the note and deed of trust in question did not indicate that the indebtedness was for the balance of purchase money for real estate, G.S. 45-21.38 did not, even by implication, apply to prohibit plaintiff mortgagee from suing defendant mortgagor on the underlying debt or note.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 25 June 1975 in District Court, ASHE County. Heard in the Court of Appeals 8 March 1977.

Plaintiffs instituted this action seeking a judgment *in personam* against defendants for the balance allegedly due to plaintiffs on a promissory note. Defendants admit the execution and regularity of the note and that it is unpaid. By way of defense, the defendants aver, and it is admitted, that the note is one of a series of notes representing the purchase price of real property and being secured by a deed of trust encumbering the real property purchased by the defendants from the plaintiffs. Summary judgment was granted to the plaintiffs. Defendants appealed.

Bryan & Kilby, by John T. Kilby, for plaintiff appellees.

Vannoy & Reeves, by Wade E. Vannoy, Jr., for defendant appellants.

ARNOLD, Judge.

Defendants argue that G.S. 45-21.38, by implication, will not allow a mortgagee to sue his mortgagor on the underlying debt or note for purchase money for real property, and that the mortgagee can only foreclose on the deed of trust. The statute provides:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, . . . , to secure to the seller the payment of the balance of the purchase price

> of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: *Provided, said evidence of indebtedness shows upon the face that it is for the balance of purchase money for real estate. . . .* " (Emphasis added.)

A strict reading of G.S. 45-21.38 reveals that this statute does not apply unless the "evidence of indebtedness," i.e., the note and deed of trust, shows on its face that the debt is for the purchase money for real property. Nowhere on this note or deed of trust is it indicated that the indebtedness "is for the balance of purchase money for real estate. . . . " Therefore, G.S. 45-21.38 does not apply, even by implication.

No genuine issue of material fact exists. The granting of summary judgment to plaintiff is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 MARCH 1977

AYERS v. ROWLAND No. 7630SC677	Macon (75CVS38)	Affirmed
IN RE McCRAW No. 7626DC694	Mecklenburg (68CVD1708)	Affirmed
STATE v. ALLEN No. 7614SC736	Durham (76CR2924)	No Error
STATE v. BALDWIN No. 7616SC713	Scotland (74CR17)	No Error
STATE v. BRISTOL No. 7627SC743	Gaston (76CR1945) (76CR1946)	No Error
STATE v. CHAPMAN No. 7622SC701	Alexander (75CR1385)	No Error
STATE v. EDWARDS No. 7627SC741	Gaston (75CR20127)	No Error
STATE v. GHANT No. 7620SC753	Union (76CR1983) (76CR2062)	No Error
STATE v. HARRIS No. 763SC719	Pitt (75CR5144)	No Error
STATE v. MORRIS No. 7629SC759	McDowell (76CR1240) (74CR5807)	No Error Affirmed
STATE v. TEASTER No. 7624SC682	Yancey (72CR829) (72CR830)	No Error
STATE v. TICKLE No. 7619SC722	Cabarrus (75CR14656)	No Error

FILED 16 MARCH 1977

COOK v. COOK No. 7611DC703	Harnett (76CVD0142)	Affirmed and Remanded
McLEAN v. McLEAN No. 7615DC790	Alamance (76CVD386)	Affirmed
SCOTT v. SCOTT No. 764DC729	Duplin (75CVD203)	Affirmed
STATE v. HIGGS No. 766SC770	Halifax (76CR4636)	Affirmed

STATE v. HOLLINGSWORTH No. 7612SC788	Hoke (75CR1572)	No Error
STATE v. SCHLIEGER No. 764SC739	Onslow (75CR19316) (76CR400)	No Error
STATE v. SCHLIEGER No. 764SC832	Onslow (75CR19319) (75CR19318) (75CR19317) (76CR404)	No Error

STATE OF NORTH CAROLINA v. TONY GRAHAM

No. 7628SC705

(Filed 6 April 1977)

Automobiles § 134— unauthorized use of vehicle — statute unconstitutional

G.S. 14-72.2 making the unauthorized use, taking or exercise of control over a conveyance a misdemeanor and unauthorized use of an aircraft a felony violates the provisions of Art. I, § 19 of the N. C. Constitution and the Fourteenth Amendment of the U. S. Constitution in that the statute is too vague and fails to comply with constitutional due process standards of certainty.

APPEAL by defendant from *Martin (Harry), Judge.* Judgment entered 21 April 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 February 1977.

Defendant was indicted for the felonious larceny of a Honda motorcycle of the value of $700.00, the property of one Gary Glass. In December 1975 he was tried in Superior Court on a statement of charges signed by the Assistant District Attorney which charged that on 9 May 1975 defendant "did unlawfully and willfully without the consent of Gary Glass, the owner, take and exercise control of the conveyance of Mr. Glass, to wit: One (1) 1972 Honda Motorcycle," in violation of G.S. 14-72.2. The jury was unable to agree, and the judge declared a mistrial.

On 10 February 1976 defendant filed a written motion to dismiss the charges against him for the reason that the statute, G.S. 14-72.2, which he was charged with having violated, is unconstitutional on its face and as applied to defendant. The motion was denied.

In April 1976 defendant was again brought to trial in Superior Court on the statement of charges. He pled not guilty. The State presented evidence to show the following:

In May 1975 Gary Glass was the owner of the motorcycle described in the statement of charges. From October 1974 until April 1975 he lived with one Michael Angel at a trailer park near Fletcher. Angel made the monthly payments on the trailer, and Glass rented a room from him. Glass first met defendant in April 1975 after defendant's family purchased the trailer park. On 2 April 1975 Glass delivered to defendant an envelope con-

taining the April rent for the trailer space, which Angel had left with Glass for delivery to defendant. In the third week of April 1975 Glass moved out of the trailer park and moved in with his family at Hendersonville. He left the motorcycle at the trailer park because it had no battery, no license plate, and was inoperable. When he returned to the trailer park on 9 May 1975, he found that the trailer in which he had lived with Angel had been repossessed and moved away and that his motorcycle was missing. A neighbor, who lived nearby in the trailer park, saw defendant and another person about 9 May 1975 loading the motorcycle in the back of a pickup truck. Glass contacted defendant and told him that defendant had made a mistake in taking the motorcycle and that the motorcycle belonged to Glass and not to Angel, who owned the trailer. Defendant replied that Angel had left without notice and that rent was owed on the trailer space from 1 May to 9 May, which was payable plus a storage fee for the motorcycle. Defendant refused to return the motorcycle. Glass brought claim and delivery, but as of the date of defendant's trial, he had not yet recovered his motorcycle.

Defendant testified that he became manager of the trailer park after his parents purchased it from the former owner on 24 March 1975. As manager, he collected the rents, made repairs, and did the maintenance for the park. When a tenant moved out he cleaned up the space and advertised for new tenants. On 2 April 1975 Gary Glass paid him $40.00, being the monthly space rental, and defendant gave Glass a written receipt. The receipt was made out to Glass, and Glass never told defendant he was not a tenant. Defendant had seen Angel going in and out of the park, but had never talked with him. From 2 April until 9 May 1975, two vehicles were parked at the trailer occupied by Glass and Angel. One was a 1965 Oldsmobile, on which all the tires were flat, and the other was the Honda motorcycle. When defendant arrived at the park on 9 May, the trailer was gone and the lot was "a pretty bad mess." The Oldsmobile and the Honda motorcycle were still there. On several occasions he had noticed children around the motorcycle, had seen one child up on the motorcycle, and he was worried over the possibility that the motorcycle would turn over and hurt someone. In addition, he could not get another trailer in without moving the motorcycle. At that time he had received no communication from Glass or Angel concerning the

motorcycle or car, and he did not know which of the tenants owned the motorcycle. Because the motorcycle was in his way for further renting the space and because it was hazardous to the children in the park, he decided it would be better if it was moved outside the park and stored. He picked up the motorcycle, loaded it in the truck, and took it to his brother's residence in West Asheville, where he stored it in the basement. When Glass called and asked him if he had the motorcycle, he told Glass that he did and that there was no problem, Glass could have it back; all he wanted was the rent due on the space until the 9th, which would be $14.00, and a small charge for having picked up and stored the motorcycle. Glass said he was not going to pay the rent and that defendant should contact Angel, but Glass did not know Angel's address. Defendant has still never been able to locate Angel, and defendant has never been offered anything for the rent or moving fee. He has never used the motorcycle, but has just stored it. He at first intended to move the car also, but after all the trouble he had had over the motorcycle, he is afraid to do so, and the car is still at the trailer park.

The jury found defendant guilty as charged, and the court entered judgment sentencing defendant to jail for a period of eight months. This sentence was suspended upon certain conditions, including the conditions that defendant immediately transfer possession of the motorcycle to Glass, pay into court for the benefit of Glass the sum of $500.00 "partial restitution," and pay a fine of $200.00. From this judgment, defendant appeals.

Attorney General Edmisten by Associate Attorney Catharine B. Arrowood for the State.

Cecil C. Jackson, Jr., for defendant appellant.

PARKER, Judge.

By Sec. 38 of Chapter 1330 of the 1973 Session Laws, our General Assembly added a new section to Chapter 14 of the General Statutes to become effective on 1 January 1975. The new section, which now appears in the General Statutes as G.S. 14-72.2, is as follows:

"§ *14-72.2 Unauthorized use of a conveyance.*—(a) A person is guilty of an offense under this section if, without

the consent of the owner, he takes, operates, or exercises control over an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another.

(b) Consent may not be presumed or implied because of the consent of the owner on a previous occasion to the taking, operating, or exercising control of a conveyance given to the person charged or to another person.

(c) Unauthorized use of an aircraft is a felony punishable by a fine, imprisonment not to exceed five years, or both, in the discretion of the court. All other unauthorized use of a conveyance is a misdemeanor punishable by a fine, imprisonment not to exceed two years, or both, in the discretion of the court.

(d) An offense under this section may be treated as a lesser-included offense of the offense of larceny of a conveyance.

(e) As used in this section, 'owner' means any person with an interest in property such that it is property of another as far as the person accused of the offense is concerned."

By Sec. 39 of Ch. 1330, 1973 Session Laws, G.S. 20-105, the statute which formerly dealt with an offense sometimes referred to as "temporary larceny" of a vehicle, was repealed effective 1 January 1975.

Defendant in the present case stands convicted under G.S. 14-72.2. In apt time and manner before the trial court he challenged the constitutionality of that statute. He has renewed that challenge on this appeal, and the principal question now presented is whether the challenged statute is constitutional. We hold that it is not.

At the outset, we recognize that "every presumption is to be indulged in favor of the constitutionality of a statute," *State v. Matthews,* 270 N.C. 35, 43, 153 S.E. 2d 791, 797 (1967), and that, in passing upon the constitutional question involved, the courts "must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears." *State v. Anderson,* 275 N.C. 168, 171, 166 S.E. 2d 49, 50 (1969). We also recognize that, except as limited by the State or Federal Constitutions, the General

Assembly has the inherent power to define and punish any act as a crime, including the power "to declare an act criminal irrespective of the intent of the doer of the act." *State v. Hales*, 256 N.C. 27, 30, 122 S.E. 2d 768, 771 (1961). Nevertheless, where a criminal statute clearly transgresses some provision of the State or Federal Constitutions, and where, as here, the question is squarely presented, it is the duty of the courts to declare the act void. We find G.S. 14-72.2 violates the provisions of Art. I, § 19, of the Constitution of North Carolina and of the Fourteenth Amendment to the Constitution of the United States. Accordingly, we declare that statute void.

Firmly embedded in our constitutional law are the fundamental precepts "[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926); *accord, State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972); *State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275 (1966); *State v. Hales, supra.*

Examining G.S. 14-72.2 in the light of the foregoing principles, we first note that in its heading the statute speaks in terms of "[u]nauthorized *use* of a conveyance" (emphasis added), and in subsection (c) the statute makes the "[u]nauthorized *use* of an aircraft" a felony and "[a]ll other unauthorized *use* of a conveyance" (emphasis added) a misdemeanor. If these were the only provisions, it is possible that the statute might be sufficiently clear to withstand the challenge that it is void for vagueness, for in such case it might reasonably be said that the concept of the "unauthorized *use* of a conveyance" is sufficiently well understood that men of common intelligence would not have to guess at its meaning. The statute, however, is not so limited. Subsection (a) declares that "[a] person is guilty of an offense [without specifying whether a felony or a misdemeanor] under this section if, without the consent of the owner, he takes, operates, *or exercises control over* an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." (Emphasis added.) Subsection (a) does not spell out the degree of the offense proscribed,

whether a felony or a misdemeanor, nor does it specify what punishment might be imposed; these provisions are included only in subsection (c). On the other hand, subsection (c) is not restricted to proscribing the unauthorized use of *motor-propelled* conveyances, while subsection (a) is clearly limited so as to apply only to *motor-propelled* conveyances. It therefore seems that the Legislature intended the two sections to be read and construed together. The statute contains no declaration that its various subsections should be considered as severable, and in view of the manifest legislative intention that all sections be construed together as integral parts of the whole, we hold that the statute must be considered in its entirety. Accordingly, we do not consider subsection (a) as severable from the remainder of G.S. 14-72.2, and we do not pass upon the question whether, absent subsection (a), the statute might be held sufficiently clear to withstand constitutional attack on the ground of vagueness. Incidentally, we note that such a question could not in any event be presented on the present record, because there was no evidence in this case that the defendant ever made any *use* of the motorcycle here involved. On the contrary, all the evidence shows the motorcycle was inoperable.

When G.S. 14-72.2 is viewed as a whole against the background of the facts of this case, the vagueness and overbreadth of the statute are readily revealed. Two motor vehicles, inoperable and apparently abandoned, are left by their owners on lands of others. To remove them necessarily requires that someone "exercises control" over them. If the landowners, their agent (the defendant), or anyone else, does remove either vehicle without the consent of its owner, the statute is violated and the guilty party is subject to imprisonment. Yet so long as the vehicles remain on the land, the landowners are deprived of the lawful use of their own property without due process of law. Advertent to this dilemma, the able trial judge in the present case instructed the jury as follows:

> "Now, members of the jury, I further instruct you that the fact that the motorcycle may have been hazardous to children would not be a defense to this charge. Such possible hazard could be removed in other ways. For example, it would not have been a violation of this statute for the motorcycle to have been removed from the property of the defendant and left upon the right-of-way of the public

highway. A person has a right to remove someone else's property off of his own property. When someone leaves a car or a motorcycle upon someone else's land, then the owner of that land has a right to remove that motorcycle off of his property.

That's not the purpose of this statute. The purpose of this statute is to prevent persons from taking and carrying away the motor vehicle of another without any consent or permission."

The difficulty with this solution is that it simply does not comport with the language of the statute. It could only be arrived at by rewriting the statute by judicial fiat. (Quite incidentally, it may be questionable whether the solution suggested, i.e., leaving the motorcycle on the public highway right-of-way, could be accomplished without violating another penal statute, G.S. 136-90.)

The statute as enacted by the General Assembly does not include "carrying away" the motor vehicle of another as an essential element. The mere exercise of control over the motor-propelled conveyance of another without the consent of the owner, regardless of the circumstances and quite apart from the bona fides of the accused, constitutes the offense proscribed in the statute. One may readily imagine many circumstances in which most reasonable men would think it entirely proper to exercise a temporary control over the motor vehicle of another without first obtaining the owner's consent. For example, if one should find the entrance to his driveway partially blocked by a parked vehicle, most citizens would deem it entirely proper to push the offending vehicle the short distance required to clear the entrance to his home without first waiting to obtain the consent of the owner. Yet to do so would subject the homeowner to prosecution under this statute. We doubt the legislature intended such a result. Nevertheless, where the legislature declares an offense in language so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, citizens subject to the statute may not be required to guess at their peril as to its true meaning. Such a statute is too vague, and it fails to comply with constitutional due process standards of certainty. For that reason we declare G.S. 14-72.2 void.

The record before us fails to disclose why the owner of the motorcycle has so far been unsuccessful in obtaining it from the defendant by the civil process of claim and delivery. Although the defendant's stubborn refusal to surrender possession may be reprehensible, that fact furnishes no basis for sustaining his conviction for violation of a void statute.

The judgment appealed from must be vacated.

Judgment vacated.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. DAVID WILLIAM DANGERFIELD

No. 7626SC749

(Filed 6 April 1977)

1. **Criminal Law § 21— indictment returned — no necessity for preliminary hearing**

Defendant was not entitled as a matter of right to a preliminary hearing where a bill of indictment was returned before the date of a preliminary hearing scheduled by the court pursuant to G.S. 15A-606(d).

2. **Homicide § 21— second degree murder — sufficiency of evidence**

The State's evidence was sufficient to support a verdict finding defendant guilty of the second degree murder of his wife where it tended to show that the wife's body was found in a rural area with numerous wounds on the head and face; death was caused by head injuries inflicted by blows from a heavy object; on the night of the crime a woman's screams and sounds of pounding on the floor came from the wife's apartment; defendant and another person carried a large object covered by a blanket from the wife's apartment and placed it in a car; several items in the wife's bedroom were stained with blood matching that of deceased; defendant's bloody handprint was found on a doorknob inside the bedroom; bloodstains were found on the rear seat of defendant's car; and carpet had been removed from the rear floorboard and the front seat belts had been cut out of defendant's car.

3. **Criminal Law § 73— threat by third person — hearsay**

In this prosecution of defendant for the murder of his wife, testimony that a few days before her death deceased told the witness that her boyfriend was trying to kill her and asked the witness to call defendant was not admissible to show deceased's state of mind,

i.e., her fear for her life, where there was no evidence which would have put deceased's state of mind at issue, and the testimony was properly excluded as hearsay.

4. **Criminal Law § 113— jury's recollection of evidence — instruction — absence of request**

In the absence of a request, the trial court was not required to instruct the jury that he had no opinion with regard to the evidence and that his statement of the evidence should not be considered if it differed from the jury's recollection of the evidence, particularly where the court did instruct the jury that it should take only its recollection of the evidence in arriving at a verdict.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 18 March 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 February 1977.

Defendant was charged by indictment in proper form with first degree murder and entered a plea of not guilty. He was convicted by a jury of second degree murder and, upon that verdict, judgment was entered sentencing him to imprisonment for a term of 40 years.

The State introduced evidence which tended to show that on 8 November 1975, the dead body of Robyn Dangerfield, the wife of the defendant, was discovered in a rural area in Mecklenburg County by two young girls riding horseback. Deceased's body was burned in several places and had received numerous wounds in the head and face. Around the neck were the remnants of a burned rope, and a tooth lay on the ground beside the body. Police investigators also found a Winston Light cigarette butt approximately 12 inches from the body. An autopsy revealed that Mrs. Dangerfield died 25 to 48 hours prior to the time her body was discovered. Death was caused by massive blunt force head injuries inflicted by blows from a heavy object.

At the time of her death, Mrs. Dangerfield lived in Apartment # 4 of the Morningside Apartments in Charlotte. Billy Eury testified that on 7 November 1975 he visited a friend who lived in Apartment # 3 of the Morningside Apartments. At approximately 2:00 a.m. that morning, " . . . a scream came from the next apartment over. . . . It was a very loud scream, and it was definitely a woman. . . . About approximately the same time music started quite loud. . . . And about the same time started a loud beating on the floor. . . . The heavy pound-

ing on the floor and the music went on for four or five minutes. Then everythng was quiet. Nothing else happened."

Edith Peppler, who lived in Apartment # 2 in the Morningside Apartments testified that at approximately 2:00 a.m. on the morning of 7 November 1975 she was awakened by " . . . the most ungodly noise I have ever heard in my life. . . . [I]t might have been somebody screaming or something."

Robert Deaton, Sr., who lived in Morningside Apartments across the hall from the Dangerfield apartment, testified that after going to bed on 6 November 1975 he was awakened by a car pulling into the parking lot behind his apartment. He got out of bed and looked out his window and saw defendant standing beside his car. Deaton returned to bed, and the car went away. Later, however, Deaton heard a car return and again rose to investigate. He again saw defendant standing in the parking area beside his car. Soon thereafter, another car came into the parking lot, and Deaton observed defendant walk to it. One of the cars left but later returned, and Deaton saw defendant and another man walking up an embankment to the rear of the apartment. Again, one of the cars left and returned, and Deaton then heard someone coming up the back steps to the Dangerfield apartment. Deaton subsequently heard someone on the steps and observed defendant and another man going down the steps. The other man was carrying over his shoulder an object draped by a blanket. As they returned to the car, defendant opened the right rear door, and, after the other man threw the object into the car, both men got into the car and drove away.

Edward Faison, who lives in the Morningside Apartments directly underneath Deaton, testified that in the early morning hours of 7 November 1975 he heard a car enter the parking lot behind his apartment, looked out his window and recognized defendant's car. He saw defendant get out of his car, go up to his (defendant's) apartment, turn around, go back to the car and smoke a cigarette. Defendant then drove away but returned in 30 or 40 minutes, whereupon he entered his apartment. Faison then ". . . heard this loud pounding of the floor, sounded like on the wall. . . ." After approximately 30 or 40 minutes, ". . . everything got quiet and in about ten minutes, all of a sudden the door opened and I heard somebody coming down the steps, walking real heavy, the fire escape steps." Faison then

saw defendant and another person walking down the steps from defendant's apartment. They were carrying something "as big as a trash can bag" which they threw into a parked car. They then got into the car and drove away.

Investigating officers discovered several items in Mrs. Dangerfield's bedroom that were stained with blood which matched deceased's. Defendant's bloody handprint was found on the doorknob inside the bedroom. Defendant's car, which was searched with his consent, had blood stains in the rear seat. Police also found that the rear carpet had been removed from the rear floorboard and that the front seat belts were cut out. There was also evidence that defendant smoked Winston Light cigarettes, the same type as the cigarette butt found near deceased's body.

Defendant testified in his own behalf in substance as follows: He and his wife were married on 3 May 1974. Beginning in January 1975, defendant and deceased underwent a series of separations and reconciliations. They lived together in Apartment # 4 of the Morningside Apartments from 1 October 1975 through 2 November 1975, at which time defendant decided to separate again from his wife. On the night of 2 November, defendant and his brother Keith drove separately to the Morningside Apartments. While Keith waited in the parking lot, defendant took his wife to a tavern, left her there and then returned to the apartment alone. He and Keith then broke into the apartment by breaking a pane of glass in the back door, cutting defendant's hand in the process. They removed defendant's possessions from the apartment, brought them down the rear steps to the parking lot and loaded them into defendant's car. Defendant further testified that he never saw his wife after 2 November and that he was at his brother's apartment during the early morning hours of 7 November.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Frank Patton Cooke for defendant appellant.

MORRIS, Judge.

[1] Defendant was arrested on 19 November 1975. On 20 November, he made an initial appearance in the district court

before Johnson, Judge, pursuant to G.S. 15A-601. At that time, defendant filed a motion demanding a probable-cause hearing pursuant to G.S. 15A-606. However, the district attorney announced in open court during the initial appearance that at the next session of the Mecklenburg County grand jury he intended to submit a bill of indictment charging defendant with murder. On 24 November, the presiding district court judge set defendant's probable-cause hearing for 11 December. However, Judge Johnson entered an order on 28 November which made findings of fact and concluded " . . . as a matter of law that the defendant is not entitled to as a matter of right to have the State conduct a probable cause hearing and that a probable cause hearing is not an essential prerequisite to the return of a bill of indictment." The grand jury's next session began on 1 December 1975, and defendant was served with the true bill of indictment on 5 December. The probable-cause hearing was never held.

In his first and second assignments of error, defendant contends that the trial court committed prejudicial error in failing to order that defendant was entitled as a matter of right to a probable-cause hearing. We disagree.

Prior to the adoption of Chapter 15A of the General Statutes, a criminal defendant could be tried on a bill of indictment without the necessity of a preliminary hearing. *E.g., State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972). However, G.S. 15A-606 states:

> "(a) The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. A defendant represented by counsel, or who desires to be represented by counsel, may not before the date of the scheduled hearing waive his right to a probable-cause hearing without the written consent of the defendant and his counsel.
>
> . . .
>
> (d) If the defendant does not waive a probable-cause hearing, the district court judge must schedule a hearing not later than 15 working days following the initial appearance before the district court judge; . . . " .

In *State v. Sutton,* 31 N.C. App. 697, 230 S.E. 2d 572 (1976), this Court held that G.S. 15A-606 does not entitle a criminal

defendant to a probable-cause hearing as a matter of right after a bill of indictment has been returned. We noted that "[w]e find nothing in Chapter 15A or its legislative history which demonstrates the legislature's intention to alter the preexisting rule which dispensed with the requirement for a preliminary, or probable-cause, hearing when the defendant has been charged by indictment." *Id.* at 700, 230 S.E. 2d at 574.

In the present case, defendant's hearing was properly scheduled within the 15 working-day requirement of G.S. 15A-606(d). However, the necessity for the hearing was eliminated by defendant's subsequent indictment on 5 December. Therefore, we fail to see how the order of 28 November denying defendant's motion could possibly have been prejudicial to defendant. These assignments are overruled.

[2] At the close of State's evidence and again at the close of all the evidence, defendant moved for "a directed verdict of not guilty." The trial judge denied both motions, and defendant assigns these rulings as error. Defendant's motions are properly treated as motions for judgment as of nonsuit. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974). In ruling upon the motions, the trial court is required to view the evidence in the light most favorable to the State and to give the State the benefit of every reasonable inference and intendment to be drawn therefrom. *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975). Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant the granting of the motion. *State v. Cox,* 289 N.C. 414, 222 S.E. 2d 246 (1976). If there is evidence, direct, circumstantial, or both, from which the jury can find that the defendant committed the offense charged, the motion should be overruled. *State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24 (1975). Applying these principles to the present case, we believe there is plenary evidence in the record to overcome defendant's motions and to take the case to the jury. This assignment is overruled.

[3] At trial, one of defendant's witnesses was Lolanda Fisher, an employee in a convenience food store in Charlotte. She testified that on 4 November 1975, Robyn Dangerfield had come into the convenience store and " . . . wanted to hide in the stockroom. When she came in, she was moving very fast. She was very upset. She was crying." Fisher further testified, outside the presence of the jury, that Mrs. Dangerfield said that

her boyfriend was trying to kill her; that she asked Fisher to phone her husband but that he did not answer; that she wanted to hide in the stockroom; that Fisher called a cab for Mrs. Dangerfield; that Fisher temporarily closed the store and Mrs. Dangerfield hid in the rear of the store until the cab arrived; and that Mrs. Dangerfield left in the cab. The court ruled that the testimony was inadmissible, and defendant assigns as error the exclusion of this evidence. We disagree.

"Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Branch,* 288 N.C. 514, 529, 220 S.E. 2d 495, 506 (1975); *State v. Bryant,* 283 N.C. 227, 230, 195 S.E. 2d 509, 511 (1973); 1 Stansbury, N. C. Evidence, § 134, p. 458 (Brandis Rev. 1973). When the evidence is offered for any purpose other than to prove the truth of the matter stated, it is not hearsay. *State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366 (1971). Our courts have long held that threats made by a third person against the deceased are hearsay and therefore inadmissible. *State v. Duncan,* 28 N.C. 236 (1846). Defendant, however, contends that the testimony was admissible, not to show that deceased's boyfriend had threatened her, but rather to show her state of mind, i.e., her fear for her life. While evidence of the declarations showing the state of mind of a decedent are sometimes admissible, this is true only where the state of mind is at issue in the case. Stansbury notes that any state of mind may be shown by contemporaneous declarations " . . . whenever a person's intention or design is considered relevant . . . " 1 Stansbury, N. C. Evidence, § 162, p. 541 (Brandis Rev. 1973). *See also* 6 Wigmore on Evidence, § 1790, pp. 237-40 (3rd Ed. 1940).

Defendant cites two cases, *State v. Prytle,* 191 N.C. 698, 132 S.E. 785 (1926), and *State v. Miller,* 16 N.C. App. 1, 190 S.E. 2d 888 (1972), *modified on other grounds,* 282 N.C. 633, 194 S.E. 2d 353 (1973), as authority for his position that the testimony was admissible under the state-of-mind exception to the hearsay rule. We find neither case persuasive. In *Prytle,* the defendant was on trial for the murder of his wife, and he alleged as a defense that she committed suicide. Our Supreme Court held that declarations of the wife tending to show her despondent state of mind were not violative of the hearsay rule. In *Miller,* the defendant, a "house man" employed at a

gambling house, was charged with the murder of a police officer, and he claimed that the killing was in self-defense. This Court held that statements which defendant received from third parties concerning robberies of other gambling games were admissible " . . . as bearing upon the reasonableness of defendant's apprehension that a robbery might have been in progress when he saw unidentified armed men walking rapidly into the room." 16 N.C. App. at 13, 190 S.E. 2d at 896. Thus, state of mind was clearly relevant in each instance. In the present case, however, there is no claim of self-defense or any other allegation which would put decedent's state of mind at issue. The testimony, therefore, was properly excluded by the trial court. This assignment is overruled.

[4] Defendant contends that the trial court erred in failing to instruct the jury " . . . that he had no opinion with regard to the testimony, and that his statement of the evidence, if it differed from that of the jury, was not to be considered, but that the jury should take only their recollections of the evidence in arriving at their verdict." However, the record reveals that defendant failed to ask for such instruction. It is well settled in this State that such instructions are not required absent a request therefor, particularly where, as here, the court did instruct the jury that they should be guided by their own recollections of all the evidence. *State v. Biggerstaff,* 226 N.C. 603, 39 S.E. 2d 619 (1946); *State v. Harris,* 213 N.C. 648, 197 S.E. 142 (1938); *State v. Chappell,* 23 N.C. App. 228, 208 S.E. 2d 508 (1974). This assignment is overruled.

We have reviewed defendant's other assignment of error and find it to be without merit. Defendant has received a fair and impartial trial free from prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

IN THE MATTER OF THE CUSTODY OF ELIZABETH HARRIS WILLIAMSON, WILLIAM G. WILLIAMSON IV, AND CYNTHIA MANNING WILLIAMSON

No. 7615DC675

(Filed 6 April 1977)

1. **Divorce and Alimony § 24— child custody proceeding — opinion of child psychologist — admissibility**

The trial court in a child custody proceeding did not err in allowing a witness to testify concerning the opinion of a clinical child psychologist who had examined the children, since the opinion related by the witness was substantially the same as that given by the psychologist herself at an earlier hearing.

2. **Divorce and Alimony § 24— child custody proceeding — investigation report — admissibility**

The trial court in a child custody proceeding did not err in allowing into evidence portions of a report of an investigation ordered by the court to be performed by the Orange County Department of Social Services where the portions objected to contained questions raised by a clinical child psychologist concerning the possible reactions of petitioner's present wife, of her child by her own former marriage, and of the petitioner himself, if custody of the three children of petitioner and respondent should be granted the petitioner.

3. **Divorce and Alimony § 24— child custody — sufficiency of evidence to support findings**

Evidence in a child custody proceeding was sufficient to support the trial court's finding that there was no bond between the youngest child and petitioner-father, and the court did not err in concluding that it was to the best interests of the daughters to remain in the custody of their mother.

4. **Divorce and Alimony § 24— child custody order — fit and proper person — no specific finding — absence not fatal**

Although it would be the better practice for an order awarding child custody to contain an express finding of fitness, the absence of such an express finding will not be fatal where such a finding is implicit in the findings which the court does make.

5. **Divorce and Alimony § 24— child custody — mother as fit and proper person — sufficiency of evidence**

Though the evidence in a child custody proceeding revealed that respondent-mother had not always conducted herself in a responsible and exemplary manner, such evidence did not compel a finding by the court that respondent was not a fit and proper person to have custody of the daughters of petitioner and respondent.

APPEAL by petitioner from *Peele, Judge.* Orders entered 12 January 1976 and 16 March 1976 in District Court, ORANGE County. Heard in the Court of Appeals 20 January 1977.

Petitioner (father) and respondent (mother) were formerly married to each other. Three children were born of the marriage: Elizabeth Harris Williamson, born 20 December 1965; William G. Williamson IV, born 21 August 1968; and Cynthia Manning Williamson, born 13 February 1972. On 3 June 1974 petitioner and respondent entered into a separation agreement under which respondent took custody of the children. On 4 June 1974 petitioner and respondent were divorced in Fulton County, Georgia.

The present proceeding was commenced 11 June 1975 when petitioner filed an application for a writ of habeas corpus in the District Court in Orange County, N. C. In this application the petitioner alleged that the children were in the custody of the respondent, who is a resident of Orange County, N. C., under the terms of the separation agreement; that since the signing of the separation agreement there has been a substantial change in circumstances in connection with respondent's ability to care for the children; and that respondent is not a fit and proper person to have custody of the children. Petitioner prayed that custody of the children be awarded to him. After a hearing held on 20 June 1975, the Court issued an order making findings of fact and conclusions of law on the basis of which temporary custody of the two girls was awarded to respondent-mother and temporary custody of the boy was awarded to petitioner and respondent jointly. The Court further ordered the Orange County Department of Social Services to investigate the living circumstances of the children with the mother and requested the Department of Social Services of DeKalb County, Georgia, to make a similar investigation into the circumstances of the home of the father in Georgia.

On 3 December 1975 petitioner filed a motion that he be awarded custody of the three children and that he be relieved from making the payments to respondent for support of the children required by the 3 June 1974 separation agreement. After a hearing on this motion, at which both petitioner and respondent presented evidence, the Court entered an order on 12 January 1976, making findings and conclusions and awarding permanent custody of the boy to the petitioner and permanent custody of the two girls to the respondent.

In apt time, petitioner filed a motion under G.S. 1A-1, Rule 52, requesting the Court to make additional findings, to

amend certain of the findings made, and to amend its order so as to award to petitioner the permanent custody of the two girls. By order dated 16 March 1976, the Court denied petitioner's motion. In apt time as provided in Rule 3(c) of the North Carolina Rules of Appellate Procedure, petitioner gave notice of appeal from the 12 January 1976 and the 16 March 1976 orders.

Spears, Barnes, Baker and Boles by Robert F. Baker for petitioner appellant.

Graham, Manning, Cheshire & Jackson by Lucius M. Cheshire and David R. Frankstone for respondent appellee.

PARKER, Judge.

Petitioner has made seven assignments of error. The first two are directed to the Court's actions in admitting certain evidence to which petitioner objected as hearsay. The remainder are directed to the Court's findings, or its failure to make findings, and to certain of the Court's conclusions in its judgment awarding custody of the two little girls to their mother.

The scope of appellate review of a trial court's judgment awarding custody of children is well settled in this State. "The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted." *In re McGraw Children,* 3 N.C. App. 390, 392, 165 S.E. 2d 1, 3 (1969).

[1] By his first assignment of error, petitioner challenges the Court's action in permitting Mrs. Patricia Keshen, an employee of the Orange County Department of Social Services, to testify at the hearing held in January 1976, concerning an opinion expressed to her by Dr. Sanders, a clinical child psychologist who had examined the children. The witness, over petitioner's objection, was permitted to testify that Dr. Sanders "felt that the children should stay in Chapel Hill with their mother." Petitioner contends that the admission of this testimony violated the hearsay rule. We find no prejudicial error. Dr. Sanders had herself testified at the hearing held on 20 June 1975 prior to the entry of the order awarding temporary custody. At that time she was presented and qualified, without objection, as an

expert in the field of child psychology, and she was examined on both direct and cross-examination. The opinion which she expressed from the witness stand at that hearing was substantially the same as that attributed to her by the witness, Mrs. Keshen, in the testimony which is the subject of petitioner's first assignment of error. Under these circumstances we find no prejudicial error in the Court's action permitting the witness Keshen to testify concerning the opinion which has been expressed to her by Dr. Sanders, and petitioner's first assignment of error is overruled.

[2] Petitioner's second assignment of error is directed to the Court's action in allowing introduction into evidence, over petitioner's objection, of certain portions of the report of an investigation made by the Orange County Department of Social Services. In the order dated 20 June 1975 awarding temporary custody, the Court had expressly directed that an investigation be made by the Orange County Department of Social Services. The report was dated 11 November 1975 and was prepared by Mrs. Patricia Keshen, the witness who testified at January 1976 hearing. The portions of the reports to which petitioner objected were those which he contends were based "on hearsay information between Mrs. Keshen and Dr. Sanders on matters pertaining to Mr. Williamson's fitness for custody of those children in Georgia." In his second assignment of error he contends that these portions of the report were hearsay, that they represented opinion not based on fact, that they were outside the scope of the investigation ordered by the Court to be performed by the Orange County Department of Social Services, and that the Court committed prejudicial error in admitting them in evidence. Again, we find no prejudicial error. The portions of the report to which petitioner now excepts were contained in three short paragraphs. In these, Mrs. Keshen set forth a series of questions which had been raised by Dr. Sanders concerning the possible reactions of petitioner's present wife, of her child by her own former marriage, and of the petitioner himself, if custody of the three children of petitioner and respondent should be granted the petitioner. These questions were inherent in the situation of the parties as shown by all of the evidence before the Court. The Court must have been fully aware of their existence quite apart from whether Dr. Sanders had expressed her concern as to them to Mrs. Keshen. This was a proceeding before the Court without a jury, and even to rule

on petitioner's objection, it was necessary for the Court to read the report. Moreover, it would be fatuous even to suppose that the court had not already read the entire report, which had been prepared as result of the Court's prior order. We can perceive no prejudicial error in the Court's overruling petitioner's objection to the portions of the report which are the subject of petitioner's second assignment of error. That assignment of error is overruled.

[3] Petitioner's third, fourth, and fifth assignments of error challenge certain of the Court's findings and conclusions. Specifically, in these assignments of error petitioner contends that the Court erred in finding that no bond exists between Cindy (the youngest child) and her father (the petitioner); in concluding that "[t]aking the girls from the mother would decimate her, the girls would know this, would rebel, and the father and step-mother simply could not handle them"; and in concluding that "[i]t is to the best interests of the girls, Harris and Cynthia, that their custody remain with the Mother under the supervision of the Orange County Department of Social Services." In cases involving custody of children, the trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion. *Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974). Therefore, so long as the trial judge's findings are supported by competent evidence, his decision should not be upset absent a clear showing of abuse of discretion. *King v. Allen,* 25 N.C. App. 90, 212 S.E. 2d 396 (1975). We have carefully reviewed the record and find that there is competent evidence to support the challenged findings and the conclusions drawn therefrom by the trial judge in the present case. Some of the pertinent evidence presented reveals that although the younger girl, Cindy, was "affectionate" towards her father during two visits to Georgia, she is very happy at home, loves her mother, has a very close relationship with her older sister, Harris, and shares her sister's preferences in not wanting to move to Georgia. The evidence also reveals that Harris has a very close relationship with her mother and younger sister, that she appears to be happy and well-adjusted in her present situation, and that she has a great fear of being uprooted from her present home by being moved again. (During the time petitioner and respondent were married, the family had a long history of frequently being moved from place to place.) Although not controlling, the wishes of a child who has

reached the age of discretion are entitled to consideration in awarding custody, "because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child." *Brooks v. Brooks,* 12 N.C. App. 626, 631, 184 S.E. 2d 417, 420 (1971). We find no abuse of discretion and overrule petitioner's third, fourth, and fifth assignments of error.

[4] In petitioner's sixth assignment of error, he contends the Court erred in awarding custody of the two little girls to their mother because the Court failed to find that she was a "fit and suitable" person to have custody. We find no reversible error in this regard. It is true that the order awarding custody of the two girls to their mother did not contain an express finding that she was a "fit and suitable" person for that purpose. However, it did contain an express finding that "[i]t is to the best interests of the girls, Harris and Cynthia, that their custody remain with the Mother under the supervision of the Orange County Department of Social Services." Implicit in this finding is that respondent-mother is a fit and suitable person to have custody of her daughters under the supervision of the County Department of Social Services. *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384 (1949), cited by petitioner, did not hold that an order awarding custody is fatally defective if it fails to include an express finding that the person to whom custody is awarded is a fit and proper person. That case involved an appeal from orders entered in a divorce proceeding providing for alimony pendente lite and temporary custody of two small children. Our Supreme Court found error in the order awarding alimony pendente lite and held that the error was of such nature as would affect the whole proceeding. The opinion mentions that appellant had pointed out that the trial judge had "made no findings of fitness as to the plaintiff for the custody of the children under the challenging evidence of the defendant," but as to that matter, the opinion of the court simply states: "Apart from that we think the question of custody is so intimately connected with the other matters involved in the appeal that it should be left to a rehearing." 231 N.C. at 130. It will thus be seen that our Supreme Court did not hold in *Cameron v. Cameron, supra,* that an express finding of fitness is an absolute essential to the validity of a custodial decree. The statement contained in *Powell v. Powell,* 25 N.C. App. 695, 698, 214 S.E. 2d 808, 810 (1975), that "[s]uch a finding was neces-

sary under the decision in *Cameron v. Cameron,*" is not borne out by a careful examination of the latter case. Moreover, in *Powell v. Powell, supra,* the trial judge had made an express finding that the parent to whom custody of the children was awarded was a fit and suitable person to have such custody; therefore, this Court in that case was not called upon to pass on the question with which we are now concerned. We now hold that, although it would be the better practice that an express finding of fitness be made, the absence of such an express finding will not be fatal where, as here, such a finding is implicit in the findings which the Court did make.

[5] In his seventh and final assignment of error, petitioner contends the Court committed reversible error in denying his motion made under G.S. 1A-1, Rule 52(b), to make certain additional findings of fact. In arguing this assignment of error in his brief on this appeal, petitioner contends that certain of the specific findings of fact which the Court did make would compel an additional finding that the respondent-mother was not a fit and proper person to have custody of the two little girls. We do not agree. It is true that the evidence reveals, and the Court's specific findings indicate, that respondent has not always conducted herself in a responsible and exemplary manner. That the trial judge was keenly aware of this is shown by the conscientious way in which he evaluated the evidence and made detailed findings in this regard. "But in a custody proceeding it is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interests and welfare of the minor child." *In re McGraw Children, supra* at 395. The record now before us reveals that in this case the trial judge's overriding concern was the welfare and best interests of the children. His was a difficult task, and the entire record shows that he carried it out in a careful, considerate, and compassionate manner. He had the great advantage of seeing and listening to the parties and their witnesses, of being able to receive and evaluate the myriad intangible impressions which simply cannot be brought forward in a printed record. In cases such as this, there is seldom an entirely good and happy solution. The solution chosen by the trial judge in this case may well be the best one available. We find no error in the manner in which he arrived at it.

If in the future there shall be a change of circumstances affecting the welfare of the children such as to justify modification of the custodial orders previously entered, the matter can again be brought before the Court for review. In the orders from which the present appeal is taken, we find no error. Accordingly, they are

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM RAY HYATT

No. 7630SC762

(Filed 6 April 1977)

1. **Criminal Law § 92—three charges of first degree murder — severance properly denied**

The trial court did not err in denying defendant's motion to sever three first degree murder charges for trial.

2. **Criminal Law § 91— untimely motion for continuance — denial proper**

The trial court in a first degree murder prosecution did not err in denying defendant's motion for continuance made after the case was called for trial where there was no showing that defendant was thereby denied any substantial right.

3. **Criminal Law § 101— sequestration of jury — denial proper**

The trial court did not err in denying defendant's motion for the sequestration of the jury during the taking of the evidence in a first degree murder prosecution.

4. **Criminal Law §§ 87, 169— witness's reference to warrants — similar testimony elicited by defendant — no error**

The trial court in a first degree murder prosecution did not err in admitting into evidence testimony that warrants were issued charging defendant and another with the murders for which defendant was being tried, since the warrants themselves were not read or shown to the jury, but they were simply shown to the sheriff in order to refresh his recollection as to the date when the defendant was finally charged after months of investigation; moreover, defendant's counsel, during the cross-examination of the sheriff, elicited the same information complained about and defendant thereby waived his objection to the evidence.

5. **Criminal Law § 34— first degree murder — prior offense of receiving stolen goods — evidence properly admitted**

The trial court in a first degree murder prosecution properly admitted evidence that defendant had been charged with receiving stolen goods in connection with a breaking and entering committed by the murder victims who, defendant feared, would testify against him, since the evidence was competent to establish defendant's intent and motive for the killings.

6. **Homicide § 21— first degree murder — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where it tended to show that the three victims were last seen in defendant's presence; defendant offered a State's witness $5000 to "knock off" the victims; defendant feared the victims would testify against him in another criminal prosecution pending against him; and defendant told an informant in Alabama that he had killed three people in N. C. and there were warrants out for him.

APPEAL by defendant from *Martin (Harry), Judge.* Judgments entered 20 May 1976 in Superior Court, JACKSON County. Heard in the Court of Appeals 17 February 1977.

Defendant was tried on three charges of first degree murder. The State's evidence tended to show the following:

On 22 September 1975, the bodies of Wayne Buchanan, Gerald Franks and Billy Joe Franks were found in the vicinity of an electric company's powerhouse located on the Tuckaseegee River. The victims had died of a stab wound to the right of the heart, loss of blood caused by a wound in the left chest, and loss of blood caused by the severing of major blood vessels to the head, respectively. All had been dead for over 2 days when discovered and could possibly have been dead for 10 to 14 days. Autopsies revealed that they were all intoxicated at the time of death. The bodies had all been placed in the Tuckaseegee River after the fatal wounds had been inflicted.

The deceased were last seen by relatives and others on 16 September 1975. One witness saw them with defendant and Lloyd Green [Green has apparently been charged but not tried in connection with the murders] in the vicinity of Munger's Shell Station, around 7:30 p.m., on that date. Another witness saw defendant, Wayne Buchanan and Billy Joe Franks at the same filling station sometime between 8:00 p.m. and 10:30 p.m. That day Buchanan and Franks "acted a little high." Around 8:30 p.m. on the same date defendant, Gerald Franks,

Wayne Buchanan, and another man were seen in a pickup truck at a Phillips 66 station in Sylva. Gerald Franks was intoxicated and Buchanan had been drinking.

Defendant and Lloyd Green went to Georgia on the night of 16 September 1975, arriving at about midnight. Defendant told those with whom he was seeking refuge that he was fleeing from "the law" in North Carolina.

The sheriff began looking for the defendant and Lloyd Green after the discovery of the bodies on 22 September 1975. The authorities were unable to locate either of them despite surveillance of their residences, numerous telephone calls and trips to South Carolina and Georgia.

An informant testified that he met defendant and Green at a trailer park in Birmingham, Alabama on 2 December 1975. The men sat around drinking beer and discussing the warrants that were outstanding against them. According to two witnesses to this discussion, the defendant bragged that warrants for traffic violations were nothing and that there were warrants out for him for possession of stolen property, weapons and "putting some people away." During this conversation the defendant did not mention in what state the warrants were outstanding, but the next day while defendant and the informant were driving to Atlanta the defendant said in response to an inquiry, " . . . I killed three people back in North Carolina, and I'll do it again . . . . " After spending the night in Atlanta, the defendant cautioned the witness, while en route to Birmingham, in the following manner: "Be damned sure you don't get stopped, because I have a $5,000.00 reward out for me."

Upon their return to Birmingham, this witness notified the authorities that the defendant had an outstanding warrant against him in North Carolina and, as a result of this information, defendant and Lloyd Green were arrested on 4 December 1975 by FBI agents on a federal warrant for crossing state lines after having been charged with a local felony. Defendant was returned to Jackson County, North Carolina on 12 December 1975.

Another witness testified that defendant had offered to pay him $5,000.00 if he would "knock Wayne Buchanan and Billy Joe Franks off." The offer was made on 21 August 1975. Defendant took this witness to the site where the bodies were

later discovered and suggested that the witness could shoot the two with a rifle, which defendant had with him, and then dump the bodies into the river at the powerhouse site. Defendant wanted these two people "knocked off" because he was afraid that they would testify for the State in a receiving stolen goods case pending against him.

At the close of the State's evidence the defendant moved for dismissal of each case. The motion was denied. Defendant did not introduce any evidence and renewed his motion to dismiss. That motion was also denied. The jury returned verdicts of guilty of second degree murder in each of the three cases. Judgment was entered imposing consecutive prison sentences of 80, 60 and 40 years.

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

Rodgers, Cabler & Henson, by John Edwin Henson, for defendant appellant.

VAUGHN, Judge.

[1] Defendant brings forward nine assignments of error which have been grouped into eight arguments. His first assignment is that the trial court erred in failing to grant his motion to sever the three cases for trial. Defendant contends that if the cases had been tried separately, he would have had the election of presenting evidence in one case without being forced to present evidence in the others. Severance of criminal cases is governed by G.S. 15A-927.

In *State v. Davis*, 289 N.C. 500, 507, 508, 223 S.E. 2d 296, the Supreme Court stated:

> "The general rule in this jurisdiction is that the trial judge may consolidate for trial two or more indictments in which the defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of the other. *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721; *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336; *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652."

The Supreme Court in *Davis* stated further that:

"It is true that in ruling upon a motion consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. *Pointer v. United States,* 151 U.S. 396, 14 S.Ct, 410, 38 L.Ed. 208; *Dunaway v. United States,* 205 F. 2d 23. Nevertheless, it is well established that the motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Jarrette, supra; State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *Dunaway v. United States, supra.*"

There was no error in the court's refusal to grant defendant's motion to sever the three cases for trial. Moreover, defendant waived any right to severance by failing to renew his motion as required by G.S. 15A-927(a)(2).

[2] Defendant next assigns as error the trial court's failure to grant his motion for a continuance. No motion to continue the case had been made until after the case was called for trial. *See* G.S. 15A-952.

During the hearing on the motion, defendant's counsel stressed that they had worked almost full time on defendant's case since their appointment and said they were ready to go to trial. They also said that an extension of time would not necessarily enable them to locate any witnesses beneficial to the defendant. There was no evidence offered as to what defendant would attempt to prove by any witness that was not available. It is clear from the record that the trial court did not abuse its discretion or deny defendant any substantial right when it denied defendant's untimely motion for continuance and, in the absence of a showing of an abuse of discretion or a denial of a substantial right, the court's ruling is not subject to review on appeal. *State v. Brower,* 289 N.C. 644, 224 S.E. 2d 551. This assignment of error is, therefore, without merit.

[3] Defendant's third assignment of error is that the trial court erred in failing to grant his motion for the sequestration of the jury during the taking of evidence in this case.

It is within the sound discretion of the trial court whether to require the sequestration of the jury during the course of trial. *State v. Bynum,* 282 N.C. 552, 193 S.E. 2d 725, *cert. den.,* 414 U.S. 869, 94 S.Ct. 182, 38 L.Ed. 2d 116. There is not the slightest suggestion in this record of any impropriety on behalf of any juror. The assignment of error is overruled.

[4] The defendant next assigns as error the admission into evidence of testimony that warrants were issued charging defendant and Lloyd Green with the murders for which defendant was being tried. We find this assignment of error to be without merit. The warrants were not read or shown to the jury and their contents were not revealed. The warrants were simply shown to the sheriff in order to refresh his recollection as to the date when the defendant was finally charged after months of investigation. In this, there was no error. Moreover, defendant's counsel, during cross-examination of the sheriff, elicited the same information about which he complains in this assignment of error. An objection to certain evidence, even though seasonably made upon a sound ground, is waived when like evidence is thereafter admitted without objection and especially where like evidence is subsequently offered or elicited by the objecting party himself. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755, *cert. den.,* 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157.

[5] Defendant's fifth assignment of error is that the court erred in allowing into evidence testimony concerning admissions made by him as to his involvement in the crimes for which he was being tried and other crimes for which he was not being tried. Defendant concedes that his alleged admissions of having killed three people was admissible under the rule that "[a]nything that a party to the action has done, said or written, if relevant to the issues and not subject to some specific exclusionary statute or rule, is admissible against him as an admission." 2 Stansbury, N. C. Evidence (Brandis rev.), § 167. It is his contention that evidence that he had been charged with receiving in connection with the breaking and entering at White's Auto Store was irrelevant to the issue of his guilt in this case and should have been excluded. The testimony was competent for the purpose of establishing defendant's intent and motive for the killings. The State's evidence disclosed that Wayne Buchanan, Billy Joe Franks, Kenneth Potts and others were involved in a breaking and entering at White's Auto

Store in Jackson County, North Carolina. Defendant expressed to several of the State's witnesses his fear that Buchanan and Franks would testify against him in the receiving stolen goods case that was pending against him. Defendant also offered a witness for the State $5,000.00 to "knock off" two of the three decedents and openly discussed with another witness having all of those involved in the breaking and entering "beaten up" or "knocked off." The evidence was properly admitted.

[6] Defendant also assigns as error the trial court's denial of his motion for dismissal at the close of the State's evidence and at the conclusion of all the evidence. When considering the sufficiency of the evidence to survive a motion to dismiss, the evidence, considered in the light most favorable to the State, is deemed to be true and inconsistencies or contradictions therein are disregarded. After the evidence is considered in the light most favorable to the State, the ultimate question for the court's determination is whether there is a reasonable basis upon which the jury might find that the offenses charged in the indictments had been committed and that the defendant was the perpetrator, or one of the perpetrators of the offenses. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866. The evidence in this case points unerringly to defendant's guilt. The motion to dismiss was properly overruled.

Defendant's seventh assignment of error is that the judge erred in failing to instruct the jury on the law of manslaughter and in failing to submit voluntary manslaughter to the jury as a possible verdict. The jury was told that it could return three possible verdicts: guilty of murder in the first degree, guilty of murder in the second degree, or not guilty. It suffices to say that there was no evidence in the record to justify an instruction on manslaughter as a possible verdict. *State v. Vestal, supra; State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840.

Defendant's final assignment of error, directed to a portion of the judge's charge to the jury, has been carefully considered. It fails to disclose prejudicial error.

We find no prejudicial error in defendant's trial.

No error.

Judges MORRIS and MARTIN concur.

MECKLENBURG COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA v. JOHN R. WESTBERY AND WIFE, PATRICIA WESTBERY

No. 7626SC724

(Filed 6 April 1977)

1. **Rules of Civil Procedure § 56— summary judgment — immaterial issue of fact**

A question of fact which is immaterial does not preclude summary judgment.

2. **Counties § 5; Municipal Corporations § 30— absence of building permit — injunction for removal of structure**

In an action to obtain an injunction requiring defendants to remove a certain structure from land owned by them, an issue of whether the structure was a storage structure or a mobile home was immaterial and could not be grounds for the denial of summary judgment where defendants had no valid building permit for the structure and its presence on their land was thus in violation of G.S. 153A-357 and the county zoning ordinance.

3. **Municipal Corporations § 30— building permit — revocation — substantial expenditures**

Landowners did not acquire a vested right to construct a storage structure on their land pursuant to a building permit which was revoked, notwithstanding they incurred substantial expense in good faith reliance upon the permit before it was revoked, where the planned usage of the property was illegal from its inception and the permit was mistakenly issued.

4. **Municipal Corporations § 30— installation of mobile home — necessity for building permit**

The installation of a mobile home constitutes the construction of a building within the meaning of the statute requiring a building permit, G.S. 153A-357, and injunctive relief is available to prevent a violation of that statute. G.S. 153A-372.

APPEAL by defendants from *Grist, Judge.* Judgment entered 25 June 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 February 1977.

Plaintiff sought, and upon hearing of its motion for summary judgment, obtained an injunction ordering defendants to remove a certain structure from their premises at 108 Auten Avenue.

The pleadings, an affidavit and a deposition of defendant John Westbery, stipulations, and other matter supporting plaintiff's motion, established the following facts:

1. On 17 October 1974, Mr. Westbery applied to the Mecklenburg County Building Inspection Department for a permit to place on the premises at Auten Avenue a 40′ x 60′ storage building. Mr. Westbery applied for the permit under the good faith belief that he was entitled to have it issued.

2. The permit was issued under the mistaken belief that the property on which the structure was to be placed was in an industrial zone. In fact, defendants' property on Auten Avenue was divided between two zoning districts. The part of the property on which the structure was to be placed was zoned residential, not industrial.

3. Mr. Westbery was unable to find a 40′ x 60′ structure, and instead purchased a 24′ x 70′ structure from Charlotte Mobile Sales with a down payment of $7,100.00 and balance due of $18,000.00.

4. By notice dated 31 October 1974, Mr. Westbery was informed by a zoning inspector that he was in violation of the zoning ordinance prohibiting mobile homes in an R-9 residential district and was "advised to remove the mobile home from the premises."

5. By letter dated 4 November 1974, Mr. Westbery was informed by the Building Inspection Department that the building permit issued 17 October 1974 had been revoked because it "was issued in error. The zoning should have been R-9, Residential where storage buildings of this size are prohibited." Defendants did not appeal this revocation.

6. On 6 January 1975, the County Commission denied defendants' petition to have their property rezoned Rural. (The zoning ordinance permitted mobile homes in districts zoned Rural.)

7. By notice dated 21 January 1975, Mr. Westbery was advised by the zoning inspector that a show cause hearing would be held on 30 January to determine why the notice of violation dated 31 October 1974 should not be enforced.

8. At the hearing before the zoning administrator on 30 January 1975, Mr. Westbery stated that he was arranging to

have the structure moved to Lake Wiley and requested thirty days to remove it from the premises on Auten Avenue.

9. By notice dated 3 February 1975, Mr. Westbery was advised by the zoning administrator "to remove the mobile home from the property on or before February 28, 1975, . . . "

10. On 13 February 1975, Mr. Westbery applied for a permit to place a 24' x 70' R-Anel mobile home at 108 Auten Avenue. The zoning administrator denied the permit. On 25 February 1975, Mr. Westbery appealed to the Board of Adjustment, stating that the ground for appeal was that he had "erected a 'single family dwelling' on the premises" and that he had "been instructed to remove said structure and no permit has been granted to allow an electrical hookup."

11. On 12 March 1975 the Board of Adjustment met to consider the appeal and heard testimony from two zoning inspectors, the zoning administrator, Mr. Westbery's attorney, and two neighbors of Mr. Westbery. The Board denied the appeal and found the following facts:

"(a) Subject property is zoned R-9.

(b) There was substantial departure from the information submitted on permit # 107142 issued 10-14-74 which was sufficient grounds for revocation.

(c) That the mobile home meets the definition of a mobile home as outlined in Section 2-31 of the Zoning Ordinance and should not be permitted in the R-9 District.

(d) The Zoning Administrator did not commit an error in denying the permit for a mobile home on subject property."

Defendants did not petition the Superior Court for review of the decision.

12. By certified letter dated 29 April 1975, Mr. Westbery was advised by the zoning administrator that legal proceedings would be initiated unless notification of intention to comply was received.

13. The complaint seeking injunctive relief, filed on 23 June 1975, alleged that

"34. The continued presence of the *structure* on the premises is in direct defiance of the Zoning Ordinance of

Mecklenburg County *and the General Statutes of North Carolina.*" (Emphasis added.)

Plaintiff requested that defendants "show cause why a temporary injunction should not be issued requiring the Defendants to move the existing structure from the premises which is zoned R-9. . . . " Defendants moved to dismiss the complaint on the grounds that plaintiff was not entitled to injunctive relief in seeking to enforce its ordinances. From judgment granting plaintiff's motion for summary judgment and ordering the defendants "to remove the structure from the premises . . . " , defendants appealed.

Ruff, Bond, Cobb, Wade & McNair by Hamlin L. Wade for plaintiff appellee.

Curtis and Millsaps by Cecil M. Curtis for defendant appellants.

CLARK, Judge.

G.S. 1A-1, Rule 56 permits a summary judgment upon a showing of two conditions: (1) that there is no genuine issue as to any material fact, and (2) that one party is entitled to a judgment as a matter of law.

In the present appeal defendant brings forward three assignments of error. Though not precisely categorized as such, one assigns error to the determination that no genuine issue existed as to any material fact, and two assign error to the determination that plaintiff is entitled to judgment as a matter of law.

Defendants' first assignment concerns conclusions by the trial court that there was no issue as to whether the structure in question was a mobile home. Defendants cite evidence in the record tending to show that the structure has never been occupied nor is equipped to be occupied for living, and cite the definition of a mobile home in the Mecklenburg County Zoning Ordinance, which refers to "a moveable or portable *dwelling* place." Defendants contend that a genuine issue exists whether the structure in question is a "dwelling" place or a storage structure, and therefore whether it is a mobile home as defined in the zoning ordinance.

[1, 2] A question of fact which is immaterial does not preclude summary judgment. *Railway Co. v. Werner Industries,* 286 N.C. 89, 209 S.E. 2d 734 (1974); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971). An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974); *McNair v. Boyette,* 282 N.C. 230, 192 S.E. 2d 457 (1972). Whether the structure in question was a storage structure or a mobile home is of no consequence in this case, since in either event defendants had no building permit for the structure. G.S. 153A-357 provides that "No person may commence or proceed with: (1) The construction . . . of any building . . . without first securing from the inspection department with jurisdiction over the site of the work each permit required by . . . local ordinance . . . . " Section 14-2 of the Mecklenburg County Zoning Ordinance requires a permit from the zoning administrator before "commencing the construction or erection of any building or structure. . . . " The only permit that defendants had, which was for the construction of a storage structure, was revoked by the zoning administrator on 4 November 1974. No appeal was taken from that decision to the Board of Adjustment as is provided for in Section 15-4 of the Zoning Ordinance. The parties stipulated that that permit had been issued mistakenly. In response to the motion for summary judgment, defendants offered no evidence that revocation was based upon an erroneous interpretation of the zoning ordinance. Defendants' application for a permit for the installation of the mobile home was denied on 13 February 1975. Their appeal to the Board of Adjustment pursuant to Section 15-4 was also denied. They did not apply for writ of certiorari to the Superior Court for review of this decision as provided for in G.S. 153A-345(e). Since defendants have no permit for this structure irrespective of whether it serves as a storage structure or a mobile home, its presence is in violation of G.S. 153A-357 and Section 14-2 of the Mecklenburg County Zoning Ordinance. Therefore the issue as to whether it is a storage structure or a mobile home is not material and its existence cannot be grounds for denying a summary judgment.

[3] Defendants also assign error to the entry of summary judgment on the ground that plaintiff should be estopped from

denying the validity of the permit issued for the construction of the storage structure on 17 October 1974, and therefore is not entitled to judgment as a matter of law. Defendants contend that since it is uncontroverted that they incurred a substantial expense in good faith reliance upon that permit before it was revoked, they have a right to continue their use. Defendants rely upon *Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904 (1969). However, that case makes it clear that the permit must have been lawfully issued in order for the holder of the permit to acquire a vested right in the use. In that case, after the holder of the permit had made substantial contractual obligations based on a lawfully issued permit, a change in the zoning district made his planned use illegal. The court held that defendant could not be denied his use. In this case, the permit was mistakenly issued. The planned usage was illegal from its inception. G.S. 153A-362 expressly provides for the revocation of a permit mistakenly issued in violation of local ordinance. In *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897 (1950), a municipality was allowed to enforce a zoning ordinance against a property owner who had been erroneously given a permit and had made substantial expenditures for ten years in reliance on the permit. Justice Ervin put the plight of the private citizen into proper perspective by noting that

> "Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it." 232 N.C. at 635, 61 S.E. 2d at 902.

See also *Helms v. Charlotte,* 255 N.C. 647, 122 S.E. 2d 817 (1961). We find no merit to this assignment of error.

[4] Defendant's third assignment of error raises the issue of whether plaintiff was entitled to equitable relief. Defendants contend that any sanction for violation of a county zoning ordinance must be contained within the ordinance itself, and that the Mecklenburg County Zoning Ordinance provides only for fines and imprisonment. We note, however, that plaintiffs also alleged a violation of the building inspection laws of North

Carolina, and alleged that injunctive relief was available under G.S. 153A-372. G.S. 153A-372 provides that

> "*Equitable enforcement.* — Whenever a violation is denominated a misdemeanor under the provisions of this Part, the county, either in addition to or in lieu of other remedies, may initiate any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or to prevent the occupancy of the building involved."

As previously noted, G.S. 153A-357, which is a provision to which G.S. 153A-372 is applicable, and Section 14-2 of the Mecklenburg County Zoning Ordinance make it a misdemeanor to construct a building without a permit. G.S. 153A-350 states that "As used in this Part, the words 'building' or 'buildings' include other structures." We think it would defeat the clear intent of the drafters if the installation of a mobile home were not considered the construction of a building within these provisions. We hold, therefore, that irrespective of the availability of injunctive relief to enforce the Meckenburg County Zoning Ordinance, such relief is available to prevent a violation of G.S. 153A-357.

The judgment is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. ELTON RAY PARRISH

No. 768SC817

(Filed 6 April 1977)

1. Jury § 7— juror's beliefs as to guilt— challenge for cause

The court did not err in the denial of defendant's challenge for cause of a juror who stated that he felt that persons arrested or charged with crimes were probably guilty and that if he thought defendant was guilty he would vote to convict the defendant even if he had a reasonable doubt where, in response to questions by the court, the juror thereafter stated that he would follow the court's instructions and would require the State to prove all elements of the crime beyond a reasonable doubt if the court so instructed.

2. Criminal Law § 75— confession — waiver of counsel — no custodial interrogation

The trial court properly found that defendant expressly waived his right to counsel prior to interrogation where there was evidence on *voir dire* tending to show that defendant was given the *Miranda* warnings, defendant told officers he would tell them all he knew, defendant asked whether he could obtain a lawyer later if he answered questions that night and was told that he could, defendant signed a waiver form in which he stated that he did not want a lawyer, and defendant then made a confession; furthermore, defendant was not subjected to a custodial interrogation, and a waiver of counsel was not required, where defendant was questioned in his own home in the presence of his wife, and defendant was neither in custody nor deprived of his freedom in any significant way.

APPEAL by defendant from *Small, Judge.* Judgment entered 29 April 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 March 1977.

Defendant was placed on trial upon a bill of indictment, proper in form, charging him with first-degree murder of Eugene Douglas Pipkin on 29 September 1975 in Wayne County.

The State's evidence tends to show that at 1:00 or 2:00 p.m. on 29 September 1975 defendant went to the restaurant where Vera Estelle Pipkin worked and asked where her son Droopy Pipkin lived. Kay Pearce testified that at about 8:15 p.m. on that same day a man drove up to her trailer while she and Droopy Pipkin were inside watching television. The man asked if Pipkin was there and Pipkin went out to talk to him. About a minute later Mrs. Pearce heard two shots fired, rushed outside, observed the car driving away rapidly, and saw Pipkin lying on the ground dead. An autopsy revealed that Pipkin died as a result of hemorrhage from two gunshot wounds in the chest. During the early morning hours of 30 September law enforcement officers went to defendant's home, and defendant confessed that he had shot Pipkin. He said that Pipkin had broken into his home while he was away; that he had gone to talk to Pipkin, but Pipkin denied breaking in; and that he then shot Pipkin. Defendant gave the officers the rifle with which he had shot Pipkin and a firearms expert determined that the two bullets found in Pipkin's body had been fired from this rifle.

Defendant offered evidence tending to show that he was away from home on 6 September 1975 and did not return home until September 26. On September 6 Droopy Pipkin came to the

trailer where defendant lived, and he would not leave when defendant's wife (Judy Parrish) told him to go away. Mrs. Parrish fired a gun at Pipkin through the trailer door, but he still did not leave. Instead, he broke into the trailer and told Mrs. Parrish: "I know you're wanting some loving." Mrs. Parrish finally left the trailer herself, taking her children with her and telling Pipkin he could have the trailer if he wanted it. Pipkin then departed, cursing as he went. On the morning of 29 September, Mrs. Parrish told the defendant what had happened. The defendant testified that he then went to the restaurant where Pipkin's mother worked in order to find out where Pipkin lived; that he drove to Pipkin's trailer that night and asked to talk to Pipkin; that when Pipkin came out, defendant pointed a rifle at him and accused him of breaking into his trailer; that Pipkin denied that he had broken into the trailer; that defendant and Pipkin argued for a brief period; that Pipkin reached into his pocket, and defendant immediately shot him; and that Pipkin had a reputation as a dangerous and violent person, and defendant believed that he might be reaching for a weapon.

Before defendant's confession was admitted in evidence, a *voir dire* hearing was held. On *voir dire* the State offered evidence tending to show that when the officers went to defendant's home, they thought Gary Foreman had killed Pipkin, and they merely wanted to obtain information from defendant. When they first saw defendant, one of them, N. R. Uzzell, asked: "Elton, do you know why we're here?" Defendant answered: "Because I shot Droopy." Uzzell told him not to say anything until he was advised of his constitutional rights, and he proceeded to advise defendant of his rights. When Uzzell asked defendant whether he wanted a lawyer, defendant answered: "I will tell you all I know." Defendant asked whether he could obtain a lawyer later if he answered questions that night, and Uzzell said he could. Defendant signed a waiver form in which he stated that he understood his rights; that he was willing to make a statement; and that he did not want a lawyer. He then gave his confession. Officer Uzzell testified that when the officers talked to defendant, he was in control of his faculties and not under the influence of alcohol.

Defendant offered evidence on *voir dire* tending to show that when the officers advised him of his right to counsel, they told him that a lawyer could not be appointed for him that

night, and that he answered: "I'll need one when the time comes"; that defendant was "very much tipsy" when he shot Pipkin; that he kept on drinking after the shooting; and that he was still tipsy when he talked to the officers. The court held the confession admissible.

The jury found defendant guilty of voluntary manslaughter, and a prison sentence was imposed. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Taylor, Allen, Warren & Kerr, by Robert D. Walker, Jr., for the defendant.

MARTIN, Judge.

[1] Defendant has grouped his thirty-four assignments of error into six arguments in his brief. He first contends the court erred by failing to excuse one of the jurors, Juror Dunbar, for cause. During the jury selection, Mr. Dunbar stated that he felt that persons arrested or charged with crimes were probably guilty, and that if he thought the defendant was guilty then he would vote to convict the defendant even if he had a reasonable doubt. In response to questions by the court, however, Mr. Dunbar stated that he would follow the court's instructions and that he would require the State to prove all the elements of the crime beyond a reasonable doubt if the court so instructed. The court then found the juror qualified. Later during the jury selection defendant proceeded to exercise his fourteen peremptory challenges and was denied an additional peremptory challenge of Juror Hooks. By exhausting his peremptory challenges and thereafter asserting his right to challenge peremptorily an additional juror, defendant preserved his exception to the denial of his challenge for cause of Juror Dunbar. *State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14 (1975); *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969).

In the case of *State v. Dixon,* 215 N.C. 438, 440, 2 S.E. 2d 371, 372 (1939) our Supreme Court held that "[t]he finding that a juror is a fair one, though he has formed and expressed an opinion, is a matter in the discretion of the trial judge and is not reviewable on appeal." (Citation omitted.) See also

State v. Terry, 173 N.C. 761, 92 S.E. 154 (1917). Moreover, it has been stated that:

> "Admission that he held an opinion before, or at the time of, the voir dire examination, in the course of which a juror states that he can disregard such opinion, listen to the evidence, and apply to it the instructions of the court, and that he can and will be fair and impartial in the trial of the issue, brings to play the trial judge's exercise of his discretion." 47 Am. Jur. 2d *Jury* § 305 (1969).

In the case at bar, there is no showing of prejudice against defendant on the part of Juror Dunbar. Although his answers during questions by defendant's counsel reveal some concern regarding the effect of defendant's having been arrested and charged, this point was pursued and clarified during further questioning by the trial judge. Dunbar's responses to the judge's questions clearly sustain the implied finding by Judge Small that Dunbar would still require the State to prove each element of the crime beyond a reasonable doubt. *State v. Boyd, supra.* This assignment of error is therefore overruled.

[2] The defendant next contends the court erred in allowing the defendant's extrajudicial statement in evidence. He argues that the record does not reflect that defendant expressly waived his right to counsel and that the evidence reflects that the defendant in fact requested that he be allowed counsel. Defendant relies on *State v. Robbins,* 4 N.C. App. 463, 167 S.E. 2d 16 (1969). This case is distinguishable from the one under consideration. In the *Robbins* case the defendant was told by the arresting officer that "we have no way of giving you a lawyer but one will be appointed for you if you wish *if and when you go to court.*" It is understandable that a statement of this kind may well cause a defendant to understand that he was not entitled to court-appointed counsel prior to trial.

In the case at bar, the judge's conclusions that the defendant's oral statements were admissible are clearly supported by the *voir dire* evidence of record. All the evidence on *voir dire* tends to show that the defendant was first advised of his constitutional rights as prescribed by the United States Supreme Court in *Miranda,* and that he was asked: "Do you want a lawyer?" The defendant responded: "I'll tell you all I know" and stated that he did not want a lawyer at that time. The officers then proceeded to explain that if he decided to answer

questions then he had a right to stop talking at any time. The defendant then told the officers that he understood all his rights and that he wished to talk to the officers and answer questions right then. At that point, the officers read to defendant a waiver statement to the effect that:

> "I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. *I do not want a lawyer.* [Emphasis added.] 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."

The defendant then read and signed this waiver in the presence of three witnesses.

The evidence indicates that the defendant understood his right to counsel and his right to remain silent; that he did not indicate a desire to talk to an attorney before making a statement or to stop talking during the course of his statement; and that the same was freely, voluntarily and understandingly made while several witnesses, including the defendant's wife, were present. We therefore find no error in the trial court's conclusion that: "The defendant purposely, freely, knowingly and voluntarily waived each of his rights. . . . " Thus, the defendant intelligently and understandingly rejected the offer of counsel.

Furthermore, as the State's brief points out, *Miranda* warnings and waiver of counsel are only required when a defendant is being subjected to custodial interrogation. *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973). A custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). *Miranda* warnings are thus required only when there has been such a restriction on a person's freedom as to render him "in custody." See *Oregon v. Mathiason,* ____ U.S. ____, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977).

In the case at bar, the evidence is undisputed that defendant was questioned in his own home in the presence of his wife. At the time he gave his statement to the officers, he was neither under arrest nor in custody and he was neither

detained nor deprived of his freedom in any significant way. He was not placed under arrest until after he confessed orally to his participation in the offense and after he went to the Wayne County Sheriff's Department several hours later. Clearly, defendant made the incriminating statements in response to interrogation, yet he was neither in custody nor deprived of his freedom in any significant way.

Defendant's remaining arguments have been carefully reviewed and found to be without merit.

No error.

Judges MORRIS and VAUGHN concur.

RIDGE COMMUNITY INVESTORS, INC.; F. L. WRENN, TRUSTEE; W. CLYDE BURKE AND WIFE, NORMA B. BURKE; HAROLD H. GRISWOLD AND WIFE, DOROTHY B. GRISWOLD; AND MILL RIDGE PROPERTY OWNERS ASSOCIATION, INC. v. BILLY EUGENE BERRY, AND WARD CARROLL, SHERIFF OF WATAUGA COUNTY, NORTH CAROLINA

No. 7626SC760

(Filed 6 April 1977)

1. **Laborers' and Materialmen's Liens § 8; Judgments § 6— default judgment — failure to make award a specific lien**

Although a judgment contained no provision expressly declaring the monetary award a lien on the lands referred to therein, the judgment was sufficient to impose a laborer's and materialman's lien on such lands where it purported to perfect the notice and claim of lien filed in the county in which the property was located, declared that it should be retroactive to the date labor and materials were first furnished, and ordered that execution issue on lands which were adequately identified.

2. **Laborers' and Materialmen's Liens § 8; Rules of Civil Procedure § 55— laborer's and materialman's lien — default judgment — execution — assistant clerk of court**

A laborer's or materialman's lien is a "contractual security" within the meaning of the provision of G.S. 1A-1, Rule 55(b)(1) giving the clerk authority to make further orders required to consummate foreclosure when the clerk enters judgment by default upon a claim for debt which is secured by any "pledge, mortgage, deed of trust or other contractual security" in respect of which foreclosure may be had; therefore, an assistant clerk of court had authority to

enter a default judgment establishing a laborer's and materialman's lien on certain lands and ordering that execution issue on such lands. G.S. 7A-102(b).

3. **Laborers' and Materialmen's Liens § 8— enforcement of lien — jurisdiction — land in another county**

An action to enforce a laborer's or materialman's lien is not required by G.S. 44A-12 and G.S. 44A-13(a) to be brought in the county in which the realty subject to the lien is located; therefore, the Superior Court of Mecklenburg County had jurisdiction to declare a laborer's lien on realty located in Watauga County.

4. **Laborers' and Materialmen's Liens § 8— prior enforcement action — statement of account — standing to complain**

Only the defendants in a prior action to enforce a laborer's and materialman's lien had standing to complain that the statement of account attached to the complaint in that action was not properly itemized.

5. **Laborers' and Materialmen's Liens § 9— subordination agreement — insufficiency for preliminary injunction**

An agreement subordinating a laborer's and materialman's lien to a bank's deed of trust under which plaintiffs claim title which was vague as to the specific property included was insufficient to entitle plaintiffs to a preliminary injunction prohibiting the sale of common and public areas of a ski resort development pursuant to execution on a judgment establishing the laborer's and materialman's lien on the property.

APPEAL by plaintiffs from *Snepp, Judge.* Order entered 28 May 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 February 1977.

In this action, instituted 7 May 1976, plaintiffs seek (1) to have declared null and void a judgment rendered in the Superior Court of Mecklenburg County insofar as it purports to establish a lien on certain lands of plaintiffs located in Watauga County, and (2) to have defendant Carroll, as Sheriff of Watauga County, restrained and enjoined from selling plaintiffs' lands pursuant to an execution issued on said judgment.

Upon the filing of the complaint the court entered a temporary restraining order returnable on 12 May 1976. At the hearing on plaintiffs' motion that the temporary restraining order be succeeded by a preliminary injunction, the following was made to appear:

On 7 June 1974 defendant Berry brought an action in Mecklenburg Superior Court against Caledonia Corporation

and Mill Ridge Developers, Inc. (Mill Ridge). In his complaint he alleged that he had furnished labor and materials in connection with the making of improvements on property owned by Caledonia and Mill Ridge in Watauga County; that he had not been paid; and that he was entitled to a laborer's lien on the property. He had filed a notice and claim of lien in Watauga County setting out a description of the real estate on which he claimed a lien and stating that the date of first furnishing of labor and materials was 27 November 1972.

Caledonia and Mill Ridge filed no answer and on 17 July 1974 default judgment was entered against them for $16,894.27. The judgment was signed by an assistant clerk of superior court and contains the following language: "AND IT IS FURTHER ORDERED . . . that this Judgment be transcribed and that execution issue against that property of the said defendants described as follows, retroactive to the 27th day of November, 1972. . . . " The judgment then contained a description of the real estate on which defendant Berry claimed a lien; the description includes several numbered lots shown on a subdivision plat recorded in Watauga County Registry together with certain unnumbered areas of the subdivision.

In their verified complaint plaintiffs allege that they own portions of the property described in the judgment; that said judgment is void for the reasons hereinafter set forth.

Among other things, plaintiffs submitted an affidavit of L. T. Dark, Jr., who stated that during the 120 days before the claim of lien was filed, defendant Berry performed no work on one of the numbered subdivision lots listed in the judgment, or on the office building, clubhouse, ski slope, or certain other specified portions of the unnumbered areas.

Prior to 12 March 1974 Mill Ridge owned the property in question. On that date Mill Ridge conveyed the property to William A. Bowen as trustee for Wachovia Bank and Trust Company (Wachovia). Wachovia assigned the deed of trust to plaintiff Ridge and on 8 December 1975 the deed of trust was foreclosed. The only lands sold at the foreclosure sale were the unnumbered areas, all of which were purchased by plaintiff Ridge.

Other facts necessary for an understanding of the questions raised on this appeal are set forth in the opinion.

Following the hearing the court dissolved the temporary restraining order and refused to issue a preliminary injunction prohibiting defendants from executing the judgment on the unnumbered areas. The court did prohibit execution of the judgment on the numbered lots. Plaintiffs appealed.

Dark and Edwards, by L. T. Dark, Jr., and Henderson, Henderson & Shuford, by David H. Henderson, and William A. Shuford, for plaintiff appellants.

Harkey, Faggart, Coira & Fletcher, by Francis M. Fletcher, Jr., and Henry A. Harkey, for defendant appellee.

BRITT, Judge.

Ordinarily a preliminary injunction will be granted pending a trial on the merits (1) if there is probable cause for supposing that plaintiffs will be able to sustain their primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiffs' right until the controversy between them and defendant can be determined. *Conference v. Creech* and *Teasley v. Creech and Miles*, 256 N.C. 128, 123 S.E. 2d 619 (1962); *Service Co. v. Shelby*, 252 N.C. 816, 115 S.E. 2d 12 (1960).

In effect the trial court concluded in the instant case that the pleadings, materials and testimony presented at the hearing failed to show probable cause that plaintiffs will be able to sustain their alleged causes of action. We agree with this conclusion and will discuss the various grounds argued by plaintiffs why the Mecklenburg judgment does not support the execution issued against their lands.

[1] First, plaintiffs contend the judgment does not impose a lien on their property because it contains no provision declaring it a lien on the property referred to therein, retroactive to 27 November 1972. We find no merit in this contention.

The judgment specifically makes a monetary award in favor of Berry for $16,894.27, with interest thereon at 6 percent per annum from 8 May 1974 until paid. It then orders that the judgment be transcribed, that it be retroactive to 27 November 1972, and that execution be issued against certain lands referred to by lot numbers as shown in various numbered books, on

various numbered pages, in Watauga County Registry, together with the unnumbered areas containing the ski slope, chair lift, clubhouse, pool complex, roads, office and sewage treatment plant, all as shown on plat recorded in book 7, page 92, of the Watauga County Registry. As stated above, the judgment was entered on 17 July 1974, purported to perfect the notice and claim of lien filed in Watauga County on 9 May 1974, and was transcribed to the office of the Clerk of Superior Court of Watauga County on 5 August 1974.

Needless to say, it would have been better if the judgment contained words expressly declaring the monetary award a lien on the lands referred to in the judgment. Nevertheless, by declaring that the judgment was retroactive to 27 November 1972 and ordering that execution issue on lands that were adequately identified, we think the judgment was sufficient to impose the laborer's and material furnisher's lien on the lands in question. This holding finds support in G.S. 44A-13(b) which provides: "Judgment enforcing a lien under this Article may be entered for the principal amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced."

Plaintiffs rely on the opinion of this court in *H & B Co. v. Hammond,* 17 N.C. App. 534, 195 S.E. 2d 58 (1973). While there are several features of the two cases that are similar, we think they are distinguishable with respect to the key point involved here. In *Hammond,* the original judgment granted only a monetary judgment, with no provision that it was retroactive and that specified lands would be sold to satisfy it; when plaintiffs attempted to have the judgment amended to provide for a materialman's lien, the rights of innocent third parties had intervened. In the case *sub judice,* plaintiffs were not innocent third parties since the judgment in question was filed in Watauga County on or about 5 August 1974 and they did not acquire title until on or after 8 December 1975.

[2] Plaintiffs contend next that the judgment is void for the reason that it was signed by an assistant clerk of the superior court rather than by a judge of the court. We reject this contention.

G.S. 1-209(4) authorizes the clerks of the superior court to enter all judgments by default final as are authorized by Rule

55 of the Rules of Civil Procedure, "and in this section provided." G.S. 1A-1, Rule 55(b)(1), authorizes the clerks to enter judgment by default when plaintiff's claim is for a sum certain or for a sum which can by computation be made certain; said rule further provides: "In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, . . . the clerk may likewise make all further orders required to consummate foreclosure . . . . "

Plaintiffs argue that a laborer's or materialman's lien is not a "pledge, mortgage, deed of trust or other contractual security" within the contemplation of the quoted rule. While our research fails to disclose any direct authority supporting our holding, we think the term "contractual security" includes a laborer's or materialman's lien.

G.S. 44A-8 provides: "Any person who performs or furnishes labor . . . or furishes 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."

In Black's Law Dictionary (4th ed. 1951), page 1522, "security" is defined thusly: "Protection; assurance; indemnification. The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. . . . "

There must be a contract, express or implied, to create a laborer's or materialman's lien. The holder of the lien has a "security" that open or general creditors do not have, and being based on contract we hold that it is a "contractual security" within the contemplation of Rule 55(b)(1). G.S. 7A-102(b) authorizes an assistant clerk "to perform all the duties and functions of the office of clerk of superior court . . . . "

[3] Plaintiffs contend next that the superior court in Mecklenburg County did not have jurisdiction to declare a laborer's

lien on realty in Watauga County. We find this contention without merit.

G.S. 44A-13(a) provides that an action to enforce the lien created by Article 2 *may* be instituted in any county in which the lien is filed. G.S. 44A-12 provides that all claims of lien against any real property *must* be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located. Do we have a question of jurisdiction or one of venue? We think it is the latter.

Pertinent statutes relating to statutory liens on real property were rewritten in 1969 and are now codified under Article 2 of Chapter 44A. In many cases based on the prior statutes relating to a materialman's lien, our Supreme Court held that the question is one of venue. *See Sugg v. Pollard,* 184 N.C. 494, 115 S.E. 153 (1922), and *Penland v. Church,* 226 N.C. 171, 37 S.E. 2d 177 (1946).

Plaintiffs argue that G.S. 44A-13 must be considered *in pari materia* with G.S. 44A-12; that the latter statute *requires* that claims of lien be filed in each county wherein the real property subject to the claim is located; and that the "may" in G.S. 44A-13 affords the plaintiff a choice of counties for bringing the action only when the real property is located in more than one county.

While we are impressed with plaintiffs' reasoning that the action to enforce the lien *ought* to be filed in the county where the land is situated, our examination of the authorities impels us to conclude that this is not required. Had the General Assembly intended this as a requirement, it could have provided so in explicit language.

Plaintiffs' insistence that the word "may" in G.S. 44A-13(a) should be construed as "must" is not persuasive when we consider the construction that has been given a parallel statute, G.S. 1-76. In the latter statute it is provided that certain causes *must* be tried in the county in which the subject of the action, or some part thereof, is situated; the statute then specifies actions for recovery of real property or of an estate or interest therein, partition of real property, foreclosure of a mortgage on real property, and recovery of personal property when the recovery of the property itself is the sole or primary relief demanded.

In *Thompson v. Horrell,* 272 N.C. 503, 158 S.E. 2d 633 (1968), the court held that if the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies *unless* defendant waives the proper venue. In *Williams v. McRackan,* 186 N.C. 381, 119 S.E. 746 (1923), the court held that an action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper *venue* is in the county in which the land is located.

We hold that the Mecklenburg court had jurisdiction to render the challenged judgment.

Plaintiffs contend next that the trial court erred in holding that they did not have standing to attack the Mecklenburg judgment. This contention has no merit.

Plaintiffs' primary argument on this contention is based on the premise that the judgment is void, hence they have the right to attack it. Since we have rejected the three grounds advanced by plaintiffs as to why the judgment is void, this argument becomes moot.

Finally, plaintiffs contend that the trial court erred in signing the order appealed from. We find this contention without merit.

[4] Under this contention plaintiffs argue that they are entitled to challenge the judgment for the reason that the statement of Berry's account attached to the complaint in the former action is not properly itemized and does not comply with the statute. We find this argument unpersuasive and hold that only the defendants in the prior action had standing to raise that point.

[5] Also under this contention plaintiffs argue that on 9 March 1974 defendant Berry executed a Subordination of Liens Agreement in favor of Wachovia Bank which subordinated all claims which Berry had against any of the Mill Ridge development property to the Wachovia deed of trust under which plaintiffs claim title. We have carefully reviewed the agreement and find it quite vague, particularly as to specific property intended to be included. Suffice it to say, we do not think the document is sufficient to establish "probable cause for supposing that plaintiffs will be able to sustain their primary equity."

For the reasons stated, the order appealed from is

Affirmed.

Judges HEDRICK and CLARK concur.

C. A. DAWSON AND CHARLES DAWSON v. RUBY HARPER SUGG AND HUSBAND, GUY SUGG, AND HAROLD MITCHELL

No. 768DC792

(Filed 6 April 1977)

Trespass § 6— value of cut timber — boundary question — right to raise waived

In an action to recover the value of growing timber allegedly cut and removed from plaintiffs' lands by defendants, defendants waived their right to have the jury consider evidence with respect to the boundary line between lands of plaintiffs and lands of defendants, since the trial court's order adopting the report of a surveyor and establishing the true boundary line was not excepted to or appealed from by defendants; defendants stipulated the provisions of that order in the "Order on Pretrial Conference"; and at the pretrial conference defendants did not contend that they were entitled to an issue on the question of boundary location and the court submitted issues as contended by defendants.

APPEAL by defendants from *Exum, Judge.* Judgment entered 30 April 1976 in District Court, GREENE County. Heard in the Court of Appeals 10 March 1977.

Plaintiffs instituted this action on 1 November 1973 to recover the value of growing timber allegedly cut and removed from their lands by defendants. In their complaint they alleged the value of timber to be $1,065 and asked the court to render judgment for double that amount as authorized by G.S. 1-539.1.

Defendants filed answer denying all allegations of the complaint.

On 14 May 1974 the court appointed McDavid Associates, Engineers, "to locate the boundary lines between the parties, to mark the same on the ground, map the same and file a copy with the court and with the plaintiffs and defendants."

On 14 August 1974 Albert V. Lewis, Jr., of said engineering firm, filed a report setting forth that he had been upon the lands in question, located the boundary lines between the respective lands of the parties, marked the same on the ground, and prepared and filed a map with the court. In the report Lewis stated that the area in question contained approximately 4.8 acres, that it belonged to plaintiffs and that the true boundary line between lands of plaintiffs and lands of defendants was "Old Nahunta." (The map shows Old Nahunta to be a branch or small stream running from the New Nahunta Canal northerly and easterly to Contentnea Creek.)

On 4 November 1974 defendants excepted to the map filed by Lewis on the ground that it "does not conform to the description of the plaintiffs' land as contained in" their recorded deeds.

On 16 September 1975 plaintiffs, pursuant to Rule 53(d) of the Rules of Civil Procedure, moved for adoption of the report of the court appointed surveyor. Following a hearing on the motion, the court, on 30 September 1975, entered an order containing the following:

> " . . . that the report of the court appointed surveyor previously entered herein is hereby adopted and the boundary line between the plaintiffs, C. A. Dawson and Charles Dawson, and the defendants, Ruby Harper Sugg and husband, Guy Sugg, be and the same is hereby adopted and the true boundary line between said parties is hereby established as the run of 'Old Nahunta' as shown on the map filed as a part of said report. It is further ordered that the trial of the issue of damages sustained by the plaintiffs as a result of the cutting and removal of timber within said area shall be submitted to the jury."

(There was no exception noted to, or appeal taken from, said order.)

On 5 April 1976 an "ORDER ON PRETRIAL CONFERENCE" was entered. This order contains stipulations that plaintiffs are the owners of the land described in the complaint; that defendants Sugg are the owners of Tract (e) as shown on a map of the Harper division recorded in Book 202, Page 590, Greene County Registry; that defendant Mitchell is a logging contractor and was employed by defendants Sugg to cut timber; that McDavid Associates, Engineers, had been appointed for purpose of locat-

ing the boundary line between the parties, marked the same on the ground, and filed a report and map with the court and provided copies thereof to the parties; that, pursuant to motion by plaintiffs for adoption of said report and a hearing on the motion, the court had entered an order adopting the report of the surveyor "establishing the line between the parties" and ordering a trial of the issue of damages sustained by plaintiffs.

The pretrial order also contains the following:

"12. The defendants contend that the contested issues to be tried by the jury are as follows:

"1. Did defendants or either of them cut and remove timber from the lands of the plaintiffs as alleged in the Complaint?

"2. If so, what was the value of the timber so cut and removed?"

Prior to the introduction of evidence at trial, the court ruled that any question of fact regarding the boundary line between the lands of plaintiffs and the lands of defendants had been settled and was not a matter for decision by the jury. (Defendants excepted to this ruling.)

Without objection plaintiffs' counsel read to the jury the 14 May 1974 order of the court appointing surveyors, the report of Surveyor Lewis, and the 30 September 1975 order adopting the report of the surveyor.

As a witness for plaintiffs, Surveyor Lewis testified in pertinent part: The deeds of plaintiffs and the deeds of defendants Sugg called for the run of Old Nahunta as their common boundary. " . . . Since both descriptions call for the run of the Old Nahunta, it was a matter of going on the ground to actually define where the Old Nahunta was. There has been a new canal cut in; and the meandering of the Old Nahunta has been eliminated. . . . " The plaintiffs' deeds called for 16 acres but his survey located only 14 acres. The area in question from which the timber was cut consists of 4.8 acres and is located between Old Nahunta and the New Nahunta Canal.

Plaintiff C. A. Dawson testified that he thinks it was in 1971 when he first learned that timber was being cut on the 4.8 acres in question; that he went on the land and found de-

fendant Mitchell's logging crew cutting his timber; and that he had not authorized them to cut any timber.

A consultant forester testified that he inspected the land in question and the stumps from which 79 trees had been cut; that he estimated the trees would yield 13,800 board feet; that, in his opinion, the value of the trees as standing timber was $1,035.

At the close of plaintiffs' evidence, defendant Sugg moved for judgment "under Rule 50." The motion was denied.

Defendant Mitchell testified as a witness for defendants and his testimony is summarized in pertinent part as follows: In 1971 he was in the "logging timber and pulpwood business." He bought some timber from defendants Sugg "on the basis of per thousand feet." They told him where to cut the timber and he did so, on an area containing approximately 25 acres. Plaintiff Charles Dawson approached him about cutting over the line and at that time he had cut some timber beyond the line pointed out to him.

On cross-examination defendant Mitchell testified in pertinent part: He contracted with defendants Sugg to "do the logging operation." He cut some timber on the 4.8 acres in question and paid defendants Sugg for the timber cut and removed from that area. One of the plaintiffs called him about the timber and demanded $750 by the next morning. He withheld paying defendants Sugg that amount for a few days and then talked with them about it. Mr. Sugg told him that the land was theirs; he then paid defendants Sugg the money and he thinks Mrs. Sugg wrote him a receipt "saying all payment had been received."

Defendants then rested and renewed "the Motion under Rule 50." The motion was denied.

Issues were submitted to and answered by the jury as follows:

> "1. Did defendants, or either of them, cut and remove timber from the lands of the plaintiffs as alleged in the complaint?
>
> Answer: Yes

"2. If so, what was the value of the timber so cut and removed?

Answer: $500.00"

Pursuant to G.S. 1-539.1 the court entered judgment on the verdict in favor of plaintiffs for $1,000 plus costs. Defendants appealed.

Bridgers & Horton, by Marvin V. Horton, for plaintiff appellees.

Turner and Harrison, by Fred W. Harrison for defendant appellants.

BRITT, Judge.

By their first assignment of error, defendants contend the court erred in signing and entering the judgment. The only question this assignment presents in this case is whether the judgment is supported by the verdict. Rule 10(a), Rules of Appellate Procedure, 287 N.C. 671, 699 (1975). We hold that the judgment is supported by the verdict, therefore, the assignment is overruled.

By their second assignment of error defendants contend the court erred by refusing to allow the jury to consider evidence with respect to the boundary line between lands of plaintiffs and lands of defendants Sugg. We find no merit in this assignment.

Had defendants properly followed through on the denials set forth in their answer, they would have been entitled to present evidence with regard to, and have the jury pass upon, the location of the boundary line. But we think defendants waived that right.

While we do not pass upon the propriety of plaintiffs moving under G.S. 1A-1, Rule 53, the fact remains that the trial court's order of 30 September 1975 adopting the report of the surveyor and establishing the true boundary line became a valid and binding order when it was not challenged by defendants. They did not except to or appeal from the order. Furthermore, they stipulated the provisions of the order in the "ORDER ON PRETRIAL CONFERENCE." In addition to that, at the pretrial conference they did not contend that they were entitled to an

issue on the question of boundary location and the court submitted issues as contended by defendants.

We hold that defendants waived the rights they now attempt to claim under their second assignment.

By their third assignment of error, defendants contend the court erred in denying their "Rule 50" motion made at the close of the evidence. This assignment has no merit.

We do not pass upon the propriety of the form of defendants' motion, only their argument that the evidence was not sufficient to show that defendants Sugg knew of or condoned any wrongful act committed by defendant Mitchell. Pertinent evidence on this point is set forth above and no worthwhile purpose would be served in restating it here. It suffices to say that we think the evidence of liability on the part of defendants Sugg was sufficient to go to the jury.

Finally, by their fourth assignment of error, defendants contend the trial court erred in its charge to the jury in that it failed to explain the law as required by G.S. 1A-1, Rule 51. We have carefully considered this assignment and find it also to be without merit.

No error.

Judges HEDRICK and CLARK concur.

WACHOVIA BANK & TRUST COMPANY v. PEACE BROADCASTING CORPORATION, JOSEPH M. WHITEHEAD AND WIFE, ELIZABETH W. WHITEHEAD, CLAUDE S. WHITEHEAD AND WIFE, VIRGINIA H. WHITEHEAD, FLOYD M. FOX, JR. AND WIFE, RITA R. FOX

No. 768SC746

(Filed 6 April 1977)

1. Rules of Civil Procedure § 56— summary judgment — findings of fact

Summary judgment is improper if findings of fact are necessary to resolve an issue as to a material fact; however, action by the trial judge in making findings of fact was not error where his findings were merely a summary of the material facts not in issue which he thought justified the entry of summary judgment.

2. **Bills and Notes § 20— action on note — default in payment — summary judgment**

In an action to recover on a promissory note endorsed by individual defendants, there was no genuine issue of fact as to whether the note was in default on 23 July 1975 when the suit was commenced, and summary judgment was properly entered for plaintiff, where an examination of the terms of the note and the uncontradicted affidavits offered by plaintiff as to payments show that the note was in default on that date, and where defendants offered no material in support of their allegation that the note was paid through October 1975 and failed to utilize G.S. 1A-1, Rule 56(f) or to point out specific areas of impeachment and contradiction in plaintiff's affidavits.

3. **Attorney and Client § 9; Bills and Notes § 20— action on note — taxing attorney's fees against endorsers**

The trial court properly taxed attorney's fees for collection of a note against endorsers of the note since (1) the note itself clearly extended the duty to pay attorney's fees to "all parties" and to "the undersigned," which include endorsers, and (2) G.S. 6-21.2 contemplates such liability on the part of endorsers since it provides for the giving of notice to endorsers by the holder or his attorney that the provision for attorney's fees, in addition to the outstanding balance, shall be enforced.

APPEAL by individual defendants from *Small, Judge.* Judgment entered 15 June 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 16 February 1977.

This case involves a civil action commenced by plaintiff on 23 July 1975 to recover the balance due on a promissory note executed by the corporate defendant and endorsed by the individual defendants. The complaint alleged that, as of 21 July 1975, the defendants were jointly and severally liable to plaintiff for the outstanding balance of $20,846.43, together with interest and attorney fees, on a $25,000 note executed by defendants in favor of plaintiff on 30 October 1974. It was further alleged that demand was made on defendants for payment of the outstanding balance plus attorney fees on 3 June 1975, after which defendant made one payment but failed to pay the balance outstanding.

The individual defendants answered admitting their endorsement of the note, the making of the loan by the plaintiff, and the failure and neglect of the corporate defendant to pay the note. They alleged, however, that they had made payments on the note through October 1975. In its answer, the corporate defendant admitted the execution of the note and its default.

On 14 May 1976 plaintiff moved for summary judgment against the individual defendants. Its motion was supported by two affidavits, one by plaintiff's vice-president and one by plaintiff's collection manager. These two affidavits, when taken together, stated that the note endorsed by defendants called for 28 monthly installments of $1,033.52 beginning 15 December 1974 with interest at 12%; that between 18 December 1974 and 19 September 1975, $10,373.68 in payments were made by defendants but no payments were made between January and May 1975; that on 11 March 1975 individual defendants, as endorsers, were notified of corporate defendant's default; that on 2 May 1975 the note was referred to plaintiff's attorney for collection; that suit was commenced on 23 July 1975 after which defendants made the August and September payments; that when no October payment was received, plaintiff refused to make further extensions to defendants; and that as of 31 July 1975 the sum owing on the note was $20,846.43 and as of 1 May 1976 the sum owing on the note was $18,375.29.

Defendants filed no response to plaintiff's motion for summary judgment and affidavits.

The court granted summary judgment in favor of plaintiff after making findings of fact based upon the facts admitted in the pleadings and stated in plaintiff's affidavits. It ordered payment by defendants of $18,375.29 plus interest from 1 May 1976 and $3,670.05 in attorney fees. Defendants appealed.

Smith, Everett & Womble, by W. Harrell Everett, Jr., for the plaintiff.

Freeman & Edwards, by George K. Freeman, Jr. and James A. Vinson III, for the defendants.

MARTIN, Judge.

[1] We repeat again what we have said many times, 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 as to whether an issue which is germane to the action exists. *Leasing, Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 230 S.E. 2d 559 (1976); *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E. 2d 641 (1976). If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. *Leasing, Inc. v. Dan-Cleve Corp., supra; Insurance*

Agency v. Leasing Corp., 26 N.C. App. 138, 215 S.E. 2d 162 (1975). However, the action by the trial judge in making findings of fact in the instant case was without error since his stated findings were merely a summary of the material facts not at issue which he thought justified entry of judgment. See *Insurance Agency v. Leasing Corp., supra.*

Defendants contend the trial court erred in granting the plaintiff's motion for summary judgment because there existed genuine issues as to material facts. In ruling on this motion, the trial court made and entered into the record detailed "findings of fact." Defendants assign error based on exceptions to a number of these findings.

[2] In particular, one of defendants' arguments is that there was a material issue of fact as to whether the note was in default on 23 July 1975. However, the allegations in plaintiff's complaint and the admissions in defendants' answer establish (1) the execution and delivery of the promissory note endorsed by defendants (appellee's exhibit A); (2) issuance of a check for $25,000 in consideration thereof to the maker; (3) the failure of the maker to pay the indebtedness; and, (4) the demand upon defendants, as endorsers, for payment of the entire balance. The affidavits of the plaintiff show seven payments on the note and the amounts thereof. From an examination of the terms of the note and from the uncontradicted evidence offered as to payments, it is clear the note was in default on 23 July 1975.

The defendants failed to produce any counter-affidavits or other evidentiary matter concerning payments except to allege in their answer that they made payments on the note through October 1975. No other evidence was offered to support their allegations. Section (e) of Rule 56 clearly states that unsupported allegations in the pleadings of a non-moving party are insufficient to create a genuine issue of fact where the moving adverse party supports its own motion for summary judgment with allowable evidentiary matter showing the facts to be contrary to those alleged by the non-moving party's pleadings. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970); G.S. 1A-1, Rule 56(e).

The defendants failed to offer any material supporting their opposition to the affidavits of plaintiff's employees upon which the plaintiff's motion was based in part. In addition, they

failed to utilize Rule 56(f) or to point to specific areas of impeachment and contradiction in the plaintiff's affidavits.

Our Supreme Court has established that summary judgment may be granted for

> " . . . a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate." *Kidd v. Early,* 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).

Having applied the foregoing principles to all the issues of fact alleged by defendants in the instant case, we conclude that the granting of the plaintiff's motion for summary judgment was proper. This assignment of error is therefore overruled.

[3] Defendants next contend the court erred in taxing attorney fees for collection against defendants. They argue that defendants were endorsers of the note and no other words appear which would enlarge their contract as endorsers. They cite the case of *Credit Corp. v. Wilson,* 281 N.C. 140, 187 S.E. 2d 752 (1972) as authority for their position. This case dealt with whether guarantors of a note were liable under G.S. 6-21.2 for attorney fees incurred by the creditor in an action on a guaranty contract when the separate guaranty contract contained no provision for the payment of attorney fees. The Court held that a guarantor was not liable for attorney's fees under G.S. 6-21.2. However, that case involved *guarantors* and is distinguishable from the present case which involves *endorsers.*

In the *Credit Corp.* case, the guaranty agreement contained no provision for collection of fees but contained only a provision to pay the debt. In the case at bar, however, there was a provision in the note that "[a]ll parties hereto shall be jointly and severally liable for the payment of the obligation evidenced hereby." This provision clearly extends the duty to pay attorney's fees to the endorsers since "all parties" is defined in the note to include endorsers as well as sureties and guarantors. Moreover, one of the obligations evidenced by the note is that "the undersigned promise(s) to pay all costs of collection, including such reasonable attorney's fees as may be allowed by

law." Furthermore, G.S. 6-21.2 contemplates such liability on the part of endorsers since it provides for the giving of notice to endorsers by the holder or his attorney that the provision for attorney's fees, in addition to the outstanding balance, shall be enforced. According to the pleadings, such notice was given in this case.

Additionally, *Credit Corp. v. Wilson, supra,* is inapplicable because it involved guarantors whose liability was based upon a contract separate from the note. In the instant case the note is the basis of plaintiff's claim and it clearly incorporates a provision for payment of attorney's fees by the endorsers.

Finally, defendants contend that, even if they are liable for attorney's fees, the court erred in awarding such fees in the amount of $3,670.05. Since the note does not specify the amount of attorney's fees in any particular percentage, G.S. 6-21.2(2) and (3) govern. These statutes provide for attorney's fees of 15% of the principal and interest owing at the time suit is instituted. Fifteen percent of $20,846.43, the amount prayed for in plaintiff's complaint, is $3,126.97, not $3,670.05. Plaintiff agrees that the the amount of attorney's fees awarded should be modified to $3,126.97 due to a mathematical error. We agree.

Modified and affirmed.

Judges MORRIS and VAUGHN concur.

DONALD M. TOWNE, a/k/a D. JONATHAN BALFOUR v. KENNETH COPE

No. 7630SC776

(Filed 6 April 1977)

1. Libel and Slander § 9— defamatory statements — qualified privilege

Allegedly defamatory statements made by defendant, an SBI agent, to the sheriff charged with safekeeping plaintiff in the county jail pending extradition were made on a qualifiedly privileged occasion, since both defendant who had arrested plaintiff and the sheriff had an interest in and duty with reference to the safekeeping of plaintiff, and the statements made by defendant might be useful to the sheriff in carrying out his responsibilities.

2. Libel and Slander §§ 9, 14— qualified privilege pleaded — summary judgment motion — requirement of showing malice — reliance on complaint insufficient

In an action for defamation where defendant supported his motion for summary judgment by establishing the affirmative defense of qualified privilege, summary judgment was properly entered against plaintiff since he had the burden of setting forth specific facts by affidavits or otherwise showing a genuine issue existed as to whether defendant made the alleged statements with actual malice, but instead plaintiff relied simply on the allegations of his complaint to show malice.

3. Rules of Civil Procedure § 56— summary judgment motion — failure to file with clerk — hearing properly conducted

Even if defendant failed to file properly his summary judgment motion with the clerk of superior court, there was no prejudicial error in the court's hearing and ruling on the motion, since defendant filed copies of the motion with the superior court judge and plaintiff's attorney, at the hearing on the motion all parties were represented by counsel, and no one objected to the hearing of the motion or to its not being properly filed with the clerk.

4. Rules of Civil Procedure § 56; Trial § 58— trial without jury — summary judgment — entry out of session proper

The trial judge had authority to enter summary judgment for defendant out of session and absent an agreement by the parties, since the trial judge was the resident judge of the district which included the county in which the action was brought, and the hearing was on a matter not requiring a jury. G.S. 7A-47.1.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 23 April 1976 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 8 March 1977.

This is a civil action wherein the plaintiff, Donald M. Towne, seeks to recover from the defendant, Kenneth Cope, $75,000 compensatory and $150,000 punitive damages for defamation. In his complaint plaintiff alleged that on 20 August 1974 defendant, an agent of the State Bureau of Investigation, with malice made the following defamatory statements of and concerning plaintiff to Blain Stalcup, Sheriff of Cherokee County:

> "That guy is nutty as a fruitcake, he is a right wing radical, an extremist, and he has tried to bribe a witness in New Hampshire; that when the children were taken from the plaintiff they had welts and bruises on their bodies where they had been beaten, and that they were dirty and half-starved, and had lice in their hair and insect bites all over

them; that plaintiff had run out on $27,000.00 in debts in New Hampshire; that plaintiff was apt to be violent, to use a gun and that a letter existed saying that plaintiff would kill the said minor children and himself if plaintiff's former wife ever attempted to locate the plaintiff."

Defendant filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. In his motion defendant set up the affirmative defense of qualified privilege. The court considered matters outside the pleadings and treated the motion as one for summary judgment. The uncontroverted evidence offered in support of and in opposition to the motion establishes the following facts:

On 18 August 1974 Bruce Cheney, Chief of Police in Gilford, New Hampshire, contacted the North Carolina State Bureau of Investigation concerning the possibility that the plaintiff, who was under indictment in New Hampshire for the abduction of his three children, was residing in western North Carolina. Defendant located plaintiff in Murphy, North Carolina, where he was teaching pre-school children at "Free Methodist Church." On 20 August 1974 defendant, accompanied by Chief Cheney and Sergeant Gene Rogers of the Belknap County, New Hampshire, Sheriff's Department, served a fugitive arrest warrant on plaintiff at the church. Plaintiff would not waive extradition to New Hampshire, and defendant took him to the Cherokee County jail. Defendant turned plaintiff over to Sheriff Blain Stalcup and left, but returned later and made the alleged defamatory statements to Sheriff Stalcup. Defendant then fingerprinted and photographed the plaintiff and departed.

After a hearing on the motion in Jackson County on 22 March 1976, the court on 23 April 1976 made specific and detailed "findings of fact," stated separately its conclusions of law based thereon, and entered summary judgment for defendant.

Plaintiff appealed.

Wesley F. Talman, Jr., and Joel B. Stephenson for plaintiff appellant.

Attorney General Edmisten by Associate Attorney T. Lawrence Pollard and Associate Attorney Joan Byers for defendant appellee.

HEDRICK, Judge.

Since it is not necessary, even inadvisable in most cases, for the trial court in ruling on a motion for summary judgment to find the facts specially and state separately its conclusions of law as in a trial before the judge without a jury, *Wall v. Wall,* 24 N.C. App. 725, 212 S.E. 2d 238 (1975), we do not rule specifically on plaintiff's numerous assignments of error based on exceptions to the findings and conclusions made in this case. Rather, we go directly to the question of whether the alleged slanderous statements made by the defendant to the Sheriff were qualifiedly privileged, and whether the record discloses that there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law.

It is the occasion of the publication of the alleged defamation that is privileged, *Ponder v. Cobb,* 257 N.C. 281, 126 S.E. 2d 67 (1962), and the burden is on the defendant to prove the affirmative defense of qualified privilege by establishing facts sufficient to show that the publication was made on a privileged occasion. *Stewart v. Check Corp.,* 279 N.C. 278, 182 S.E. 2d 410 (1971).

> "Conditional or qualified privilege is based on public policy. It does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege, and makes a showing of falsity and actual malice essential to the right of recovery.
>
> "A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a manner in which the parties have an interest or duty." 50 Am. Jur. 2d Libel & Slander § 195, pp. 698-699 (1970).

Where the occasion is privileged, the presumption of law is that the defendant acted in good faith, and the burden is on the plaintiff to prove that the publication was made with actual malice in order to destroy the qualified privilege. *Stewart v. Check Corp., supra; Ponder v. Cobb, supra; Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775 (1891).

"Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact." *Ramsey v. Cheek, supra,* at 274, 13 S.E. at 775.

[1] There is no dispute as to the circumstances of the publication in this case. It was made by one law enforcement officer who had just arrested the plaintiff to another law enforcement officer who was charged with the safekeeping of plaintiff in the Cherokee County jail. Both the defendant and the Sheriff had an interest in and duty with reference to the safekeeping of plaintiff while he awaited extradition to New Hampshire. The statements made by the defendant to the Sheriff concerning plaintiff's alleged mental state and political persuasion, and concerning the facts surrounding plaintiff's alleged abduction of his three children and subsequent arrest in North Carolina might be useful to Sheriff Stalcup in carrying out his responsibilities as Sheriff of Cherokee County. Therefore, the record establishes that the alleged statements were made on a qualifiedly privileged occasion, and summary judgment for defendant was appropriate unless the record discloses, as plaintiff contends, a genuine issue exists as to whether the statements were made with actual malice on the part of defendant in which case plaintiff could recover even if the occasion were privileged.

" . . . When a motion for summary judgment is made and supported as provided in this rule [Rule 56], 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 that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e).

[2] In the present case defendant supported his motion for summary judgment by establishing the affirmative defense of

qualified privilege. Even though plaintiff, thereafter, had the burden of setting forth specific facts "by affidavits or otherwise" showing a genuine issue exists as to whether defendant made the alleged statements with actual malice, he relied simply on the allegations in his complaint to show malice. Therefore summary judgment was appropriately entered against him.

[3] Plaintiff contends the court erred in "entertaining" the motion for summary judgment and entering an order thereon when the motion had not been "docketed" with the Clerk of Superior Court of Cherokee County, the county in which the action had been commenced. While G.S. 1A-1, Rule 5(d) requires that a motion for summary judgment "shall be filed with the court," we find no prejudicial error in the court's hearing and ruling on defendant's motion for summary judgment since the record discloses the following statement of the court:

> "Inasmuch as copies of the defendant's Motion for Summary Judgment, Memorandum in support of Motion for Summary Judgment and Addendum to the Memorandum in support of the Motion for Summary Judgment were filed with Judge Lacy Thornburg, Resident Judge for Cherokee County, and Wesley F. Talman, Jr., Attorney for the Plaintiff, and that all parties were put on notice, or had reason to know, of the fact that the defendant had made a Motion for Summary Judgment, the Court therefore considered that the Motion for Summary Judgment and supporting affidavits and documents were sufficiently filed with the Court in this case.
>
> "At the time this motion came on for hearing all parties were represented through counsel, and made no objections to the hearing of this Motion, or to its not being properly filed with the Clerk's Office of Cherokee County. The Court therefore concludes that if the filing was in any way insufficient under the rules, the objection to it being heard was waived by the presence of all parties and failure to object.
>
> s/LACY H. THORNBURG
> Judge Presiding"

[4] Finally plaintiff contends Judge Thornburg, Resident Superior Court Judge for the Thirtieth Judicial District had no

authority to enter summary judgment for defendant out of session absent an agreement by parties thereto. G.S. 7A-47.1 in pertinent part provides:

> "[I]n all matters and proceedings not requiring a jury or in which a jury is waived, the resident judge of the district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court."

Since Judge Thornburg is the Resident Judge of the Thirtieth Judicial District of which Cherokee County is a part, and since the hearing was on a matter not requiring a jury, we hold he had the authority to enter the judgment out of session.

Summary judgment for defendant is

Affirmed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. CHARLIE DOYLE BRADLEY, JR.

No. 7613SC706

(Filed 6 April 1977)

1. **Assault and Battery § 4— assault on law enforcement officer — lawful conduct of officer**

The offense of assaulting a law enforcement officer while the officer is discharging or attempting to discharge a duty of his office presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office.

2. **Arrest and Bail § 3; Assault and Battery § 15— officer making warrantless arrest — probable cause to make arrest — assault on officer**

In a prosecution of defendant for assaulting a law enforcement officer while the officer was discharging a duty of his office, to wit, making a warrantless arrest of defendant's companion for driving under the influence, conflicting evidence raised for jury determination the factual question of whether the law enforcement officer had reasonable grounds to believe that defendant's companion was *driving*

the motor vehicle, and the trial court had the duty of instructing the jury on this question and the factual circumstances that the jury must find in determining whether the officer was discharging a duty of his office.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 13 May 1976, in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 9 February 1977.

The evidence for the State tended to show that about 2:30 a.m. on 29 February 1976 Trooper Thomas A. Alley, State Highway Patrol, saw C. T. Small and his wife, the defendant and his wife, Mrs. Judy Simmons and several of their friends at a restaurant on U. S. Highway 17 about three miles north of Shallotte. All had been to a dance at the Moose Club. Trooper Alley first left the restaurant. Then defendant and Small and their friends left in two cars, Mrs. Small driving one car and Mrs. Simmons the other, on U. S. Highway 17. Neither of the drivers had been drinking. Trooper Alley was following the two cars when he saw one of them travel off on the shoulder of the road. He stopped both cars for the purpose of checking the licenses of the operators. He ordered both drivers to come to his car. They complied. Defendant and Small got out of the car which Mrs. Small had operated. Trooper Alley ordered them to get back in. Small got in under the wheel. Trooper Alley testified that "the reverse back-up lights came on his vehicle and the car moved just a little bit."

(Small and others in his car testified that Mrs. Small had left the car in "drive" with the motor running, and that Small put his foot on the brake, shifted the lever from "drive" to "park," and switched off the motor.)

Trooper Alley jumped out of the patrol car, ran up to the Small car, told Small he was under arrest for "driving under the influence," and attempted to handcuff him. Others in the car told the Trooper that Small had not been driving the car, that Mrs. Small had been driving it. The Trooper got one handcuff on one of Small's arms. The others got out of the car and approached the officer who returned to his car and called by radio for assistance.

(Small and others testified that Trooper Alley jerked him from the car and hit him on the head with a five-cell flashlight, leaving a gash two to three inches long over his left ear.)

Two deputy sheriffs arrived at the scene. The officers approached Small to place him under arrest. Defendant struck Trooper Alley on the forehead with his fist. The Trooper struck at defendant with his flashlight. There was a struggle between defendant and Deputy Sheriff Frye. Small jerked Trooper Alley's gun from his holster and struck him on the forehead. There was a tussle over the gun, during which it fired twice before the officer managed to get it away from Small.

Small was charged with (1) driving under the influence of intoxicating liquor, (2) assaulting Trooper Alley with his fists while the officer was attempting to discharge a duty of his office, and (3) assaulting with a firearm Trooper Alley while the officer was in the performance of his duty. Defendant was charged under G.S. 14-33(b)(4) with misdemeanor assaults on (1) Trooper Alley and (2) Deputy Sheriff Frye, each in the performance of their duty (arresting Small on the "driving under the influence" charge). The trials were consolidated. The "driving under the influence" charge was dismissed at the close of the State's evidence. The jury found Small not guilty of the firearm assault, but guilty of the midemeanor of assault on the officer while in the performance of his duty. However, it was then discovered that this charge had been dismissed in the District Court. The record on appeal does not disclose what disposition the trial court made upon this jury verdict. The jury found defendant not guilty of the assault on Deputy Frye, but guilty as charged of the assault on Trooper Alley. From judgment imposing imprisonment, defendant appealed.

Attorney General Edmisten by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin for the State.

Ray H. Walton for defendant appellant.

CLARK, Judge.

Defendant assigns as error the failure of the trial court to charge the jury that if the officer were attempting to make an illegal arrest of C. T. Small on the charge of driving a motor vehicle on a public highway while under the influence of intoxicating liquor, the officer was not discharging a duty of his office and defendant would not be guilty of the crime charged.

One of the elements of the assault charge against the defendant was that Trooper Alley "was discharging a duty of his office, to-wit: attempting to arrest Talmadge Small, in violation of the following law: G.S. 14-33(b)(4)." The burden was on the State to prove this element of the offense.

[1] The offense of assaulting a law-enforcement officer while the officer is discharging or attempting to discharge a duty of his office presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Jefferies*, 17 N.C. App. 195, 193 S.E. 2d 388 (1972), *cert. denied*, 282 N.C. 673, 194 S.E. 2d 153 (1973).

Trooper Alley was arresting or attempting to arrest Mr. Small on the charge of "driving under the influence," a misdemeanor. G.S. 20-138(a). He did not have a warrant. He had the right to make a warrantless arrest of Small if he had probable cause to believe that, in his presence, Small was driving a motor vehicle on a public highway while under the influence of intoxicating liquor. G.S. 15A-401(b)(1). If he did not have probable cause to make the arrest, then the arrest or attempted arrest was illegal, and Trooper Alley was not discharging or attempting to discharge a duty of his office.

[2] The reasonableness of the officer's grounds to believe the defendant had committed a misdemeanor in the officer's presence, when properly raised, is a factual question to be decided by the jury. *State v. Jefferies, supra.* Was the question properly raised in the case before us? Trooper Alley testified that he told Small that he was under arrest for "driving under the influence." There was no conflicting evidence as to the two elements of this offense, to-wit: (1) on a public highway, and (2) while under the influence of intoxicating liquor. There was conflicting evidence as to the third element of the offense, driving a motor vehicle. It has been held that "driving" requires that the vehicle be in motion. *State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972).

All of the evidence tends to show that Mrs. Small and Mrs. Simmons complied with Trooper Alley's order to come to his patrol vehicle, and that Mrs. Small had left her vehicle parked on the shoulder of the highway with the gear in "drive" position. Defendant and Mr. Small got out of the car. Trooper Alley ordered them to get back in the car. They did so, but Small

got in under the steering wheel, shifted the gear from "drive" to "park" and cut off the motor. Trooper Alley testified that "the car moved just a little bit." Small testified that it did not move. This conflicting evidence raised for jury determination the factual question of whether Trooper Alley had reasonable grounds to believe (probable cause) that Small was *driving* the motor vehicle. The trial court had the duty of instructing the jury on this question and the factual circumstances that the jury must find in determining whether Trooper Alley was "discharging or attempting to discharge a duty of his office."

We are aware that G.S. 20-138(a) has been amended to add "or operate" so that it is now a violation of the statute to *drive or operate* a motor vehicle on the public highways while under the influence of intoxicating liquor; and we are also aware that G.S. 20-4.01(25) defines an "operator" as "A person in actual physical control of a vehicle which is in motion or has the motor running." In *State v. Turner*, 29 N.C. App. 163, 223 S.E. 2d 530 (1976), it was held that where defendant sat behind the steering wheel of a car which had the motor running, the motor stopped, and the car began to roll backward, he was *operating* the vehicle. However, in the case before us Trooper Alley charged Small with *driving* the car. He testified that the car moved, and the State based its case on movement of the vehicle. At the close of the State's evidence, the trial court dismissed the charge against Small of "driving under the influence." In view of the State's evidence that Small was in the car on a public highway and was intoxicated, it is reasonable to infer that the ground for dismissal was that the trial judge did not find sufficient evidence to go to the jury on the element of *driving* a motor vehicle.

It is important that a law-enforcement officer be protected against assault or unlawful resistance while he is discharging or attempting to discharge a duty of his office. It is equally important that members of the public be protected against the illegal deprivation of their liberty by a law-enforcement officer. Where the evidence is so conflicting as to raise the question of whether the law officer is acting lawfully, the jury must be properly instructed by the trial judge.

New trial.

Judges VAUGHN and HEDRICK concur.

MILTON GADDY, EMPLOYEE v. C. J. KERN, CONTRACTOR, EMPLOYER; AETNA CASUALTY AND SURETY COMPANY, CARRIER

No. 7614IC764

(Filed 6 April 1977)

1. **Master and Servant § 77— workmen's compensation — change of condition**

A change of condition refers to a substantial change, after a final award of compensation, of the injured employee's physical capacity to earn and in some cases of his earnings.

2. **Master and Servant §§ 56, 77— workmen's compensation — change of condition — symptoms unrelated to injury**

In a hearing before the Industrial Commission on plaintiff's claim of a change in his condition, medical testimony revealed that plaintiff was suffering at that time from the same headaches and other symptoms which he exhibited soon after his injury and which, according to testimony in an earlier hearing, were unrelated to his injury.

APPEAL by plaintiff from Industrial Commission. Order of full Commission entered 22 June 1976. Heard in the Court of Appeals 17 February 1977.

On 2 September 1970, Milton Gaddy, plaintiff herein, sustained an injury to his left wrist and hand in an accident which arose out of and in the course of his employment as a cement finisher for defendant Kern. After two surgical operations on his wrist, plaintiff began suffering from severe headaches. Kern admitted liability and paid plaintiff temporary total disability compensation.

A hearing on the matter was held on 25 January 1972 before Stephenson, Commissioner, at which time plaintiff presented evidence of his disabling injuries, including the headaches. On 17 February 1972, an order was entered which found that plaintiff's headaches were unrelated to his accident and that he " . . . has a 20% permanent partial disability to his left hand resulting from his injury." The order then awarded plaintiff a sum representing a 20% partial disability. Plaintiff appealed from the failure of the order to award any permanent partial disability benefits due to the headaches, but the order was affirmed by the full Commission and by this Court. *Gaddy v. Kern,* 17 N.C. App. 680, 195 S.E. 2d 141, *cert. denied,* 283 N.C. 585, 197 S.E. 2d 873 (1973).

The Governor's Office subsequently received a letter from plaintiff apparently stating that his compensation benefits had ceased and asking for help. The letter was referred by the Governor's Office to the Chairman of the Industrial Commission and received on 13 June 1973.

On 5 December 1974, plaintiff's counsel wrote the Industrial Commission requesting a new hearing due to a change in plaintiff's condition. On 11 June 1975, a review hearing was held at which time defendants moved for a dismissal on the grounds that review was barred by G.S. 97-47. The hearing commissioner reserved ruling on the motion to dismiss and proceeded with the hearing. After receiving evidence, the hearing commissioner filed an order on 1 August 1975 denying defendants' motion to dismiss and finding that plaintiff had no change in condition since the original hearing and award. Plaintiff appealed from this second order to the full Commission, which ordered that plaintiff submit to further medical examination by certain specified physicians ". . . for the purpose of determining the causal relationship between plaintiff's injury by accident, and his chronic headache condition, if any such relationship exists."

On 4 May 1976, a third hearing was held on the matter. Dr. Joseph B. Parker, Jr., a psychiatrist, testified, *inter alia,* that he examined plaintiff on 25 March 1976; that based on this examination, plaintiff suffered from headaches, tension, and sleeplessness; that these symptoms were essentially the same as those he exhibited soon after his surgery, but that there had been a progression in the severity of the symptoms; that in his opinion, plaintiff's injury caused these symptoms and left plaintiff totally disabled. Dr. Michael Hamilton, a specialist in internal medicine, testified, *inter alia,* that he had treated plaintiff over a period of several years; that plaintiff was suffering from some of the same symptoms throughout the period; that there had been a "progression in degree of severity" of these symptoms; and that this progression constituted a material change in plaintiff's emotional condition.

The case was referred to the full Commission which on 22 June 1976 adopted as its own the opinion and award of 1 August 1975 which denied defendants' motion to dismiss and found no change of condition. Plaintiff appeals from the Commission's order of 22 June 1976.

Pearson, Malone, Johnson, DeJarmon and Spaulding, by T. Mdodana Ringer, Jr., and W. G. Pearson II, for plaintiff appellant.

Spears, Barnes, Baker & Boles, by Alexander H. Barnes, for defendant appellees.

MORRIS, Judge.

Appellant assigns as error the findings and conclusions of the Industrial Commission that he had shown no change of condition which would justify an award for permanent total disability. Plaintiff alleges no change of condition with respect to his left wrist or hand. Therefore, we must examine the evidence in the record in terms of plaintiff's other allegedly disabling condition, i.e., his headaches.

[1] A change of condition ". . . refers to a substantial change, after a final award of compensation, or the injured employee's *physical capacity to earn* and in some cases, of his earnings." *Swaney v. Construction Co.*, 5 N.C. App. 520, 526, 169 S.E. 2d 90, 94-95 (1969). (Emphasis supplied.) In the initial order of 17 February 1972, Commissioner Stephenson found as a fact that plaintiff's headaches were unrelated to his injury and concluded that he was entitled to a 20% permanent partial disability for the partial loss of use of his left hand. This order was adopted by the full Commission and affirmed by this Court. *Gaddy v. Kern, supra.* At subsequent hearings, however, plaintiff introduced testimony which tended to show that plaintiff is unable to work.

[2] Even assuming, *arguendo,* that plaintiff has shown a substantial change in his physical capacity to earn which constitutes a change of condition under G.S. 97-47, he has not sufficiently shown that the headaches were caused by the injury to his left hand. In the final hearing of 4 May 1976, Drs. Parker and Hamilton testified that there was a relationship between plaintiff's injury and headaches. However, Dr. Parker also stated that plaintiff is suffering from "essentially the same group of symptoms" as he had immediately after his initial surgery. Dr. Hamilton testified that plaintiff exhibits the same symptoms as he did several years earlier but that "there has been a change for the worse in those symptoms. . . . a progression in degree of severity . . ." Thus, the medical testimony reveals that plaintiff is presently suffering from the *same headaches* and other

symptoms which he exhibited soon after the injury and which, according to previous medical testimony, were unrelated to his injury. A change of condition ". . . must be actual, and not a mere change of opinion with respect to a pre-existing condition." *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E. 2d 27, 33 (1960). Moreover, plaintiff's more recent evidence served only to produce a conflict as to the cause of plaintiff's headaches. "Where the evidence before the Commission is contradictory, the findings of fact by the Commission, which are nonjurisdictional, are conclusive on appeal to the Court of Appeals." *Priddy v. Cab Co.*, 9 N.C. App. 291, 298, 176 S.E. 2d 26, 30 (1970).

Defendants have cross-assigned as error the failure of the full Commission to dismiss the review of plaintiff's condition. They contend that plaintiff failed properly to apply to the Commission for such review within the time limits as prescribed by law.

Former G.S. 97-47, *amended* 1973 Session Laws, c. 1060, s. 2, is applicable to the case *sub judice* and provides,

> "Upon its own motion or upon the application of any party in interest on the grounds of a change of condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . [B]ut no such review shall be made after 12 months from the date of the last payment of compensation pursuant to an award under this Article . . ."

The last payment pursuant to the award of compensation was made on 16 April 1973. Plaintiff's counsel wrote the Commission to request a hearing based on a change of condition on 5 December 1974. Defendants argue that the request for review of a change of condition was made after the 12-month period of G.S. 97-47 had run. However, plaintiff's letter to the Governor was received and forwarded to the Commission on 13 June 1973, well within the 12-month period. This Court has recognized that ". . . there are instances where an informal letter may serve as a claim for compensation or for a modification of an award on the grounds of change of condition . . ." *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 576, 227 S.E. 2d 627, 631 (1976). We note that the hearing examiner in his opinion and order dated 31 July 1975 stated: "On June 13,

1973 the Commission received notification from plaintiff that he contended he was entitled to additional benefits; and later his counsel on December 5, 1974 advised the Commission plaintiff could show a change in condition so as to warrant payment of further compensation. . . ." and that the full Commission, in its order affirming the hearing examiner stated, "On June 13, 1973 plaintiff requested a hearing based upon an alleged change in condition . . .". The letter itself is not a part of the record. Although there is indication in the record that it was an exhibit, if so, it was not sent up with the record. The letter is, therefore, not before us. We note further that in appellant's brief, he states that the letter expressed a desire for "further benefits." Appellee's brief sets out what it says was the letter in question. It is the same in content as is set out in the "Statement of Facts" in the record. Assuming this is the letter referred to, the writer informs the addressee (presumably the Governor of North Carolina) that he received Workmen's Compensation of $50 a week until 16 November 1971. It stated further: "I had two operations at Duke in neuro-surgery for cut nerve and tedors (sic) in my wrist. I think I am getting a rotten deal and my lawyer is not cooperating. If there is anything your office or the Attorney General, please come to my rescue. My nervous condition cause (sic) me not to be able to except (sic) employment. Thank you."

Regardless of what the letter actually requested, the Industrial Commission, throughout these proceedings, has treated it as an application for review under G.S. 97-47. Whether properly so we do not reach because our decision on the merits obviates the necessity to discuss it further. Suffice it to say that the hearing examiner and the full Commission certainly gave the claimant the benefit of every doubt.

The Commission's order of 22 June 1976 has ample factual basis in the record to support it, and the order is

Affirmed.

Judges VAUGHN and MARTIN concur.

PATRICIA ERVIN CALDWELL, WIDOW; PATRICIA ERVIN CALDWELL, NEXT FRIEND OF TONI MICHELLE CALDWELL AND TIFFNEY RENEE CALDWELL, MINORS OF ERVIN LEE CALDWELL, DECEASED EMPLOYEE v. MARSH REALTY COMPANY, EMPLOYER; AND THE ST. PAUL COMPANIES, CARRIER

No. 7622IC754

(Filed 6 April 1977)

Master and Servant § 79— workmen's compensation — death benefits — dependent children under 18

The 1973 amendment of G.S. 97-38 provides for the continuation of compensation death benefits after 400 weeks to all dependent children until such children reach the age of 18 years and does not require the existence of a disabled, unmarried widow or widower before dependent children under the age of 18 years may continue to receive compensation beyond the 400 weeks.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission filed 12 July 1976. Heard in the Court of Appeals 16 February 1977.

Ervin Lee Caldwell died on 1 October 1975 as a result of an accident on the job on that day. At the original hearing before Chief Deputy Commissioner Shuford, it was stipulated that the parties were subject to the Workmen's Compensation Act; that the deceased was an employee of defendant employer; that defendant carrier was the carrier on the risk; that deceased employee's average weekly wage was $120.00; and that the only question for determination is to whom compensation benefits should be paid.

The deceased separated from his former wife on 3 July 1975. They executed a separation agreement, and the former wife makes no claim for compensation. Deceased was survived by no dependents other than two children born of his former marriage; namely, Toni Michelle Caldwell, born 9 April 1971, and Tiffney Renee Caldwell, born 24 June 1973.

On 14 April 1976 Chief Deputy Commissioner Shuford filed an opinion and award which provided, *inter alia*, that defendants pay compensation at the rate of $80.00 per week for a period of 400 weeks to the duly appointed, qualified, and acting guardians for Toni Michelle Caldwell and Tiffney Renee Caldwell, share and share alike. Neither party appealed from this award.

On 4 May 1976 an order was entered by Chief Deputy Commissioner Shuford which amended the total amount of compensation payable by providing that $40.00 per week be paid to each child until such child reaches the age of 18 years, even though such payments exceed a total of 400 weeks. At the time the amended order was entered, Toni Michelle was approximately five years and one month of age, and Tiffney Renee was approximately two years and ten months of age.

Defendants appealed to the Full Commission from the entry of the amended order on 4 May 1976. By an opinion and award filed 12 July 1976, the Full Commission adopted as its own the opinion and award filed by Chief Deputy Commissioner Shuford on 14 April 1976 as amended by him on 4 May 1976, and affirmed the results reached by the Chief Deputy Commissioner.

Defendants appealed to the Court of Appeals.

Pope, Brawley, Doughton and Fields, by Richard L. Doughton, for the plaintiffs.

Hedrick, Parham, Helms, Kellam & Feerick, by Hatcher B. Kincheloe, Jr., and Richard T. Feerick, for the defendants.

BROCK, Chief Judge.

The amended order entered on 4 May 1976 by Chief Deputy Commissioner Shuford was obviously prompted by a recent amendment to G.S. 97-38. The interpretation of this recent amendment to G.S. 97-38 is the subject of this appeal.

Prior to the amendment, the second paragraph of G.S. 97-38 read as follows:

> "When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than 350 weeks from the date of the injury."

By Session Laws—1973 (Second Session 1974), Chapter 1308, Sec. 4., a period was inserted after the words "of such payments." The comma and the words "but shall not continue more than 350 weeks from the date of the injury" were stricken, and the following new sentence was inserted in lieu thereof:

> "Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death

of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18."

By Sec. 8. of the same Chapter 1308 the act was made effective on 1 July 1975, applicable to cases arising on or after 1 July 1975. The employee's injury and death in this case occurred on 1 October 1975. Therefore, the amendment is applicable in this case.

Plaintiffs argue that the above-cited portion of G.S. 97-38 should be read to provide for continuation of compensation death benefits after said 400 weeks to a widow or widower who is under a mental or physical disability as of the date of death of the employee for as long as the widow or widower lives or until he or she remarries, *and also to provide* for continuation of compensation death benefits after said 400 weeks to a dependent child until such child reaches the age of 18 years.

Defendants argue that the above-cited portion of G.S. 97-38 should be read to provide for compensation death benefits after said 400 weeks to a widow or widower who is under a mental or physical disability as of the date of death of the employee for as long as the widow or widower lives or until he or she remarries, *and in such case* (the existence of a disabled, unremarried widow or widower) to provide for continuation of compensation death benefits after said 400 weeks to a dependent child until such child reaches the age of 18 years.

There is no quarrel between plaintiffs and defendants upon the question of the right of the disabled, unremarried widow or widower to continue receiving compensation beyond the 400 weeks. They quarrel only upon the question of how the statute should be applied to dependent children. Plaintiffs argue that all dependent children are entitled to continue receiving compensation payments after the 400 weeks if they have not reached their 18th birthday prior to the expiration of the 400 weeks. Defendants argue that dependent children are not entitled to continue receiving compensation payments beyond the 400 weeks unless there is a disabled, unremarried widow or widower and

the dependent child is under the age of 18 years. In other words defendants insist that the word "and" appearing near the end of the above-quoted paragraph requires the existence of a disabled, unremarried widow or widower before a dependent child under the age of 18 years may continue to receive compensation beyond the 400 weeks.

Admittedly the wording and punctuation of the amendment cause some difficulty. As a result, we have closely followed the legislative history of the amendment to arrive at the true intent of the Legislature.

The amendment in question was first introduced in the Senate on 21 February 1974 as Section 4. of Senate Bill 1229. As first introduced, it read as follows:

> "G.S. 97-38 is hereby amended by striking out ', but shall not continue more than 350 weeks from the date of the injury.' as the same appears in lines 43 and 44 of such section and by inserting in lieu thereof a period and a new sentence as follows: 'Compensation payments due on account of a death shall be paid to a widow or widower during her or his lifetime or until remarriage, and in the event of remarriage compensation benefits which would have been due for the next two years shall be commuted to its present value and paid to such widow or widower in a lump sum; compensation payments for a dependent child shall be continued at least until such child reaches the age of 18 and beyond such age if actually dependent; provided, however, that compensation benefits to any other person or persons shall be limited to a period of 350 weeks from the date of the death of the employee.'"

The Bill was referred to the Senate Committee on Manufacturing, Labor and Commerce. Section 4. of the Bill was amended in committee by rewriting the same and, as amended, was reported favorably. As amended in committee, Section 4. of Senate Bill 1229 read as follows:

> "G.S. 97-38 is hereby amended by striking out ', but shall not continue more than 350 weeks from the date of the injury.' as the same appears in lines 43 and 44 of such section and by inserting in lieu thereof a period and a new sentence as follows: 'Compensation payments due on account of death shall be paid for a period of 400 weeks from

the date of the death of the employee; provided, however, after said 400 week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18 and beyond such age for such additional time as said child is unable to support herself or himself because of physical or mental disability.' "

On 14 March 1974 Section 4. of Senate Bill 1229 was amended on the floor of the Senate by rewriting the same and, as amended, was passed and sent to the House. As amended on the floor of the Senate, Section 4. of Senate Bill 1229 read as follows:

"G.S. 97-38 is hereby amended by striking out ', but shall not continue more than 350 weeks from the date of the injury.' as the same appears in lines 43 and 44 of such section and by inserting in lieu thereof a period and a new sentence as follows: 'Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400 week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18 and beyond such age for such additional time as said child is unable to support herself or himself because of physical or mental disability.' "

In the House Section 4. of Senate Bill 1229 was amended in committee by rewriting the same and, as amended, was passed in the House on 11 April 1974. As amended and passed in the House, Section 4. of Senate Bill 1229 read as follows:

"G.S. 97-38 is hereby amended by striking out ', but shall not continue more than 350 weeks from the date of the injury.' as the same appears in lines 43 and 44 of such section and by inserting in lieu thereof a period and a new sentence as follows: 'Compensation payments due on account of death shall be paid for a period of 400 weeks from

the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.' "

As amended in the House, the Bill was sent to the Senate for concurrence. On 11 April 1974 the Senate concurred in the House amendment. The Bill was ratified 12 April 1974.

From a reading of the foregoing sequence of legislative action, it is clear that the legislative intent was to provide expanded coverage for two distinct classes of dependents of a deceased employee, i.e., a disabled, unremarried widow or widower and dependent children under the age of 18 years. Although the coverage was not expanded to the full extent envisioned by the original draft of Section 4. of Senate Bill 1229 or as envisioned by the first two redrafts of Section 4., the original intent to expand coverage for the two distinct classes of dependents of a deceased employee was maintained throughout the legislative action. Having arrived at the legislative intent, a proper reading of the statute becomes clear. The provision of the second paragraph of G.S. 97-38, as amended, which relates to dependent children under the age of 18 years, should be read in conjunction with the introductory proviso. When so read, it means "and provided, however, after said 400-week period compensation payments due a dependent child shall be continued until such child reaches the age of 18."

In our opinion Chief Deputy Commissioner Shuford and the Full Commission correctly interpreted the statute as amended.

Affirmed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. EARL ANDREWS GAINEY, JR.

No. 765SC871

(Filed 6 April 1977)

1. **Criminal Law § 34— defendant's commission of other crimes — admissibility**

In this prosecution for rape and crime against nature, testimony that defendant committed the crimes of burglary, rape and crime against nature against the prosecutrix one week before the commission of the crimes for which he was on trial was properly admitted for the purpose of showing lack of consent and defendant's unnatural lust, identity as the perpetrator, and intent or state of mind.

2. **Criminal Law § 34— defendant's commission of another crime — admissibility**

In a prosecution for rape and crime against nature, the trial court did not err in refusing to strike testimony by the prosecutrix, in response to defendant's question as to why she failed to call the police when defendant raped her on a previous occasion, that defendant had just gotten home from prison and she didn't want to see him back in jail; furthermore, the admission of such testimony was not prejudicial to defendant where similar testimony was thereafter admitted without objection.

3. **Rape § 4— expert testimony — presence of spermatozoa**

A physician was properly allowed to testify concerning the presence of spermatozoa in the vaginal fluid of an alleged rape victim although the witness failed to identify them as "human spermatozoa," since there was no evidence that the spermatozoa could have been other than human, and the testimony tended to show penetration and to corroborate the victim's testimony.

4. **Criminal Law § 50; Rape § 4— expert testimony — chain of custody of slide**

The State's evidence in a rape case established a sufficient chain of custody of a slide to permit a pathologist to testify as to his analysis of the slide where it tended to show that the victim's name was placed on the slide when it was prepared, the slide was then placed in a "rape box" and the box was locked, the box always remains in the emergency room until the pathology department comes to get it, and the pathology department did receive the slide two days later for pathological examination; furthermore, any error in admission of testimony about the slide was harmless in view of the victim's substantial testimony of penetration.

5. **Criminal Law §§ 34, 60— fingerprint card**

Defendant in a rape prosecution was not prejudiced by the admission of a fingerprint card made in 1966 where the card did not disclose any arrest, indictment or conviction of defendant, and the only evidence relating the card to another criminal offense was an

officer's testimony that he had made defendant's fingerprint impressions on the card at the Wilmington Police Department in 1966.

6. Rape § 4— intercourse with third person — inadmissibility

In this rape prosecution, cross-examination of the prosecutrix as to whether she had had sexual intercourse with a third person was not relevant to explain the presence of sperm after the alleged rape where the prosecutrix had previously testified that she had not had intercourse with the other person during the week prior to the alleged rape.

APPEAL by defendant from *James, Judge.* Judgment entered 23 April 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 March 1977.

Defendant was charged, in separate bills of indictment, proper in form, with the felonies of second-degree rape and crime against nature. He entered a plea of not guilty as to each charge.

The State's evidence tended to show that the defendant is the ex-husband of Patricia Gainey, the prosecuting witness. On the night of 31 January 1976, the defendant broke into Patricia Gainey's home and forced her to have intercourse and oral sex with him; prosecutrix did not call the police because defendant had just gotten out of prison and was on his way to Florida for another trial. Moreover, she did not notify the police because she wanted him to have a chance to visit with their daughter, who was staying with defendant's parents at the time.

On 6 February 1976 defendant again broke into Patricia Gainey's apartment in the nighttime and forced her to have intercourse and oral sex with him. She asked defendant to stop but did not put up any resistance for fear of being assaulted again. After the defendant left, she called the police and reported the incidents of 31 January and 6 February 1976.

A set of fingerprints on a beer bottle found in the trash in Patricia Gainey's bathroom shortly after the 6 February incident matched the defendant's 1966 fingerprint card and revealed that the prints on the beer bottle were those of defendant. When a police officer attempted to arrest defendant on 7 February 1976, defendant jumped out of his truck and ran. He was subsequently arrested on 8 February 1976.

Ann Godwin testified that she saw Patricia on the morning of 1 February 1976; that Patricia was hysterical; that she had

red marks on her breasts; that she had bruises on her arms; and that she had a red mark on her throat which she said was caused by defendant's knife. Medical evidence tended to show the presence of sperm in the victim's vagina within a short time after the assault.

Defendant offered evidence tending to show that he was at his sister-in-law's house during the hours between 5:00 p.m. on 6 February and 2:30 a.m. on 7 February 1976 when the alleged assaults occurred. His sister testified that on the day defendant was arrested she was driving him to Raeford to turn himself in.

Defendant was found guilty of each charge and from judgment pronounced imposing imprisonment in each case, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Rountree & Newton, by William B. Harris III, for the defendant.

MARTIN, Judge.

[1] Defendant preserves and presents ten assignments of error. He first contends the court erred in overruling his objection to certain testimony regarding crimes allegedly committed by him prior to the alleged commission of the crimes for which he was on trial. In spite of his objection, the State was allowed to introduce testimony that the defendant had committed the crimes of rape, burglary, and crime against nature on the night of 31 January 1976, one week before the alleged commission of the crimes in the instant case.

It is well settled in this State that if a criminal defendant has not testified, evidence that he has committed another distinct, independent, separate offense is not admissible if its only relevancy is to show the character of the defendant or his disposition to commit an offense of the nature of the one for which he is presently on trial. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). If, however, the evidence in question tends to prove any fact relevant to the charge on which the defendant is presently on trial, it is not inadmissible merely because it also shows him

to have been guilty of another, independent crime. *State v. Felton, supra; State v. McClain, supra.*

The decisions in this jurisdiction have been

> ". . . markedly liberal in holding evidence of similar sex offenses admissible . . . [to show knowledge, intent, motive, plan or design, identity, etc.] especially when the sex impulse manifested is of an unusual or 'unnatural' character." 1 Stansbury, N. C. Evidence, § 92 (Brandis rev. 1973). See also *State v. Spain,* 3 N.C. App. 266, 164 S.E. 2d 486 (1968).

Our courts have repeatedly held other or repeated sex acts to be admissible to show: lack of consent, *State v. Parish,* 104 N.C. 679, 10 S.E. 457 (1889); the "unnatural" lust of the defendant, *State v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516 (1944); the defendant's attitude, animus, and purpose, *State v. Davis,* 229 N.C. 386, 50 S.E. 2d 37 (1948); intent, design or guilt on the grounds of being in corroboration, *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728 (1960); *modus operandi* or common plan and identity of defendant, *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); and *quo animo* or state of mind, *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973).

The evidence here in question was clearly relevant to show lack of consent, defendant's unnatural lust, identity as the perpetrator, and defendant's intent or state of mind. The evidence was therefore admissible.

[2] Defendant next contends the court erred in denying his motion to strike Patricia Gainey's testimony relating to the fact that defendant had previously been in prison. On cross-examination the defendant elicited the following testimony from Patricia Gainey: "I do have a telephone in my apartment, but I did not call the police after he left." Defendant's counsel then asked: "Other than asking him to stop, you didn't resist him on this occasion, did you?" The response was: "No, sir. When I came back, I didn't call the Police because he had just gotten home from prison. He was on his way to Florida for trial." The defendant moved to strike this answer as unresponsive but the court denied the motion by asserting that defendant had "opened the door." Immediately after the court's ruling, Mrs. Gainey continued her testimony: "He just came home the day before. He was on bond from Florida. I wanted to give him a chance to

be with his daughter. She loves him. I didn't want to see him back in jail, and he still had Sarah Jean too."

We hold that there was no abuse of discretion on the part of the trial judge in refusing to strike what appeared to be a full answer to defendant's question concerning her failure to call the police. Moreover, the prosecuting witness subsequently testified, without objection or a motion to strike, that defendant had just gotten out of prison and was going to Florida in a week "for armed robbery." Consequently, defendant's original objection to the evidence was lost since evidence of like import was admitted after the admission of the challenged testimony. *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4 (1967). This assignment of error is therefore overruled.

[3] Defendant's fourth assignment of error relates to the admission over objection of a physician's testimony concerning a microscopic examination of a slide and the results thereof. He contends the testimony about the examination of the vaginal fluid of the prosecuting witness failed to identify the spermatozoons which were found as being "human spermatozoon." This contention is untenable. Nowhere is there even a scintilla of evidence that the sperm could have been other than human. The State does not have the burden of offering scientific evidence to prove that the specific sperm found came from a specific individual. Prosecutrix testified to the completed act of intercourse. There is no question of mistaken identity. The challenged evidence tended to show penetration, one of the essential elements of rape, and was corroborative of prosecuting witness. It was properly admitted. See *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970).

[4] Defendant contends, in his fifth assignment of error, that the court erred in allowing the pathologist to testify regarding his analysis of a slide because the State failed to establish a complete chain of custody of the slide from the time it was prepared until the time it was analyzed by the pathologist. State's testimony tended to show, however, that when the slide was prepared the prosecuting witness's name was placed on it; that the slide was then placed in a "rape box"; that the box was then locked; that the box always remains in the emergency room until the pathology department comes to get it; and that the pathology department did in fact receive the slide two days later for pathological examination. We find that this evidence estab-

lishes a chain of custody sufficient to support allowance of the challenged testimony. See *State v. Preston,* 9 N.C. App. 71, 175 S.E. 2d 705 (1970). In any event, there was additional evidence of penetration from the prosecuting witness who testified in much detail on cross-examination concerning the sexual assault upon her by the defendant on 6 February 1976. She testified: "He got on the bed and had intercourse with me. . . . After we had intercourse I went to the bathroom to clean up. . . ." It necessarily follows that her use of the phrase "sexual intercourse" encompasses actual penetration. *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975). We therefore conclude that there was substantial evidence of penetration even without the expert testimony concerning the analysis of the slide. Hence, any possible error in admitting the slide testimony was harmless.

[5] In defendant's sixth assignment of error he contends the court erred in admitting into evidence a fingerprint card taken when the defendant was arrested on a prior occasion in 1966, because it tends to show that he committed an earlier offense. The card admitted into evidence did not, however, list a single arrest, indictment, or conviction and the only data visible on the card was a right index fingerprint. Moreover, the only evidence admitted before the jury relating the admission of the fingerprint identification card to any earlier criminal offenses was the statement of Captain Turner that he had had occasion to take fingerprints of individuals and place them on fingerprint cards; that he had seen the fingerprint card in question at the identification bureau of the Wilmington Police Department; that he made defendant's fingerprint impressions from defendant's right hand index finger; and that he could identify State's exhibit of the card as being the same card as the one he used in 1966. No inference arising from this testimony could prejudice the jury in their consideration of defendant's guilt. See *State v. Jackson,* 284 N.C. 321, 200 S.E. 2d 626 (1973). This assignment of error is without merit.

[6] In defendant's seventh assignment of error he contends the court erred in sustaining the objection of the State to the following question on re-cross examination: "It is true that you have had intercourse with Clifton Justice, is it not?" If allowed to answer, she would have said "Yes, Sir." Defendant contends the question was relevant to explain the presence of sperm after the alleged rape. Just prior to this question the defense had

elicited from the prosecuting witness testimony to the effect that she had not had intercourse with Clifton Justice during the period of time in which the alleged assault by the defendant had occurred, which was between 31 January 1976 and the night of 6 February 1976. Thus, since the prosecuting witness had denied having intercourse with Clifton Justice immediately prior to the time of the alleged crime, the defendant's contention that the question was relevant is without merit.

Defendant's remaining assignments of error are without merit and are overruled.

No error.

Judges MORRIS and VAUGHN concur.

ROBERT DEUTSCH, ANCILLARY ADMINISTRATOR OF THE ESTATE OF JERRY E. BEDINGFIELD, DECEASED v. ELSIE FISHER, INDIVIDUALLY, ELSIE FISHER, ADMINISTRATRIX OF THE ESTATE OF FORREST FISHER, DECEASED

No. 7629DC715

(Filed 6 April 1977)

1. **Pleadings § 34; Rules of Civil Procedure § 25— substitution for deceased party — necessity for supplemental pleading**

   If a motion for substitution of a personal representative for a deceased party is made and granted within one year after the party's death, G.S. 1A-1, Rule 25(a) does not require that a supplemental complaint be filed; however, if the one-year period has run, the court has no authority to order substitution without the filing of a supplemental complaint.

2. **Pleadings § 34; Rules of Civil Procedure § 25— substitution of parties — necessity for supplemental pleadings**

   The trial court erred in allowing substitution for deceased parties more than four years after the deaths of the parties by amendment of the original complaint rather than by supplemental pleadings as required by G.S. 1A-1, Rule 25(a).

3. **Pleadings § 34; Rules of Civil Procedure § 15— substitution of parties — supplemental pleadings — justness — reasonable notice**

   Attempted substitutions for deceased parties by supplemental pleadings filed more than four years after the deaths of the parties were improper where the trial court made no findings as to whether the supplemental pleadings were "just" and where the deceased de-

fendant's wife, who was his administratrix and sole heir, received no notice of the attempt to substitute her as the party defendant. G.S. 1A-1, Rule 15(d).

APPEAL by defendant from *Hart, Judge.* Judgment entered 22 July 1976 in District Court, HENDERSON County. Heard in the Court of Appeals 9 February 1977.

On 7 February 1966 Jerry Bedingfield, a resident of Virginia, filed a complaint against Forrest Fisher, a North Carolinian, in Henderson County seeking specific performance of a land sale contract. The complaint alleged, among other things, that a contract had been entered whereby Fisher was to convey sixteen and one-half acres of land located in Henderson County, North Carolina, to Bedingfield in exchange for $7,000. In his answer, filed on 3 January 1967, Fisher denied that he had entered into a contract with Bedingfield. On 18 July 1967 Fisher's attorney was allowed to withdraw from the case, but after that, nothing further happened in the lawsuit between Bedingfield and Fisher for several years.

On 21 July 1968 Jerry Bedingfield died in Virginia, and Dolores Bedingfield, was appointed as his administratrix. She subsequently died, and Larry and Pamela Bedingfield were then appointed administrators. On 11 March 1969 Forrest Fisher also died in North Carolina and Elsie Fisher, his widow and sole heir at law, was appointed as his administratrix. She filed her final account on 2 April 1971.

The next thing happening in this lawsuit occurred on 2 May 1973 when the original cause was transferred from the old county court to the district court. On 8 May 1973 Don Garren, an attorney, moved that the complaint be amended to include the names of Larry and Pamela Bedingfield "as plaintiffs in the title" of the action and Elsie Fisher "as defendant in the title." By an order dated that same day, this motion was allowed.

Elsie Fisher then made a motion to dismiss, pursuant to Rule 41, and this motion was filed on 5 July 1973. She alleged, among other things, that she was not brought into court properly since no notice was given to her, concerning the 8 May 1973 motion to make her a party defendant, as required by law.

On 26 November 1973 Robert Deutsch qualified in Henderson County, North Carolina, as ancillary administrator of Jerry Bedingfield's estate. Later, on 7 December 1973 the clerk or-

dered that Forrest Fisher's estate be reopened and that Elsie Fisher continue to serve as administratrix. On the same day Elsie Fisher objected to this order and gave notice of appeal to the superior court. Then, on 10 December 1973, in response to another motion by Don Garren, the district court ordered that Deutsch be made a party plaintiff in this action; that Elsie Fisher, in her capacity as Forrest Fisher's administratrix, be made a party defendant; and that the complaint be amended accordingly.

In March 1975 this case was tried, and the jury returned a verdict for plaintiff. The court signed judgment on 10 March 1975 appointing Don Garren as commissioner to convey the property at issue to the plaintiff, and requiring plaintiff to pay the contract price of $6,500.

On 19 March 1976 Elsie Fisher moved that the judgment of 10 March 1975 be vacated and set aside. She alleged, among other things, that she had never been validly made a party to the action since she received no notice of the motion to substitute her as a party defendant. Her motion was denied. She appeals.

Arthur J. Redden, Jr., for the plaintiff.

James C. Coleman, for the defendant.

MARTIN, Judge.

In her first assignment of error, appellant contends that her motion, dated 19 March 1976, to vacate and set aside the 10 March 1975 judgment should have been granted since there was a failure to comply with the North Carolina Rules of Civil Procedure. More specifically, she argues that she was never properly made a party to this action since G.S. 1A-1, Rule 25(a) states that a personal representative may be substituted for a deceased party only by a supplemental complaint if more than one year has passed since the deceased party's death. We agree with this argument.

Upon reviewing the facts in the instant case, we have concluded that the appellant and the appellee were both improperly substituted as parties in this action. Under G.S. 1A-1, Rule 25(a) there is a provision for substitution upon the death of a party. This rule provides as follows:

"(a) Death.—No action abates by reason of the death of a party if the cause of action survives. In such case, the

court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may order the substitution of said party's personal representative or successor in interest and allow the action to be continued by or against the substituted party." G.S. 1A-1, Rule 25(a).

[1] Rule 25(a) therefore limits the time within which a *motion* for substitution may be made to one year following the death of a party. The rule, however, is not a hard and fast limitation on substitution since the court may also order substitution after a supplemental complaint has been filed. Thus if a motion for substitution is made and granted within the one year period, it is not required that a supplemental complaint be filed unless there is a desire to allege other new matters. However, if the one-year period has run, the court has no authority to order substitution *without the filing of a supplemental complaint.*

[2] In the case at bar, the original plaintiff, Jerry E. Bedingfield, died on 21 July 1968 and the original defendant, Forrest Fisher, died on 11 March 1969. Both of the original parties died after the complaint and answer were filed but before the case ever came to trial. After their deaths, no further efforts were made to prosecute the action and no further papers were filed until four years later. On 8 May 1973, Don Garren, attorney for original plaintiff, attempted to substitute Larry Bedingfield and Pamela Bedingfield, the original plaintiff's heirs, as plaintiffs in this action and to substitute Elsie Fisher, the original defendant's wife, as defendant. Since both of the original parties had been deceased for more than one year, the only proper mode of substitution at that time was by supplemental pleadings under Rule 25(a). We note, however, that the attempted substitution of the parties was by a motion to amend the original complaint, presumably filed pursuant to G.S. 1A-1, Rule 15, rather than by a supplemental complaint as required by G.S. 1A-1, Rule 25(a). Nevertheless, the trial court allowed such a method of substitution on May 8, 1973.

Without discussing the matter at length, it suffices to say that the differences between an amendment and a supplemental complaint have already been decided by this Court. *Williams v. Freight Lines* and *Willard v. Freight Lines,* 10 N.C. App. 384, 179 S.E. 2d 319 (1971). See also G.S. 1A-1, Rule 15(a) and (d). It is therefore apparent that, prior to the appellant's mo-

tion to vacate and set aside the judgment in this case, neither of the parties had been properly substituted by supplemental complaint in accordance with G.S. 1A-1, Rule 25(a). Thus, the trial judge erred in refusing to grant the appellant's motion. Moreover, since Larry and Pamela Bedingfield, and later Robert Deutsch, were never properly substituted as plaintiffs, it is not necessary for us to discuss their contention that the appellant waived, by appearing, her right to argue on appeal that she was improperly substituted as a defendant to this action.

Even if we assume, *arguendo,* that the attempt to substitute the parties was not by amendment but rather was by supplemental pleading, as required by G.S. 1A-1, Rule 25(a), we would nevertheless be compelled to reach the same result for yet another reason. In order for a supplemental pleading to be procedurally proper, it must satisfy the requirements of G.S. 1A-1, Rule 15(d). Under this rule, it is stated:

> "(d) Supplmental pleadings.—Upon motion of a party the court may, *upon reasonable notice and upon such terms as are just,* permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. . . ." G.S. 1A-1, Rule 15(d) (emphasis added).

The language of this rule ". . . the court may . . . upon such terms as are just . . ." permits but does not require a trial court to allow a supplemental pleading. In any event, it does not appear to be a matter of right, and it seems clear that a court may deny a supplemental pleading to substitute parties if the allowance of such a pleading would be unjust.

[3] In the case at bar, we note that substitution was attempted on May 8, 1973, more than four years after the death of the original parties. However, the record fails to reveal any findings by the trial judge as to whether this or any other factor was ever considered in determining if the supplemental pleading was "just."

It must also be emphasized that G.S. 1A-1, Rule 15(d) requires a supplemental pleading to be "upon reasonable notice." We have carefully examined the record and cannot find any in-

dication that Elsie Fisher was ever served with notice of the attempt to substitute the parties in this action. To the contrary, a motion to substitute the parties by amending the original complaint was filed by Don H. Garren on the 8th day of May 1973 and no notice of this motion was ever served upon Elsie Fisher. Because of this lack of notice, the supplemental pleadings allowed by the court on 8 May 1973 were never in compliance with the requirements set forth in Rule 15(d) and, hence, were improperly allowed by the trial court. Since the supplemental pleadings were improper, it follows that the attempted substitution of parties by the supplemental pleadings was also improper and, therefore, that both parties were improperly joined to this action. Once again, since Larry and Pamela Bedingfield, and later Robert Deutsch, were never properly substituted as plaintiffs in this action, it is not necessary for us to discuss their argument that appellant waived, by appearing, her right to contest improper substitution of parties.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

CLAWSON L. THOMPSON, EMPLOYEE v. REFRIGERATED TRANSPORT CO., INC., EMPLOYER; MIDLAND INSURANCE CO., CARRIER

No. 7610IC709

(Filed 6 April 1977)

1. **Master and Servant § 49— truck leased to ICC franchise holder — owner-operator employee of lessee**

An owner-operator of a truck leased to an Interstate Commerce Commission franchise holder is the employee of the lessee within the meaning of the N. C. Workmen's Compensation Act.

2. **Master and Servant § 56— workmen's compensation — injury during job preparations — injury compensable**

Preliminary preparations by an employee which are reasonably essential to the proper performance of some required job are generally regarded as being within the scope of employment, and any injury suffered during such preparations is compensable.

3. **Master and Servant § 56— workmen's compensation — employee preparing for work — accident arising out of and in course of employment**

Evidence was sufficient to support findings of the Industrial Commission that plaintiff leased two trucks to defendant employer, plain-

tiff was required to present one of his trucks in Greensboro in condition to make a trip to San Francisco which had been offered to plaintiff and which he had accepted, and at the time of his injury plaintiff was furthering the business of his employer in that he was preparing the truck to make the journey for his employer, and such findings supported the Commission's conclusion that plaintiff's injuries arose out of and in the course of his employment.

4. **Master and Servant § 93— workmen's compensation — award by hearing commissioner — award changed by Commission**

The Industrial Commission did not err in substituting an award of $800 for a 5% permanent partial disability to plaintiff's hand for the hearing commissioner's award of $400 for serious bodily disfigurement, since the Commission has authority to review, modify, adopt or reject the findings of fact found by a hearing commissioner.

Judge VAUGHN dissents.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission dated 3 June 1976. Heard in Court of Appeals 9 February 1977.

This is a proceeding brought by the plaintiff, Clawson L. Thompson, under the North Carolina Workmen's Compensation Act to recover compensation allegedly resulting from an injury by accident on 19 July 1975.

After a hearing the Industrial Commission made findings of fact, which, except where quoted, are summarized as follows:

On 19 July 1975 plaintiff employee, owned two diesel trucks, both of which were leased to the defendant employer, Refrigerated Transport Co., an "Interstate for Hire Common Carrier, operating under a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission," under a "contractor operating agreement" or term lease. Under the agreement plaintiff was required to maintain the trucks at his own expense in the state of repair required by "all applicable regulations." He was also responsible for all operating expenses. The plaintiff is compensated under the agreement at a specified rate per mile traveled.

"The defendant employer exercises no control over a driver in the maintenance and repair of his vehicle. However, this employer has inspection lanes at its Greensboro terminal, and before each run each vehicle is inspected by the employer there. If the vehicle passes this inspection, the employee is given the trip. If it does not, the employee is given an opportunity to

correct any minor defect on the spot, but if he cannot then pass inspection, he does not get the load."

At 9:00 a.m. on 19 July 1975 plaintiff received a call at his home in Garner, North Carolina, from the employer's dispatcher inquiring as to whether he would accept a "run" from Greensboro to San Francisco. Plaintiff accepted the run, and he was directed to be in Greenboro at 6:00 p.m.

"At 11:00 a.m., one of the tractors was then in the driveway of his home and plaintiff began to clean and service the truck so that it would pass employer's inspection in order that he might make the San Francisco trip. . . . The work which plaintiff was performing on his tractor at the time in question was not general repair or maintenance but was preparatory cleaning and checking to prepare for a specific trip to which he had already been assigned that afternoon." Plaintiff fell while standing on a ladder securing the air conditioning lines on the truck and severely cut his arm. The Industrial Commission found and concluded that the plaintiff's injury arose out of and in the course of his employment with defendant Refrigerated Transport Co., and that as a result of the injury plaintiff was temporarily totally disabled from 19 July 1975 to 18 October 1975 and sustained a five per cent permanent partial disability of the left forearm or hand.

From the award of the Industrial Commission giving plaintiff $80 per week for thirteen weeks for his temporary total disability, and $800 for his permanent partial disability, defendants appealed.

Joseph Reichbind for plaintiff appellee.

Young, Moore, Henderson & Alvis by B. T. Henderson II, and R. Michael Strickland for defendant appellants.

HEDRICK, Judge.

[1] Defendants first contend that plaintiff's injuries did not arise out of and in the course of his employment with the defendant, Refrigerated Transport Co. While defendants concede that an owner-operator of a truck leased to an Interstate Commerce Commission franchise holder is the employee of the lessee within the meaning of the North Carolina Workmen's Compensation Act, *Brown v. Truck Lines,* 227 N.C. 299, 42

S.E. 2d 71 (1947), they assert that the plaintiff's injuries in this case did not arise out of and in the course of his employment because under *Brown* the employer-employee relationship exists only when the "drivers are transporting goods under the franchise authority of the ICC franchise holder." In substance, defendants argue that the plaintiff was an independent contractor with respect to repairs made on the tractor-trailer rig, and that under the facts of the present case he would not have come within the scope of his employment until he had reached the loading dock in Greensboro, preparatory to making the "run" to San Francisco.

Defendants, in their brief, and Commissioner Brown, in his dissenting opinion filed in this case, cite in support of their contention that plaintiff's injuries did not arise out of and in the scope of his employment the following from *Employment Security Commission v. Freight Lines*, 248 N.C. 496, 502, 103 S.E. 2d 829, 833-34 (1958):

> "In the decisions cited in the two preceding paragraphs, it was held that the operator (whether the owner or his employee) while operating the leased equipment in furtherance of the business of the franchise carrier, was an employee of the franchise carrier in respect of hazards to which he and the public were subjected by reason of such operation. In such case, the interstate carrier is exercising its franchise rights by use of the services of the operator; and on this ground, and also on the ground of public policy, the interstate carrier has the liability of an employer for what occurs while the leased equipment is so operated. *However, when we deal with a matter unrelated to what occurs during the operation of the leased equipment, the status of the operator is to be determined by whether the lessor is an independent contractor under the terms of the lease agreement.*"
> (Citation omitted.) (Emphasis added.)

The above quotation does not support the defendants' contention. The issue before the Court in that case was clearly set out by Justice Bobbitt (later Chief Justice) at the beginning of his opinion,

> "The question for decision is this: Are drivers of vehicles so leased [trip lease to ICC franchise holder] (whether the

> owner or a third party employed by him), during the term of the lease, employees of Hennis [lessee] or are they independent contractors or employees of independent contractors, under the Employment Security Law?"
> *Id.* at 499, 103 S.E. 2d at 832.

The status of the operator-lessor in the above cited case was determined by whether he was an independent contractor under the terms of the lease simply because the issue before the court was whether he was an "employee" within the meaning of the Employment Security Act, "a matter unrelated to what occurs during the operation of the leased equipment." In the present case it is clear that the plaintiff was the employee of the defendant Refrigerated Transport Co. within the meaning of the Workmen's Compensation Act. *Brown v. Truck Lines, supra.* Whether the injury for which he seeks compensation arose out of and in the course of his employment is to be determined as in any other case.

[2] "Preliminary preparations by an employee, reasonably essential to the proper performance of some required task or service, is generally regarded as being within the scope of employment and any injury suffered while in the act of preparing to do a job is compensable." Blair, Workmen's Compensation Law § 9:32 (1974). See also *Battle v. Electric Co.*, 15 N.C. App. 246, 189 S.E. 2d 788 (1972), *cert. denied*, 281 N.C. 755, 191 S.E. 2d 353 (1972); *Giltner v. Commodore Contractor Carriers*, 14 Or. App. 340, 513 P. 2d 541 (1973); *Employers Mutual Liability Ins. Co. v. Department of Industry, Labor & Human Relations*, 52 Wis. 2d 515, 190 N.W. 2d 907 (1971); *Harding v. Herr's Motor Express, Inc.*, 35 App. Div. 2d 883, 315 N.Y.S. 2d 693 (1970), appeal denied, 28 N.Y. 2d 487, 322 N.Y.S. 2d 1026 (1971). In the last cited case the New York court held compensable an injury suffered by an employee, who had leased his truck-tractor to the defendant employer, while performing repairs or maintenance work on the vehicle at his home in preparation for operating it in his employment as scheduled for later the same day.

[3] In the present case, plaintiff accepted the offer of a job to make the "run" from Greensboro to San Francisco. Part of the duties of plaintiff's employment was to present the tractor-trailer rig in Greensboro in condition to make the trip. Indeed, if the rig did not pass the employer's inspection, plaintiff would

not get the job in question. At the time of his injury plaintiff was furthering the business of his employer in that he was preparing the rig to make the journey to San Francisco for his employer. We hold that the Commission's findings support the conclusion that plaintiff's injuries arose out of and in the course of his employment with defendant Refrigerated Transport Co.

Based on assignment of error 4, defendants contend,

> "[T]he bare assertion by the employee-appellee that he was temporarily totally disabled is not sufficient to establish the fact of disability or the length of disability and that the findings of the Industrial Commission as to temporary total disability are not supported by competent evidence in the Record."

In appropriate circumstances the extent and period of disability may be established in the absence of medical testimony with respect thereto. 3 Larson, Workmen's Compensation Law § 79.51 (1976). However, in the present case the Commission's finding that plaintiff was totally disabled for thirteen weeks is supported not only by plaintiff's testimony, but also by the medical records and physicians' reports showing the nature and extent of his injury. This assignment of error has no merit.

[4] Finally defendants contend the Commission erred in substituting an award of $800 for a five per cent permanent partial disability to plaintiff's hand for the hearing commissioner's award of $400 for serious bodily disfigurement. Defendants argue that the amendment is erroneous because the plaintiff did not appeal from the award of the hearing commissioner. We disagree.

The Commission is the fact finding body under the Workmen's Compensation Act and has authority ". . . to review, modify, adopt, or reject the findings of fact found by a Deputy Commissioner or by an individual member of the Commission when acting as a hearing Commissioner." *Brewer v. Trucking Co.*, 256 N.C. 175, 182, 123 S.E. 2d 608, 613 (1962). The assignment of error upon which this contention is based has no merit.

We hold the material findings of fact made by the Commission are supported by competent evidence in the record, and

these findings support the pertinent conclusions of law, which in turn support the award. The order appealed from is

Affirmed.

Judge CLARK concurs.

Judge VAUGHN dissents.

FRANCES BADHAM HOWARD; FANNIE BADHAM; BESSIE B. SMALL; SIDNEY BADHAM; MILES BADHAM; PENELOPE OVERTON; ALEXANDER BADHAM; CHARITY BADHAM; CHARLES BADHAM; PAULINE B. TURNER; FRANK BADHAM; SADIE B. HAWKINS, JANIE BADHAM, AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, DEC'D, PLAINTIFFS v. LONNIE BOYCE (NOW DECEASED), ORIGINAL DEFENDANT, AND CELIA U. BOYCE, INDIVIDUALLY AND CELIA U. BOYCE AND NAOMI MORRIS, EXECUTRIXES OF THE ESTATE OF A. C. BOYCE, SOMETIMES KNOWN AS LONNIE BOYCE, DEFENDANTS

No. 761SC789

(Filed 6 April 1977)

Judgments § 10; Rules of Civil Procedure § 56— consent judgment not set aside — entry of summary judgment

Where the present plaintiffs filed a motion in the cause in this action to remove cloud from title to set aside a 1945 consent judgment of nonsuit on the ground that they did not authorize institution of the action or entry of the consent judgment, but the 1945 consent judgment of nonsuit has never been set aside as to them, there was no pending action in which summary judgment could be entered for defendants.

APPEAL by movants, being certain persons named as plaintiffs, from *Peel, Judge.* Judgment entered 30 June 1976 in Superior Court, CHOWAN County. Heard in the Court of Appeals 9 March 1977.

This is an appeal from a summary judgment entered in favor of defendants. Facts pertinent to this appeal are stated in the opinion.

Samuel S. Mitchell and Richard Powell for appellants.

Pritchett, Cooke & Burch by J. A. Pritchett and W. L. Cooke for defendant appellees.

PARKER, Judge.

For a history of this case, reference is made to the opinion of this Court reported in *Howard v. Boyce,* 26 N.C. App. 686, 217 S.E. 2d 702 (1975). Insofar as pertinent to the question presented by the present appeal, the previous developments in this case may be summarized as follows:

This action was commenced in 1944 to remove cloud from title to real property. The caption of the complaint named Frances Bedham Howard and twelve other persons as plaintiffs. It was alleged in the complaint that plaintiffs were owners of a tract of land in Chowan County, having inherited the same from their grandfather, Hannibal Badham, who acquired title in 1889 by deed from H. H. Page and wife recorded in Chowan County Book "B," page 198; that Lonnie Boyce, the defendant, claimed an interest in the land adverse to plaintiffs; and that plaintiffs prayed judgment declaring them to be the fee simple owners of the property free from the adverse claim of the defendant. The complaint was verified on 24 October 1944 by Frances Badham Howard. The original defendant, Lonnie Boyce, filed answer. In 1945 a consent judgment was entered in which it was recited that all matters in controversy had been fully settled, that there did not exist any further dispute between the parties relative to ownership of the property described in the complaint, and that plaintiffs disclaimed any further interest in the controversy and desired that this action be nonsuited. Accordingly, in 1945 a consent judgment of nonsuit was entered.

In 1959 a new action to quiet title to the same land was commenced against the original defendant by Penelope Overton, Alexander Badham, and certain other parties who had been named as plaintiffs in the complaint filed in this action. The defendant pleaded the 1945 consent judgment as *res judicata,* and the plea in bar was sustained on appeal. *Overton v. Boyce,* 252 N.C. 63, 112 S.E. 2d 727 (1960).

Following the last cited decision, Penelope Overton and Alexander Badham, two of the persons named as plaintiffs in the

complaint filed in 1944 in this action, filed motions in this cause to set aside the 1945 consent judgment. After two appeals to the Supreme Court, the 1945 consent judgment was set aside, but only as to the two movants, Penelope Overton and Alexander Badham. *See Howard v. Boyce,* 255 N.C. 712, 122 S.E. 2d 601 (1961). Having been thus freed from the plea in bar, Penelope Overton and Alexander Badham instituted an action in 1965 to remove the cloud of defendant's adverse claim from their alleged title to the same land described in the original complaint filed in this action in 1944. The trial judge granted summary judgment for defendants, holding that the description in the 1889 deed from H. H. Page and wife to plaintiffs' ancestor, Hannibal Badham, was fatally defective. On appeal, this Court reversed, *Overton v. Boyce,* 26 N.C. App. 680, 217 S.E. 2d 704 (1975) ; but on review by the Supreme Court, the judgment of the trial court was ordered affirmed. *Overton v. Boyce,* 289 N.C. 291, 221 S.E. 2d 347 (1976). In this decision, the Supreme Court stated that "[s]ince the description in the deed under which the plaintiffs claim is patently ambiguous, the deed is void and cannot be the basis for a valid claim of title in the plaintiffs to the land now claimed by them." 289 N.C. at 295. This last cited decision terminated the action brought in 1965 by Penelope Overton and Alexander Badham.

In the meantime in 1966, certain of the persons, other than Penelope Overton and Alexander Badham, who had been named as parties plaintiff in the original complaint filed in this action in 1944, filed motions in this cause to set aside the 1945 consent judgment on the grounds that they had never given authority to bring this action nor consented to the settlement of their rights therein. On 14 November 1974 the trial court denied these motions on the ground that the movants were guilty of laches by delaying too long in seeking to set aside the 1945 consent judgment. On appeal, this Court held that "[e]xcept for petitioner Frances Badham Howard, the record does not support the Court's finding that the action and delay of petitioners constitutes laches." *Howard v. Boyce,* 26 N.C. App. 686, 689, 217 S.E. 2d 702, 704 (1975). Accordingly, this Court affirmed the order of the trial judge as to Frances Badham Howard but reversed as to the other movants.

On remand to the Superior Court and before any further hearing was held on the motions in the cause to set aside the 1945 consent judgment, defendants filed a motion for summary

judgment. As grounds for this motion, defendants referred to the 1976 decision of our Supreme Court in *Overton v. Boyce, supra* which held void, because of a fatally defective description, the 1889 deed to plaintiffs' ancestor, Hannibal Badham. Without ruling on the pending motions in the cause to set aside the 1945 consent judgment, the court allowed defendants' motion for summary judgment and ordered that this action be dismissed. In this, there was error.

The 1945 consent judgment, which terminated this action as of nonsuit, has never been set aside as to the present appellants. So long as it remains in effect, there is no pending action in which a summary judgment can be entered. Appellants, in filing their motions in this cause to set aside the 1945 consent judgment as to them, have taken the position that they never authorized anyone to join them as plaintiffs in this action, that they are not parties to this action, and that they cannot be bound by the 1945 consent judgment which was entered without their knowledge or consent in an action in which they had never joined. To this time, the present appellants have never had a hearing on the merits of their motions. All that was decided on the last appeal of this case to this Court was that, except as to Frances Badham Howell, the movants had not been guilty of laches in filing their motions. Accordingly, as to the present appellants, the order of the trial court, which denied their motions solely on the grounds that they were barred from maintaining them by laches, was reversed. If, when a hearing is held on the merits of the pending motions in the cause to set aside the 1945 consent judgment, it is determined that appellants are correct in their contention that they never authorized the institution of this action and were never properly made parties thereto, then obviously the 1945 consent judgment could not be binding on them. In addition, such a determination would also foreclose the court from exercising jurisdiction in this action, whether by summary judgment or otherwise, over persons who have thus been determined not to be parties to this action. On the other hand, if it is determined after hearing on the merits of the pending motions that movants did authorize institution of this action, then the inquiry would turn to the question whether movants had given authority to settle by way of the 1945 consent judgment. In this connection, we call

attention to the following language in the opinion of our Supreme Court in one of the earlier appeals of this case:

> "If any of the heirs of Hannibal Badham should in their own name hereafter move to vacate the judgment rendered in 1945, the court should make full findings of fact, touching the questions of authority to bring the suit and authority to settle. The difference between authority to institute suit and authority to settle if authorized to sue may, depending on other facts, be important." *Howard v. Boyce,* 266 N.C. 572, 578, 146 S.E. 2d 828, 832 (1966).

If it is determined that movants did authorize institution of this action and in addition also authorized entry of the 1945 consent judgment, then their motions in the cause should be denied, the 1945 consent judgment would remain in effect, and the matter would be ended. If it is determined that movants authorized institution of this action but did not consent to the 1945 judgment, then the judgment should be set aside as to them, this action would remain pending, and the parties could then undertake such further proceedings in this cause as might be appropriate. In this latter eventuality, a renewal of defendants' motion for summary judgment would appear proper.

This action and related litigation has occupied far too much of the time of the parties and of the courts of this State. In view of the 1976 decision of our Supreme Court in *Overton v. Boyce, supra,* it is difficult to see how the present appellants can ever prevail in establishing any rights in the land which is the subject to this action. Nevertheless, for the reasons above stated it was error to enter the summary judgment against them. Accordingly, the summary judgment entered 30 June 1976 is vacated and this cause is remanded to the Superior Court in Chowan County for hearing on the pending motions in the cause to set aside the 1945 consent judgment and for further proceedings not inconsistent herewith.

Vacated and remanded.

Chief Judge BROCK and Judge ARNOLD concur.

In re Johnson

IN THE MATTER OF THE WILL OF SUSAN W. JOHNSON, DECEASED

No. 7611SC738

(Filed 6 April 1977)

1. **Evidence § 25— aerial photographs — admissibility**

Aerial photographs are admissible in evidence upon the same basis as other types of photographs.

2. **Wills § 19— caveat proceeding — aerial photograph — admission proper**

The trial court in a caveat proceeding did not err in allowing into evidence aerial photographs of the tracts of land owned by the testatrix at her death, where a witness testified that the photographs were copies of those in the ASCS Office, and the witness used them to illustrate his testimony by locating on them the tracts of land referred to in the will in question.

3. **Wills § 23— caveat proceeding — doctor's testimony — requested instruction properly denied**

The trial court in a caveat proceeding did not err in failing to present to the jury the caveator's requested instruction that the jury could give "some importance" to the testimony of caveator's expert medical witness who had examined testatrix "because he is a medical doctor who was expressing an opinion based on his personal observation and knowledge of the testator" and "[t]he law attaches peculiar importance to the opinion of medical men. . . . "

APPEAL by caveator from *Clark, Judge.* Judgment entered 3 May 1976 in Superior Court, HARNETT County. Heard in the Court of Appeals 15 February 1977.

In this caveat proceeding, it appears that Susan W. Johnson executed her purported will on 30 October 1974 in the presence of three subscribing witnesses and Marshall Woodall, the attorney who prepared the will. She died in March 1975, at the age of 85 or 86 years. The will was probated in common form on 24 March 1975, and letters testamentary were issued to Paul Johnson as Executor. Gertrude J. Lane filed a caveat to the will on 12 March 1976. Paul Johnson and Gertrude J. Lane are the children and only heirs of Susan W. Johnson, deceased.

In summary, the will of Susan W. Johnson recited that Paul Johnson had always lived with her, having dropped out of school to work on the farm when her husband (Paul's father) became disabled; that since her husband's death Paul had looked after her welfare; that she requested him not to buy

a farm but to remain with her and manage her farming interests; and that he had done so. The will further recited that she had given to her daughter, Gertrude J. Lane, a college education and various gifts of money and other property over the years. The will devised all personal property and the homeplace to her son, a 50.88-acre tract to her son and daughter as tenants in common, her lands in Grove Township to each in separate parcels, and the balance of her real estate to her son.

At trial the evidence for the caveator tended to show that in July 1973 Susan W. Johnson had "blackout spells" and was confined in the hospital for six weeks and was readmitted several times thereafter. Her ailments were diagnosed by Dr. William Adair as "bulbar stroke," heart failure, and "mental deterioration" resulting from cerebral arteriosclerosis. Dr. Adair testified that when he last saw her in November 1973 it was his opinion that "it would have been impossible (for her) to understand anything that she might intend to do." He then transferred her from the hospital to the Falcon Nursing Home, where she remained until her death in March 1975. While there she was irrational and suffered illusions. The caveator visited her in September 1974, about a month before the will was executed, and it was her opinion that neither then, nor any time thereafter, did testatrix have sufficient mental capacity to make a will. Dr. Charles W. Byrd testified that he saw the testatrix on 23 July 1974 and in his opinion she was not capable of "making decisions" and did not have the mental capacity to make a will.

The evidence for the propounder tended to show that Marshall Woodall, the attorney who prepared the will, knew that Mrs. Johnson had suffered a stroke, but he had had the opportunity to talk to and observe her, and in his opinion she had sufficient mental capacity to make a will on the date she executed it. A nurse's aid who took Mrs. Johnson from the nursing home to her home for the purpose of executing the will testified that the testatrix was alert, and in her opinion was very capable and had the mental capacity to make a will. It was the opinion of three subscribing witnesses that at the time of execution testatrix had the mental capacity to make a will.

The usual execution, mental capacity, undue influence, and paper writing issues were submitted to the jury, and all issues

were answered in favor of the propounder. From the judgment entered, caveator appealed.

Morgan, Bryan, Jones, Johnson, Hunter & Greene by James M. Johnson for caveator appellant.

Stewart & Hayes, P.A. by Gerald W. Hayes, Jr., for propounder appellee.

CLARK, Judge.

The caveator assigns as error the admission into evidence of the aerial photographs of the tracts of land owned by Mrs. Johnson at the time of her death. Authentication testimony does not appear in the record on appeal in question and answer form. The record reveals that propounder's witness, Marshall Woodall, testified that the aerial photographs were copies of those in the ASCS Office, that they showed the tracts of land referred to in the will of Mrs. Johnson; that he could illustrate the testimony by locating the tracts on the aerial photographs, and that he did so by outlining them in red.

[1, 2] "The same general principles which apply to the admissibility of photographs generally apply to aerial photographs. . . ." 29 Am. Jur. 2d, Evidence § 796 (1967). See Annot., 57 A.L.R. 2d 1351 (1958). "[A]n aerial photograph is admissible in evidence on the same basis as a photograph of any other type." 3 C. Scott, Photographic Evidence § 1411 (2d ed. 1969). Under some circumstances expertise may be required for both authentication and interpretation of an aerial photograph, but in the case before us the aerial photographs were admitted in evidence for use by the witness Marshall Woodall, attorney who prepared the will, for the simple purpose of illustrating his testimony by locating thereon the tracts of land referred to and devised to testatrix's two children. A photograph must "be identified as portraying the scene with sufficient accuracy, but it need not have been made by the witness himself, provided he can testify to its adequacy as a representation." 1 Stansbury, N. C. Evidence § 34 (Brandis Rev. 1973). The evidence is sufficient to identify the aerial photographs as representing the scenes depicted.

To support his assignment of error the caveator relies on *Gragg v. Burns*, 9 N.C. App. 240, 175 S.E. 2d 774 (1970), where the court found prejudicial error in the admission of a large

aerial photograph from the Caldwell County Tax Office, purportedly portraying the section of Caldwell County in which the road in controversy was located. The court stated: "The assignment of error is well taken for the primary reason that the photograph or map was not properly authenticated. . . ." 9 N.C. App. at 242, 175 S.E. 2d at 776. We do not find this case controlling because, *sub judice,* there was proper authentication. Further, assuming *arguendo* that there was error in the admission of the aerial photographs, it does not appear that their admission was prejudicial to the caveator.

[3] The caveator's other assignment of error is that the court failed to present to the jury the following requested instructions:

> "I charge you that in connection with Dr. Adair's testimony, you can give some importance to his opinion, because he is a medical doctor who testified upon a matter within the scope of his profession and based on his personal observations and knowledge of the testator. But, I further charge you that you are the triers of the facts and not the witnesses, not even an expert witness. So after listening to Dr. Adair's testimony, although you are not bound by it, you can give some weight to the fact that he is a medical doctor who was expressing an opinion based on his personal observation and knowledge of the testator. The law attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience in the practice of their profession, they become experts in the matter of bodily and mental ailments."

The caveator offered the instructions in reliance on *Flynt v. Bodenhamer,* 80 N.C. 205 (1879), *In re Peterson,* 136 N.C. 13, 48 S.E. 561 (1904), and *In re Holland,* 16 N.C. App. 398, 192 S.E. 2d 98 (1972), *cert. denied,* 282 N.C. 581, 193 S.E. 2d 743 (1973). In *Flynt* the trial judge had instructed the jury "that the law attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience they become experts in the matter of bodily and mental ailments." 80 N.C. at 206. On appeal the court found no error. In *Peterson,* two physicians who had not observed the testator testified for the caveators, and two physicians who had observed the testator

testified for the propounder. At the request of caveators the trial court had instructed the jury in part that "the law attaches peculiar importance to the opinion of medical men upon the question of mental capacity. . . ." 136 N.C. at 23, 48 S.E. at 565. In finding error, the court stated: "It would seem that the safer rule would be to permit the entire evidence to go to the jury to be weighed and considered by them in the light of all the other evidence upon the question." 136 N.C. at 26, 48 S.E. at 566. In *Holland,* the trial court had instructed the jury in part that it could give some importance to the opinion of the physcian witness, " 'perhaps more than you would to another witness, because he is a doctor. . . .' " 16 N.C. App. at 399, 192 S.E. 2d at 99. On appeal it was held that the instruction was an expression of opinion in violation of G.S. 1A-1, Rule 51(a). We conclude that though *Flynt* has not been expressly overruled, both *Peterson* and *Holland* reject it by implication. Dr. Adair did not have the opportunity of observing the testatrix for several months prior to her execution of the will. Lay witnesses observed her on and near the day of execution. Under these circumstances the rejection of the requested instructions by the trial court was not error.

No error.

Judges BRITT and HEDRICK concur.

MARY H. CHRISTENBURY v. DANNY L. HEDRICK, ADMINISTRATOR OF THE ESTATE OF JAMES STEWART CHRISTENBURY, DECEASED

No. 7625SC799

(Filed 6 April 1977)

Parent and Child § 2— death of child — parent's action against spouse

The mother of two unemancipated minor children whose deaths allegedly resulted from her deceased husband's negligent operation of an automobile was not entitled to maintain an action in her individual capacity against her deceased husband's estate to recover ambulance, medical, funeral and burial expenses and an amount equal to the value of the lives of the children to plaintiff, including loss of (a) net income of the children during their minority, (b) services, protection, care and assistance of the children, and (c) society, companionship, comfort, guidance, kindly offices and advice of the children, since the sole remedy for recovery of all of the damages sought

by plaintiff was a wrongful death action by the personal representative of the deceased children. G.S. 28A-18-2.

APPEAL by plaintiff from *Ervin, Judge.* Order entered 17 May 1976 in Superior Court, CATAWBA County. Heard in the Court of Appeals 10 March 1977.

Plaintiff, mother of two minor, unemancipated children who died as the result of an automobile collision on 24 April 1974, instituted this action in her individual capacity against the administrator of the estate of her deceased husband. Plaintiff alleges that while her two children, ages eight and thirteen, were riding as passengers in an automobile being operated by defendant's intestate, her said husband, he negligently drove his automobile across the center line of a highway thereby causing a collision with another automobile; that intestate and both children received injuries in the collision which caused their deaths; that intestate died first.

Plaintiff seeks to recover for ambulance, medical, funeral and burial expenses, and an amount equal to the value of the lives of the children to plaintiff, including loss of (a) net income of the decedents during their minority, (b) services, protection, care and assistance of the decedents, and (c) society, companionship, comfort, guidance, kindly offices and advice of the decedents.

Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) alleging that the complaint fails to state a claim upon which relief can be granted. In his motion defendant points out that the accident occurred before 1 October 1975 on which date G.S. 1-539.21 became effective. Defendant asked the court to take judicial notice of the fact that a prior action was instituted by Mary H. Christenbury, as administratrix of the estates of her said children, against defendant administrator; that said action was dismissed on 10 January 1976 for failure to state a claim for relief; and that plaintiff did not appeal.

A hearing was held on the motion and the action was dismissed for failure of the complaint to state a claim for relief. From the entry of an order dismissing the action, plaintiff appealed.

Sigmon and Sigmon, by Jesse Sigmon, Jr., for the plaintiff appellant.

Byrd, Byrd, Ervin & Blanton, P.A., by Robert B. Byrd, for defendant appellee.

BRITT, Judge.

Did the trial court err in concluding that the complaint does not state a claim upon which relief can be granted and dismissing the action? We hold that it did not.

Decision in this case involves construction and application of our wrongful death statute since the amendments of 1969. The statute, now codified as G.S. 28A-18-2 provides in pertinent part:

> "Death by wrongful act of another; recovery not assets.—(a) when the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death; . . . .
>
> "(b) Damages recoverable for death by wrongul act include:
>
> (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
>
> (2) Compensation for pain and suffering of the decedent;
>
> (3) The reasonable funeral expenses of the decedent;
>
> (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, includ-

ing but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

"(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act."

Subsections (b) and (c) as set forth above were enacted by Chapter 215 of the 1969 Session Laws and became effective on 14 April 1969.

Specifically, we are faced with the question whether the wrongful death statute above quoted precludes plaintiff from asserting her alleged cause of action.

It is well settled that the common law of England is in force in this State to the extent that it is not destructive of, repugnant to, or inconsistent with our form of government, and to the extent that it has not been abrogated or repealed by statute or has not become obsolete; however, when the General Assembly legislates in respect to the subject matter of any common law rule, the statute supplants the common law and becomes the public policy of this State in respect to that particular matter. 3 Strong, N. C. Index 3d, Common Law, § 1, pp. 130, 131, and cases therein cited.

An action for wrongful death did not exist at common law and rests entirely upon the quoted statute. *Graves v. Welborn,*

260 N.C. 688, 133 S.E. 2d 761 (1963); *Colyar v. Motor Lines*, 231 N.C. 318, 56 S.E. 2d 647 (1949). A review of pertinent decisions of our appellate division leads us to perceive that any common law claim which is now encompassed by the wrongful death statute must be asserted under that statute.

We think each of the elements of damage which plaintiff seeks to recover in the instant case are now included in our wrongful death statute quoted above. In fact, in her complaint plaintiff adopts some of the same language and terms employed in G.S. 28A-18-2(b).

The only element that gives us serious concern is that for loss of services that the children might have rendered between the time of the collision and their deaths. The complaint does not state the dates of their deaths. Even so, due to the young ages of the children and the fact that they survived their father, plaintiff would be the person "entitled to receive the damages recovered" under G.S. 28A-18-2(b)(4). *See* G.S. 29-15(3). That being true, we think any claim she has for loss of services between the time of the injuries and the time of the deaths is encompassed by the statute.

We are aware of the following language found in *Gibson v. Campbell*, 28 N.C. App. 653, 654, 222 S.E. 2d 449, 450-451 (1976):

> "When an unemancipated minor child receives bodily injuries as result of the tortious conduct of another, a cause of action arises in the parent to recover from the tort feasor for loss of services of the child during its minority. *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E. 2d 27 (1965); 3 Lee, North Carolina Family Law, § 241; Annot., 32 A.L.R. 2d 1060 (1953). However, if the child dies as a result of such tortious conduct, there can be no recovery for loss of services for the period following the death, *though the parent may still recover damages for loss of services of the child for the period intermediate its injury and death. White v. Comrs. of Johnston*, 217 N.C. 329, 7 S.E. 2d 825 (1940). . . ." (Emphasis ours.)

We do not consider the emphasized statement binding on us here. In the first place, the statement was *obiter dictum* as the child in that case died instantly following the injury complained

of. In the second place, the authority cited for the statement predated the 1969 amendments to the wrongful death statute.

Our wrongful death statute is not penal but is remedial in its nature, and it should be given such construction as will effectuate the intention of the Legislature in enacting it. *Hall v. R.R.*, 149 N.C. 108, 62 S.E. 899 (1908); *Vance v. R.R.*, 138 N.C. 460, 50 S.E. 860 (1905). We think the intent of the Legislature was well stated by Judge Baley in *Forsyth Co. v. Barneycastle*, 18 N.C. App. 513, 516, 197 S.E. 2d 576, 578, *cert. denied*, 283 N.C. 752, 198 S.E. 2d 722 (1973), as follows:

> "Under the present provisions of G.S. 28-174 [now G.S. 28A-18-2] the conclusion seems inescapable that all of the items of damage which might conceivably have been set out in a claim for personal injuries prior to death are now includable in an action for damages for death by wrongful act. Any recovery in an action for wrongful death would of necessity cover these express items. . . ."

Plaintiff relies very heavily on our decision in *Crawford v. Hudson*, 3 N.C. App. 555, 165 S.E. 2d 557 (1969). Suffice it to say, the decision in that case predated the 1969 amendments to the wrongful death statute.

We note the allegation in defendant's motion for dismissal that plaintiff, as administratrix of the estates of her two children, had previously brought an action for their wrongful deaths and that the action was dismissed. No doubt the trial court followed *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972), in which case the Supreme Court held that the administrator of an unemancipated child cannot bring an action against the administrator of his father for wrongful death caused by the ordinary negligence of the deceased father in the operation of an automobile.

Since that time, the General Assembly has seen fit to abolish the parent-child immunity in motor vehicle cases by enacting G.S. 1-539.21, effective 1 October 1975, which provides: "The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent." Obviously, the provisions of this new statute were not available to plaintiff.

For the reasons stated, the order appealed from is

Affirmed.

Judges HEDRICK and CLARK concur.

LEILA ANN GADDY, BY HER GUARDIAN AD LITEM, LINDA GADDY SOX v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

LINDA FAYE RAMSEY, AN INFANT, BY HER GUARDIAN AD LITEM, GRADY RAMSEY v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 7628SC815

(Filed 6 April 1977)

1. **Insurance § 85— "owned" vehicle — transfer of title required**

Under N. C. law an automobile is not "owned" within the meaning of an automobile liability insurance policy until the transferee obtains from the transferor a properly executed certificate assigning and warranting title.

2. **Insurance § 85— non-owned vehicle — inapplicability to regularly used vehicle**

Pursuant to insured's policy with defendant insurance company, all cars which were not owned within the meaning of G.S. 20-72(b) were insured "non-owned" automobiles except those which were furnished for the regular use of insured or his relatives; therefore, a car purchased by insured and his son and used by them, but for which they did not yet have the certificate of title or license tags, was furnished for the regular use of the insured and his son and was therefore not insured under the "non-owned" clause of the insured's policy.

APPEAL by defendant from *H. Martin, Judge.* Judgments entered 4 June 1976 and 12 July 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 March 1977.

These cases arise out of an automobile accident in which Vernon Lee Franklin, a minor, allegedly struck and injured the plaintiffs, Leila Ann Gaddy and Linda Faye Ramsey. Each girl sued Vernon Lee Franklin and his father, Lee B. Franklin, and each recovered a judgment against the defendants. At the time of the accident, Lee B. Franklin owned an automobile liability insurance policy written by State Farm Mutual Automobile Insurance Company (State Farm). However, State Farm

refused to defend the actions against the Franklins, or to pay the judgments, up to the policy limits of $10,000 for each plaintiff, because State Farm decided that Lee B. Franklin's policy did not cover the car which Vernon Lee Franklin was driving. Plaintiffs, therefore, brought these actions against State Farm to enforce their claims. Defendant denied that its policy extended coverage to plaintiffs, because the car driven by Franklin was neither an owned nor a non-owned vehicle as defined in Lee B. Franklin's policy.

The facts relevant to this appeal are as follows: On 2 December 1970, Vernon Lee Franklin and his father, Lee B. Franklin, purchased a 1957 Chevrolet automobile from David Webb Fender (Fender) for $350. Though Fender, an automobile salesman, was the owner of the car, he did not have either the certificate of title or the license tags for the car and was unable to provide these necessary items at the time of sale. Fender, however, did not explain the consequences of these facts to the Franklins, nor did he caution them not to use the car until they obtained the title certificate and license tags.

The Franklins took the car home. (How they did so without the license tags is not revealed in the record.) Three days later, on 5 December 1970, Lee B. Franklin told Vernon Lee Franklin that he could remove the license tags from Lee B. Franklin's Ford automobile, attach them to the 1957 Chevrolet and drive the car. The boy did so. Later that day he struck the two girls.

All parties moved for summary judgment, and from summary judgments in favor of plaintiffs, defendant appeals.

Lentz & Ball, P.A., by E. L. Ball, Jr., for plaintiff appellee Leila Ann Gaddy.

Bruce A. Elmore and George W. Moore, by George W. Moore, for plaintiff appellee Linda Faye Ramsey.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A., by Roy W. Davis, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Lee B. Franklin's insurance policy provides coverage to the "owned" automobile described in the policy, to a newly acquired "owned" automobile for the first thirty days after

acquiring ownership, provided that the new automobile replaces a previous "owned" vehicle, and to any "non-owned" automobiles as defined in the policy. Under North Carolina law, an automobile is not "owned" within the meaning of an automobile liability insurance policy until the transferee obtains from the transferor a properly executed certificate assigning and warranting title. G.S. 20-72(b); *Nationwide Mutual Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970). Because Lee B. Franklin did not have the certificate of title at the time of the accident, clearly, the 1957 Chevrolet was not an "owned" automobile within the terms of the policy. The question of whether or not the State Farm policy covered Vernon Lee Franklin's Chevrolet depends, then, on whether or not the car was a "non-owned" automobile within the meaning of the policy.

[2] The policy says in pertinent part:

> "The following are insureds. . . : (b) With respect to a non-owned automobile; (1) the named insured, (2) any relative, but only with respect to a private, passenger automobile or trailer, provided his actual operation or . . . use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission . . . .
>
> " '*Non-owned automobile*' *means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative,* other than a temporary substitute automobile." (Emphasis added.)

In other words, all cars which are not owned within the meaning of G.S. 20-72(b) are insured "non-owned" automobiles *except* those which are *furnished for the regular use of* the insured or his relative.

State Farm argues that the automobile in question was furnished by Fender, its owner, for the regular use of the Franklins. State Farm cites two North Carolina Court of Appeals cases in support of its position, *Nationwide Mutual Insurance Co. v. Bullock*, 21 N.C. App. 208, 203 S.E. 2d 650 (1974), and *Devine v. The Aetna Casualty & Surety Co.*, 19 N.C. App. 198, 198 S.E. 2d 471 (1973), *cert. den.* 284 N.C. 253, 200 S.E. 2d 653 (1973). *Bullock* is distinguishable. In that case the car owner, an invalid, had an arrangement with a friend whereby

the friend was given custody of the car. The friend regularly used the car for her personal business as well as to carry the invalid owner. This was a permanent arrangement, so the car was unquestionably being furnished for the regular use of the driver. Therefore, when the car was involved in an accident, her insurance policy did not cover the car under its "non-owned" automobile clause.

Devine v. The Aetna Casualty & Surety Co., supra, State Farm's other cited authority, is factually indistinguishable from the case at bar. Briefly stated, that case involved a driver who purchased a car but did not obtain title and license tags. He drove the car and was involved in an accident. This Court held that the car was furnished for regular use and, therefore, not insured under the "non-owned" car clause in the driver's policy.

Lee Franklin and his son had unrestricted use and possession of the Chevrolet car from the time the sales agreement was entered until the accident. They would have retained this unrestricted use and possession until proper registration and insurance were obtained had it not been for the accident. We conclude that the car was "furnished for the regular use of" the insured and his son within the meaning of the policy. Therefore, the car was not insured under the "non-owned" clause of the insured's policy.

Where an insured driver has the unrestricted use and possession of an automobile, the certificate of title for which is retained by another, the car is "furnished for the regular use of" the insured driver, and thus not covered by the "non-owned" clause of the policy. To hold otherwise would require the insurer to assume the risk of providing coverage of a vehicle not contemplated in the contract of insurance. This result is in accord with the purpose of the "non-owned" automobile clause as stated by this Court in *Devine:*

> "The clear import of the provision excluding coverage of another's automobile which is furnished the insured for his 'regular use' is to provide coverage to the insured while engaged in only an infrequent or merely casual use of another's automobile for some quickly achieved purpose but to withhold it where the insured uses the vehicle on a permanent and recurring basis." *Id.* at 206.

Vernon Lee Franklin's use of the car was not casual. He had acquired a car which he meant to use on a permanent basis.

All the evidence indicates that the 1957 Chevrolet in question was neither an "owned" nor a "non-owned" vehicle covered by the policy. The court should have granted summary judgment to defendant, State Farm, in each action. Accordingly, summary judgment for plaintiffs is reversed. This cause is remanded with directions that summary judgment be entered for defendant.

Reversed and remanded.

Chief Judge BROCK and Judge PARKER concur.

IN THE MATTER OF JEFFERY D. KOWALZEK

No. 7611DC791

(Filed 6 April 1977)

1. **Infants § 9— order changing child custody — requirements**

Order of the district court changing the custody of the child in question is fatally defective and must be vacated since no notice was given, there was no showing of changed circumstances or needs of the child, nor did the order contain appropriate findings of fact and conclusions of law. G.S. 7A-285; G.S. 7A-286.

2. **Infants § 9— persons in physical custody of child — custodians**

Appellants who were given physical custody of the child in question, who supported him for many months and expressed their desire to keep him permanently, and who undertook with the court's approval the obligations of parents to the child were clearly custodians of the child and were entitled to rights commonly afforded to parties, including the right to notice, the right to intervene and to present evidence, and the right to contest orders of the court. G.S. 7A-278(7).

3. **Appeal and Error § 7— custodians of child — order changing custody — custodians as aggrieved parties**

Appellants who were custodians of the child in question were aggrieved parties with standing to appeal from the order of the district court, since the order complained of clearly affected substantial rights of appellants in that the child to whom they stood *in loco parentis* would be taken from them by the order.

APPEAL by respondents from *Lyon, Judge.* Order entered 4 August 1976 in District Court, LEE County. Heard in the Court of Appeals 9 March 1977.

This appeal concerns the custody of Jeffery D. Kowalzek, an infant approximately three-and-one-half years old. The facts are undisputed.

Jeffery D. Kowalzek is the son of James Kowalzek and his wife Elizabeth Kowalzek. Jeffery was born 29 October 1973. Slightly more than one year later, Elizabeth left her husband and son. She remained briefly in Lee County, where she applied for public assistance without acknowledging her son, and then traveled to Minnesota, where she remained without attempting either to contact her husband or to see her child. Approximately three months later, on 28 February 1975, James Kowalzek was killed in a traffic accident. One Mrs. Frances Carter, who had begun to take care of the child Jeffery at the time his mother left home, informed the Lee County Department of Social Services (sometimes hereinafter called the Department) about the child's situation. Apparently on the Department's petition, the district court entered an immediate custody order, pursuant to G.S. 7A-284, placing Jeffery Kowalzek in the physical custody of Mrs. Carter. This emergency order was followed by an order of 6 March 1975 placing Jeffery in the custody of the Department, with Mrs. Carter and her sister, Mrs. Frankie Liendo, one of the appellants, retaining physical custody of the child.

On 9 October 1975, a full hearing was held in district court to determine who should have custody of Jeffery Kowalzek. Among those present were Elizabeth Kowalzek, Mrs. Frankie Liendo and her husband Salvador Liendo, Mrs. Frances Carter, several character witnesses and a representative of the Department of Social Services. The court heard evidence and found that when Elizabeth Kowalzek separated herself from her family, she applied for public financial assistance without acknowledging that she had a son. The court found, further, that for more than two months following her husband's death, Mrs. Kowalzek failed to contact the Department concerning her child. In the light of the above, the court found that Elizabeth Kowalzek had "to all intends (sic) and purposes, abandoned and deserted" her child. The court also found that Mrs. Kowalzek's income and family situation were inadequate to support her child.

The court further found, on the other hand, that Salvador and Frankie Liendo were relatively affluent, able to care for the child without assistance, and desirous of obtaining perma-

nent custody of Jeffery. The court concluded that Jeffery Kowalzek's welfare required that he remain in the legal custody of the Lee County Department of Social Services and in the physical custody of Salvador and Frankie Liendo. The order was entered accordingly. Mrs. Kowalzek gave notice of an appeal but never perfected it.

At some later time, apparently in July 1976, the Lee County Department of Social Services filed a motion in the district court asking that the 9 October 1975 order be modified, and that Jeffery Kowalzek be placed in the custody of his mother. No notice of this motion was given to the Liendos. Nor was notice given to the child. No hearing was held, and no evidence was taken except for a copy of a Morrison County, Minnesota, Social Services report which was appended to the motion, and which recommended the change in custody. The record fails to show what information was contained in this report. Based on the motion and the accompanying report, the district court modified its previous order and awarded custody to Elizabeth Kowalzek. Within ten days after the order was modified the Liendos gave written notice of their intention to appeal. The court stayed execution of its order pending this appeal.

A. B. Harrington III for petitioner appellee.

Hoyle & Hoyle, by J. W. Hoyle, for respondent appellants.

ARNOLD, Judge.

[1] Section 7A-286 of the General Statutes of North Carolina establishes the authority of the district court to modify an existing juvenile custody order. The statute provides in part:

> "The court shall have a duty to give each child subject to juvenile jurisdiction such attention and supervision as will achieve the purposes of this Article. Upon motion in the cause or petition, and after notice as provided in this Article, the court may conduct a review hearing to determine whether the order of the court is in the best interest of the child, and the court may modify or vacate the order in light of change in circumstances or needs of the child."

The statute provides that notice be given before there is any modification, and, additionally, that any modification must be made "in light of changes in circumstances or needs of the

child." The record does not show any compliance with either of these provisions. Moreover, the court's order must be in writing and contain "appropriate findings of fact and conclusions of law." G.S. 7A-285. The order from which appellants appeal does not contain findings of fact or conclusions of law pertaining to any change in circumstances underlying the 6 March 1975 custody order. The order is fatally defective and must be vacated.

The Department concedes error but contends that the Liendos do not have standing to appeal. The pertinent statutes are G.S. 1-271 and G.S. 7A-289. According to G.S. 1-271, "Any party aggrieved may appeal in [civil] cases . . . , " and G.S. 7A-289 provides:

> "Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given . . . . "

[2] A "custodian" is defined as "a person or agency that has been awarded legal custody of a child by a court, or a person other than parents or legal guardian who stands *in loco parentis* to a child." G.S. 7A-278(7). Legal custody was placed in the Department of Social Services, but the court's orders of March and October 1975 placed physical custody of the child in the Liendos. Furthermore, the Liendos have supported the child for many months, and expressed their desire to keep him permanently. They have undertaken, with the court's approval, the obligations of parents to Jeffery Kowalzek. They stand *in loco parentis* to him. *Morgan v. Johnson,* 24 N.C. App. 307, 210 S.E. 2d 503 (1974); 3 Lee on Family Law, § 238. By the terms of G.S. 7A-278(7) the Liendos are clearly custodians of Jeffery Kowalzek.

The Liendos are also parties to these proceedings. In the court's order of 9 October 1975 they are explicitly referred to as parties. Moreover, the fact that they were made custodians is some evidence that the Liendos are parties. Custodians are entitled to rights which are commonly afforded to parties: the right to notice, the right to intervene and to present evidence, and the right to contest orders of the court. *See,* G.S. 7A-283, 7A-285 and 7A-289.

[3] We hold that the Liendos are aggrieved parties with standing to appeal. The order complained of clearly affects substantial rights of the parties since the child to whom they stand *in loco parentis* would be taken from them by the order.

Vacated and remanded.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOHN THOMAS FISHER, JR.

No. 763SC798

(Filed 6 April 1977)

1. **Criminal Law § 117— charge on scrutiny of defendant's testimony**

The trial court properly instructed the jury to scrutinize carefully defendant's testimony in light of his interest in the outcome of the case where the court further instructed that if the jury believed defendant, it should give his testimony the same weight as that of any disinterested witness.

2. **Constitutional Law § 33; Criminal Law §§ 48, 89— rape — failure to mention affair with prosecutrix — impeachment — right to silence**

In this prosecution for rape, an officer's testimony that defendant did not mention an alleged affair with the prosecutrix was admissible to impeach defendant's in-court testimony that he had had an affair with the prosecutrix and did not violate defendant's Fifth Amendment right to remain silent.

APPEAL by defendant from *Friday, Judge.* Judgment entered 30 April 1976. Heard in the Court of Appeals 10 March 1977.

Defendant was indicted for first-degree rape, convicted by a jury of second-degree rape, and sentenced to 50 to 70 years.

State's evidence tended to show that the prosecuting witness, a 56 year old woman, worked for a real estate broker renting apartments and houses and collecting rentals; that she rented an apartment to defendant in the summer of 1975; that defendant was slow in paying his rent and she had to call him repeatedly in order to collect; that on 14 August 1975 she went to defendant's apartment around 6:00 p.m. to collect the rent; that defendant asked her to come in and help him find

a leak in the bathroom plumbing; that she entered the bathroom and was looking for the leak when defendant struck her with his fists knocked her to the floor, grabbed her, and tried to drown her in a bathtub of water; that a knife fell from defendant's pants during the struggle; that she grabbed the knife and attempted to stab the defendant but defendant took it away; that defendant accused her of charging too much rent; that defendant locked the door to the apartment; that the prosecuting witness tried to talk and reason with defendant; that she ran to the door and attempted to escape but defendant grabbed her and a struggle ensued; that defendant told her to take her clothes off or he would kill her; that while defendant was holding the knife she took her clothes off; that defendant raped her; that she was cut at some point during the attack and after being raped she told defendant that she had to go to the hospital; that defendant drove her to the hospital after ordering her that she should claim to have been injured during a fall; that she tried to get help from a man that came up to her while she was getting in the car but he did not understand; that she called her daughter and husband from the hospital but did not try to contact the police because defendant was still beside her in the phone booth with the knife; that after her daughter arrived she was able to convince defendant that he had to leave and gave him $5.00 for a cab; that she then told of the rape and was examined; and that the examination revealed the presence of sperm in her vagina.

Defendant's evidence tended to show that the prosecuting witness initiated the sexual relationship between them as soon as he moved in; that she promised him a lower rent in return for sex; that on 14 August she came to his apartment and told him that two white men had just assaulted her; that she came in the apartment and they had sex; and that he then took her to the hospital.

In rebuttal, State called Officer Rodgers. Rodgers testified that he had interviewed defendant after his arrest and that defendant never claimed to have been having an affair with the prosecuting witness.

Defendant appealed.

Attorney General Edmisten, by Associate Attorney Jo Anne Sanford Routh.

Beaman, Kellum, Mills & Kafer, P.A., by James C. Mills, for the defendant.

MARTIN, Judge.

[1] The defendant first contends that the trial court erred in instructing the jury to consider defendant's testimony in light of his interest in the outcome. He argues that such an instruction constitutes an expression of opinion as to defendant's credibility in violation of G.S. 1-180. The challenged portion of the charge is as follows:

> "Now, ladies and gentlemen of the jury, the Court instructs you that when a defendant in a criminal action takes the witness stand as a witness in his own behalf that you, the jury, should scrutinize, that is you should look over carefully his testimony in the light of his interest in the outcome of this case here. Now, the Court further instructs you, ladies and gentlemen of the jury, that if after scrutiny of his evidence you believe the witness, then you will give his testimony the same weight as that of any other disinterested witness in the trial of this case."

It is well settled that an instruction to scrutinize a defendant's testimony, with *further* instructions that if the jury should believe him worthy of belief it should give his testimony as full credit as that of any other witness, is without prejudicial error. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). The court's instructions were a correct statement of the law and it was proper to give such instructions in a criminal case. This assignment of error is overruled.

[2] Finally, the defendant contends the court violated his Fifth Amendment right to remain silent by impressing the jury with that part of the State's evidence which revealed that the defendant failed to mention the alleged affair with the prosecuting witness at the time he was arrested by the police. In summarizing the rebuttal evidence, the judge instructed the jury that Officer Rodgers had been recalled by the State and that he had "said that the defendant did not mention any affair." We note that defendant not only failed to make any objection to

this recapitulation of the evidence but he also failed to object to the original admission of this evidence at trial.

The defendant cites the case of *Doyle v. Ohio,* 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976). In that case, the petitioners were given warnings in line with *Miranda v. Arizona* after their arrest, but remained silent. During the course of their separate trials each gave an exculpatory story that had not been previously told to the police or to the prosecutor. Over their counsel's objection, they were each cross-examined about their failure to tell the exculpatory story at the time of their arrest. The Supreme Court held that a prosecutor's impeachment of a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest violated the Due Process Clause of the Fourteenth Amendment. The Court reasoned that post-arrest silence following such warnings is insolubly ambiguous and that it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured, by the Miranda warning, that silence would carry no penalty.

We find the case at bar distinguishable from *Doyle v. Ohio, supra.* This case does not present a situation in which a defendant's exercise of his right to remain silent is used against him. Here, the defendant testified that he and the prosecuting witness had been having an affair. In rebuttal, without objection by defendant, Officer Rodgers was permitted to testify that during his investigation he had talked with the defendant on two occasions; that the defendant did not tell him that he was having an affair with the prosecuting witness; and that he did not mention that he had had sexual relations with her. The defendant's statement to Officer Windham, in contrast thereto, was to the effect that the prosecuting witness came up the steps of his apartment; that she looked as though she had been injured; that she said she had had a fight with two tenants; and that she asked him to take her to the hospital. There is no evidence that the defendant mentioned an affair to Officer Windham.

Our Supreme Court has followed other jurisdictions in holding that:

> "' . . . [I]f [a] former statement fails to mention a material circumstance presently testified to, which it would

have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent,' [citation omitted], and is termed an *indirect inconsistency.*" (Citations omitted.) *State v. Mack,* 282 N.C. 334, 340, 193 S.E. 2d 71, 75 (1972).

Moreover, our courts have also made it clear that prior inconsistent statements are admissible for the purpose of impeachment. *State v. Mack, supra; State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971). Accordingly, if the defendant in this case had a prior conversation with Officer Rodgers and, at that time, *failed* to mention a material circumstance later testified to at trial, then the prior statement was properly admitted for impeachment purposes.

Applying the foregoing principles, we conclude that the defendant's in-court testimony that he had had an affair with the prosecuting witness was inconsistent with his earlier *failure* to so state at the time he talked with Officer Rodgers. Therefore, his failure to tell the officer of the affair when it was natural to do so was indirectly inconsistent with his in-court testimony concerning such a relationship. Hence, evidence of such failure was admissible to impeach his in-court testimony and the trial court did not err in recounting it.

The defendant received a fair trial free of prejudicial error.

Judges MORRIS and VAUGHN concur.

HUBERT McGEE v. MILDRED McGEE; DELORES McGEE DOWLESS AND HUSBAND, ROGER DOWLESS; REBECCA McGEE THOMPSON AND HUSBAND, EDWARD THOMPSON; IVEY W. McGEE, JR., AND JANICE L. McGEE

No. 765SC804

(Filed 6 April 1977)

Easements § 3— easement by implication — roadway to land

The trial court's determination that plaintiff acquired an easement by implication in a road across defendants' land was supported by evidence tending to show that there was a separation of title, that the road has been existence for more than 60 years and has been used during that time for ingress to and egress from plaintiff's tract,

that the easement is necessary to the full and fair enjoyment of plaintiff's land, and that a second route to plaintiff's land is unsuitable and plaintiff would be required to tear down a building in order to widen it and make it suitable for use.

APPEAL by defendants from *P. Martin, Judge.* Judgment entered 19 March 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 March 1977.

Plaintiff acquired his land from defendants' predecessor in title and alleges in his complaint that he acquired an easement across defendants' property by operation of the rule of law creating an appurtenant easement by implication. Plaintiff sued for an injunction opening the road in question, a judgment making his easement a matter of record, and for damages. The case was tried before the court sitting without a jury.

Both parties introduced evidence, which, in summary, is as follows:

The road in question was originally a crooked, rutted, dirt cart path, sometimes as much as twenty feet wide but much narrower in some places. It ran south from the Parmele Road for a distance of more than 620 feet. The road has been in existence more than sixty years, and at one time there were two or three houses on it. These houses were abandoned, however, and they fell down and disappeared. The road crossed two tracts of land, one being immediately north of the other, and both tracts apparently were undeveloped and wooded sixty years ago. Since that time the road has been used by persons to reach the houses along it, and to gain access to the southern tract in order to hunt, farm cotton, cut wood, and tend hogs which were kept in the woods.

At some unknown time Ivey McGee acquired title to this land, which included both tracts. While Ivey McGee owned the land, he and his family, including plaintiff, Ivey's brother, used the road to cross the northern tract to reach the southern tract, and also to reach other land owned by plaintiff which was contiguous to the southern tract. Evidence does not show exactly how often the road was used, but it was used often enough that it did not vanish.

In 1963, Ivey McGee conveyed the southern tract of land to his brother, Hubert, the plaintiff. Almost immediately the two brothers began improving the road, widening and straight-

ening it, and resurfacing the road with marl. In 1967, plaintiff opened a trailer park on the southern tract of land, and he used the road as the principal access to the park. Plaintiff had an alternate route across his land which lies to the west of the trailer park, but this alternate route was too narrow for the mobile homes. Three times plaintiff attempted to move trailers over this alternate route, and twice he damaged them. In order to widen the alternate road plaintiff would have to cut down a tree, move utility poles and knock down the walls of a commercial garage and another building.

Ivey McGee died in 1973, and in 1974 defendants, his heirs, barred the road leading across their land to the trailer park because the heavy traffic to the trailer park was incompatible with defendants' intended use of their land.

The court adjudged plaintiff to be the owner of an easement by implication in the roadway. Defendants appeal.

Crossley & Johnson, by John F. Crossley, for plaintiff appellee.

Larrick & Tucker, by James K. Larrick, for defendant appellants.

ARNOLD, Judge.

In *Dorman v. Wayah Valley Ranch, Inc.*, 6 N.C. App. 497, 170 S.E. 2d 509 (1969), this Court reiterated the three requirements of an easement by implication: (1) title shall have been separated between two tracts, one dominant and one servient; (2) before the separation took place, the use which gave rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. Also, *see* Webster, Real Estate Law in North Carolina, § 282 (1971).

With regard to the third requirement that the easement be "necessary" to the beneficial enjoyment of the land granted, an easement implied upon severance of title is necessary if it is reasonably necessary to the full and fair use of the property. It need not be absolutely necessary. *Smith v. Moore*, 254 N.C. 186, 118 S.E. 2d 436 (1961).

Defendants concede that there was a separation of title. However, they contend that there was no evidence to show (1)

that any use of the roadway prior to the separation was so long continued or manifest as to show that it was meant to be permanent, and (2) that the roadway is necessary to the beneficial enjoyment of plaintiff's land. We disagree. There is clearly evidence to support the judge's findings that the road has existed for sixty or more years, and that the existence of the road for ingress and egress to plaintiff's property was so manifest that it was meant to be "a permanent easement and an appurtenance to the land conveyed . . . to plaintiff."

There is also evidence to support the finding that the easement, or the road, was reasonably necessary to the full and fair enjoyment of the land. An easement is reasonably necessary if it is so necessary to the full and fair enjoyment of the property that it appears that the grantor intended that the grantee have the easement. *Smith v. Moore, supra; Potter v. Potter,* 251 N.C. 760, 112 S.E. 2d 569 (1960). The presence of a second or alternate way onto the property is not conclusive proof that an implied easement is unnecessary. *Smith v. Moore, supra.* Where, as here, the second route is totally unsuitable, the easement is reasonably necessary. It is not reasonable to require plaintiff to tear down a building in order to make the alternate route suitable.

The findings of fact by the trial court are supported by competent evidence and the judgment is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CARROLL LENLEY HALES

No. 762SC786

(Filed 6 April 1977)

1. Larceny § 5— possession of recently stolen property — burden of going forward with evidence on defendant — no error

Mullaney v. Wilbur, 421 U.S. 684, holding that the State has the burden of proving every element of a crime and the State cannot shift this burden of proof to defendant does not affect the doctrine of possession of recently stolen property, since that doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence.

2. **Burglary and Unlawful Breakings § 5; Larceny § 7— possession of recently stolen property — sufficiency of evidence**

In a prosecution for breaking and entering and larceny, evidence was sufficient to be submitted to the jury where it tended to show that the exact quantities, brands and sizes of seed corn and herbicide which were stolen were found in defendant's barn the next day following the break-in.

APPEAL by defendant from *Albright, Judge.* Judgment entered 1 July 1976 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 9 March 1977.

Defendant was indicted for (1) felonious breaking and entering with intent to commit larceny and (2) felonious larceny. He was convicted of both and sentenced to serve not less than six years nor more than eight years. He appealed.

Evidence against defendant showed that thirty bags of seed corn and fourteen five-gallon cans of herbicide were stolen from the Kerr-McGee Farm Center warehouse in Pantego, North Carolina, sometime during the night of 20 March 1976. Four different varieties of corn and one kind of herbicide were stolen. According to the evidence, the corn comprised fifteen bags of Pioneer, lot number 2860A, size flat 12; eleven bags of Funk's, lot number G4611, size round 12; two bags of Pioneer, lot number 3368, size flat 14B and two bags of Pioneer, size flat 12 (lot number not in the record). The herbicide bore the brand and lot number LASSO, MOL1028B. There was evidence that other agricultural supply stores in the area were likely to have had seed corn bearing these lot numbers and all Kerr-McGee stores in the area had this herbicide in stock.

The evidence at the trial further tended to show that on 22 March 1976, police officers, armed with a warrant, searched defendant's tobacco barns for the stolen goods. The officers found exactly thirty bags of corn and fourteen cans of herbicide together in a locked barn. The State introduced these bags of corn and cans of herbicide into evidence, and the State's chief witness, an employee of the Kerr-McGee store, identified the goods, saying that the lot numbers on the goods in evidence corresponded exactly to the numbers on the stolen goods. On cross-examination the witness said, "Other people do carry those same type (sic) of stuff. No sir, I don't have any actually really and truly foolproof means of identifying the seed corn . . . . As to there being no really foolproof way of identifying the

LASSO [herbicide], . . . it could have been bought from one of our dealers."

Some of defendant's evidence tended to establish an alibi for the night in question. Other evidence tended to show that a friend placed the goods in defendant's barn without his knowledge. When the friend told the defendant about the goods, defendant allegedly ordered him to remove them.

Attorney General Edmisten, by Special Deputy Attorney General, John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.

LeRoy Scott for defendant appellant.

ARNOLD, Judge.

[1] The court instructed the jury properly on the doctrine of possession of recently stolen goods, but defendant challenges the instruction on the ground that the doctrine is unconstitutional in light of the United States Supreme Court decision of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). *Mullaney* holds that the State has the burden of proving every element of a crime and that the State cannot shift this burden of proof to the defendant. *Mullaney* is inapposite to the case at bar, because the so-called recent possession doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury *to infer* that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by *Mullaney. State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

[2] Defendant next argues that the court should have granted his motions for nonsuit and judgment *non obstante veredicto*, because the State failed to prove that the seed corn and herbicide found in his barn were those that were stolen from Kerr-McGee. Defendant relies on *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966), and *State v. Evans*, 1 N.C. App. 603, 162 S.E. 2d 97 (1968). In *Foster*, the defendant was shown to possess a stolen battery charger and six automobile tires identical in size, brand and tread design to six tires which were known to

have been stolen along with the battery charger. Our Supreme Court held that the tires were not identified well enough to prove that they were the stolen tires. Defendant's conviction for theft of the tires was reversed. *Evans* followed *Foster*. There the State proved that the defendant had in his possession a quantity of cigarettes, beer, chewing gum, pickles and pigs feet which was similar to a quantity of items stolen from a tavern. The owner of the stolen merchandise was unable to identify the property in the defendant's possession. This Court held that there was insufficient evidence to prove that the goods in the defendant's possession were, in fact, the stolen goods.

On a motion for nonsuit or judgment n.o.v., the evidence is considered in the light most favorable to the State. The motion must be denied where there is sufficient evidence that the offense charged was committed and that the defendant committed it. *State v. Stokesberry,* 28 N.C. App. 96, 220 S.E. 2d 214 (1975). Nonsuit is correctly denied in a larceny case where the State relies on the doctrine of possession of recently stolen goods and presents evidence of possession of the stolen goods by defendant soon after the theft. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972). The State's evidence indicated that the exact quantities, brands and sizes of seed corn and herbicide which were stolen were found in defendant's barn the next day following the break-in.

This is not a case of just six tires, or a case of unknown quantities of goods such as beer and cigarettes. Here, the exact quantities, brands and sizes of the stolen seed corn and herbicide were found in defendant's possession. A great many variables coincided perfectly. It is a reasonable and logical inference that the goods discovered in defendant's possession were the stolen goods. Defendant's motions were properly denied.

Defendant's remaining assignments of error have been considered and there is found

No error.

Chief Judge BROCK and Judge PARKER concur.

THE BILTMORE COMPANY v. HERBERT C. HAWTHORNE, F. ROCKWELL POISSON, RUSSELL E. DAVENPORT, WADE H. HARGROVE, OREN J. HEFFNER, B. F. NESBITT, VILA M. ROSENFELD, DAVID A. SMITH, DANYA YON AND WILLIAM E. YOUNTS, JR.

No. 7628SC811

(Filed 6 April 1977)

Agriculture § 16— price of reconstituted buttermilk — action against members of Milk Commission — exhaustion of administrative remedies — real parties in interest

A milk distributor's action against individual members of the N. C. Milk Commission seeking a declaratory judgment of the validity of action by the executive director of the Milk Commission requiring plaintiff to account and make payment to its producers for reconstituted buttermilk at the Class I price in accordance with a Milk Marketing Order classifying reconstituted buttermilk as Class I milk is dismissed for failure of plaintiff to exhaust its administrative remedies and for failure to bring the action against the real parties in interest.

APPEAL by plaintiff from *Ervin, Judge.* Order entered 23 September 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 March 1977.

Plaintiff is engaged in the business of processing and distributing milk and milk products.

Defendants are the members of the North Carolina Milk Commission, a state agency created by Article 28B, Chapter 106 of the General Statutes.

In part, the complaint is as follows:

"STANDING

3. Plaintiff brings this action pursuant to the provisions of the North Carolina Declaratory Judgment Act, North Carolina General Statute § 1-253 et seq., and Rule 57 of the North Carolina Rules of Civil Procedure against the defendants in their capacity as members of the North Carolina Milk Commission to obtain a declaration by the Court as to the validity and constitutionality of a regulation of said Commission, to wit: Section IV A(1) of Milk Marketing Order Number Two, as the same is interpreted and applied by said Commission to the classification of plain-

tiff's production and distribution of reconstituted or recombined milk.

4. Defendants are not immune from this suit under the doctrine of sovereign immunity as plaintiff seeks herein to have said regulation, as so interpreted and applied by defendants, declared to be in excess of defendants' statutory authority and contrary to the Constitutions of the United States and North Carolina.

CONTROVERSY

5. Defendants are, by virtue of North Carolina General Statute § 106-266.8(10), vested with the power to fix prices to be paid milk producers by distributors and to fix different prices for different grade or classes of milk.

6. Defendants or their predecessors have enacted, and defendants are maintaining in force, a regulation known as Milk Marketing Order Number Two, Section IV of which provides in pertinent part as follows:

'A. MILK CLASSIFICATION

1. Class I shall include the product weight of all fluid milk, fluid milk products, (including products sweetened or flavored), all skim milk and butterfat which is sold or disposed of for consumption or use as processed fluid milk products under any trade name (regardless of grade), except milk shake mix, heavy cream, medium cream, half and half, ½ oz. coffee creamers, egg nog, and any other cream items which are classified in a lower class and military sales approved for Class 1A.

Class I includes, but is not limited to, the following type milk products:

Pasteurized milk, homogenized milk, raw milk, whole lactic milk, buttermilk, plain and flake buttermilk, skim milk, fortified skim milk with added solids, chocolate or flavored milks or milk drinks, dietary modified milk, sterile milk, reconstituted milk and concentrated milk.

Class I shall also include any volume of fluid loss or shrinkage in excess of three percent (3%) of

each month's reconciliation as computed in accordance with Section IV-D-5 of Milk Marketing Order Number Two. Any excessive loss computed which is to be paid as Class I to producers shall be paid in the producer payroll for the month following the month in which such loss occurred.

All fluid milk sold to military installations shall be classified as Class I except for such classifications and class prices for specified periods as may be approved by the Milk Commission.

IA. Class IA shall include:

All bulk milk sold to other distributors or transferred between branches or plants of the same company for fluid use as defined in paragraph A-1 of this Section including transfers for military usage for which a different producer price may apply. Also, Class IA shall include the sales of milk made directly to military installations for which a producer price different from the Class I price may apply.

2. Class II may include:

All milk received and not accounted for in Class I and Class IA, including plant loss or shrinkage volume not in excess of three percent (3%) of the total weight to account for as determined by the provisions of Section IV-D-5(a).'

7. The prevailing price as established by defendants to be paid producers by distributors for Class I utilization milk is $11.12 per hundredweight and the prevailing price for Class II utilization milk is $8.36 per hundredweight. During March, 1976 said Class I price was $11.12 per hundredweight and said Class II price was $8.62 per hundredweight.

8. During the month of March, 1976, plaintiff manufactured and sold or disposed of for consumption or use within this State as a processed fluid milk product 10,010 pounds of reconstituted buttermilk which consisted of 8,964 pounds of water, 86 pounds of culture together with 960 pounds of a product known as Grade A low heat spray

non-fat dry milk solids, hereinafter referred to as 'milk powder.'

9. Said milk powder had theretofore been purchased by plaintiff in interstate commerce from Clofine Dairy Products, Incorporated of Linwood, New Jersey, having been produced in the states of Maryland and Virginia and manufactured in the State of Maryland.

10. In making payment to its base-holding producers for the month of March 1976, plaintiff accounted for said reconstituted buttermilk as Class II utilization milk and made payment to its base-holding producers accordingly.

11. Plaintiff has refused to account and make payment to its base-holding producers at the Class I price for said product and defendants, by and through their Executive Secretary, Grady Cooper, Jr., have, by letter to plaintiff dated June 18, 1976, directed plaintiff to account and make payment to its base-holding producers for said product at the Class I price therefor.

12. Plaintiff intends to continue the manufacture of recombined buttermilk as above-described and likewise intends to commence the manufacture of recombined low-fat milk under a similar process utilizing milk powder to be purchased by plaintiff in interstate commerce from sources outside the State of North Carolina. Upon the sale or disposition of such products by plaintiff for consumption or use as processed fluid milk products, plaintiff intends to classify the same as Class II products for purposes of accounting and making payment to its base-holding producers and intends to refuse to pay Class I prices therefor.

13. As a result of the foregoing, there exists a genuine controversy between plaintiff and defendants as to plaintiff's legal rights arising from North Carolina General Statute § 106-266.8(10), Section IV A(1) of Milk Marketing Order Number Two and the Constitutions of the United States and the State of North Carolina and plaintiff and defendants have adverse interests in such controversy.

VIOLATIONS

14. By directing and requiring plaintiff to account and make payment to its base-holding producers for such reconstituted product at the Class I price, defendants were and are acting in excess of their statutory authority as granted and conferred by North Carolina General Statute § 106-266.8(10).

15. By directing and requiring plaintiff to account and make payment to its base-holding producers for such reconstituted product at the Class I price, defendants were and are acting contrary to their own regulation fixing prices to be paid milk producers by distributors and fixing different prices for different grades or classes of milk, to wit: Section IV A(1) of Milk Marketing Order Number Two.

16. By directing and requiring plaintiff to account and make payment to its base-holding producers for such reconstituted product at the Class I price, defendants were and are acting contrary to Article I, § 19 of the Constitution of North Carolina, to Article I, Section 8 of the Constitution of North Carolina, to Article I, Section 8 of the United States Constitution and to the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, plaintiff prays that the Court determine the rights of the parties as respects defendants' interpretation and application of Section IV A(1) of Milk Marketing Order Number Two; declare that plaintiff is not required to account and make payment to its base-holding producers for such reconstituted products as Class I prices; tax the costs against defendants and afford plaintiff such other and further relief to which it may be entitled."

Defendants' motion to dismiss was heard by Judge Ervin who entered an order of dismissal, in pertinent part, as follows:

". . . [A]nd it appearing to the Court that the individual defendants are not the real party in interest, that plaintiff has not sought relief in accordance with the North Carolina Administrative Procedure Act, and that Buncombe County Superior Court is without jurisdiction to hear the matter; and it appearing to the Court that the motion should be allowed. . . ."

From the entry of that order, defendants appealed.

Adams, Hendon & Carson, P.A., by George Ward Hendon and George Saenger, for plaintiff appellant.

Harris, Poe, Cheshire & Leager, by W. C. Harris, Jr., for defendant appellees.

VAUGHN, Judge.

We have concluded that plaintiff should have exhausted the administrative remedies available to it instead of instituting this suit against the individuals named in the complaint. The Milk Marketing Order set out in the complaint was adopted and has been in effect since 1 October 1967. It seems to us that plaintiff's attack is really directed at the interpretation of the order by the executive director of the North Carolina Milk Commission, (an entity not even a party to the lawsuit) as it relates to a particular product distributed by plaintiff. Defendants, as individuals, have no authority over the executive director and have threatened no action against plaintiff. As individuals, they cannot do so. Neither has the North Carolina Milk Commission taken action against plaintiff as result of the letter issued by the executive director.

We conclude that Judge Ervin's order dismissing the action was proper and it is, therefore, affirmed.

Affirmed.

Judges MORRIS and MARTIN concur.

TEXACO, INC. v. WILLIAM B. BROWN, SHERMAN KENNEDY, AND BILL CLEVE

No. 763SC708

(Filed 6 April 1977)

Compromise and Settlement § 1— settlement agreement — claim of fraud in original contract

A settlement agreement executed by defendants at a time when they had full knowledge of all the material facts barred defendants' right to recover on claims based on alleged fraud by plaintiff in the procurement of the original contracts between the parties.

APPEAL by defendants from *Long, Judge.* Order entered 1 April 1976 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 February 1977.

Plaintiff brings this action to recover from the defendants an amount due by Fabulous Foods Corporation. Defendants are guarantors of payment of Fabulous Foods' obligations.

Plaintiff entered into a series of lease agreements with Fabulous Foods. Defendants, Brown, Kennedy and Cleve were owners and operators of Fabulous Foods. On 13 July 1971, defendants executed unconditional guaranties of the payment of all obligations due by Fabulous Foods to plaintiff. Fabulous Foods became delinquent and defendants were notified of the default. On the 27th day of July, 1973, plaintiff, the defendants and Fabulous Foods Corporation entered into a settlement agreement. Under the terms of this agreement, Fabulous Foods agreed to reimburse the plaintiff for rental deficiencies resulting under the terms of the settlement agreement. Defendants, Brown, Kennedy and Cleve, joined in the same settlement agreement unconditionally guaranteeing to plaintiff the payment of the obligations of Fabulous Foods and reaffirming their unconditional guaranties of 13 July 1971. According to the terms of the settlement agreement the rental deficiencies, for the period 1 January 1973 through 31 December 1973, owed plaintiff by Fabulous Foods is $27,590.50. Demand has been made for this amount upon Fabulous Foods and defendants but payment has not been made. According to the terms of the settlement agreement, defendants Brown and Kennedy jointly and severally guaranteed all of the obligations of Fabulous Foods to plaintiff and defendant Cleve guaranteed one-third of the total. The settlement agreement was made a part of the complaint.

The defendants answered and counterclaimed. They alleged and attempted to prove the following: Plaintiff is estopped from asserting the validity of any written instruments executed by defendants with plaintiff because the documents were executed in reliance on the false and fraudulent representations of plaintiff's agent, Robert L. Andrews. Plaintiff had been exposed to financial liability and debts of other corporations as a result of guaranties plaintiff had made on behalf of these corporations and that plaintiff sought, through a fraudulent scheme, to transfer its contingent liability to defendants. Plaintiff's agent, An-

drews, contacted defendants and urged the defendants to purchase a bankrupt corporation known as Satellite 3-N-1 Corporation. That corporation was indebted to Mercantile Financial Corporation of Chicago, Illinois, and payment of that debt (approximately $120,000.00) had been guaranteed by plaintiff. At plaintiff's agent's urging, defendants bought Satellite and, in return, plaintiff guaranteed that it would assist defendants in getting loans sufficient to allow them to operate restaurants then owned by Satellite as well as securing loans to build new restaurants. Plaintiff realized that defendants' acquisition and operation of additional restaurants were essential to the profitable operation of Satellite. In exchange for the plaintiff's guaranty, defendants would be required to pay the indebtedness of Satellite to Mercantile. Plaintiff's agent also guaranteed defendants certain restaurant sites on interstate highways throughout the eastern United States and that plaintiff would, through long-term ground leases with defendants, guarantee defendants' ability to secure financial strength with which to build the proposed additional restaurants. Based upon the representations of plaintiff's agent, defendants borrowed approximately $200,000.00 to pay Satellite's indebtedness to Mercantile and to revamp and operate the newly acquired restaurants. Defendants were relying on plaintiff's false representations that plaintiff would provide Fabulous Foods with long-term leases that would enable defendants to secure sufficient financing for the necessary expansion and successful operation of Fabulous Foods' restaurants. Plaintiff failed to enter into any such lease agreements, and defendants were damaged in the amount of $350,000.00.

Plaintiff moved for a summary judgment, and in support of its motion, it submitted defendants' depositions along with the deposition of Robert L. Andrews in which he stated that he never promised defendants that plaintiff would enter into a long-term lease agreement with them.

The court granted a summary judgment for the plaintiff on defendants' counterclaim, but not on plaintiff's claim for relief. From this partial summary judgment, defendants appealed.

Beaman, Kellum, Mills and Kafer, P.A., by James C. Mills, for plaintiff appellee.

James, Hite, Cavendish and Blount, by Marvin Blount, Jr., for defendant appellants.

VAUGHN, Judge.

The essence of this case may be stated as follows: Defendants allege that plaintiff obtained defendants' obligations on the original agreements by fraudulent representations. (We assume, without so deciding, that defendants have properly pleaded fraud with respect to the original contracts.) Plaintiff denies that there was any fraud in connection with those agreements. Absent the settlement agreement, defendants would have been at liberty to defend, on the grounds of fraud, any action brought by plaintiff and to assert their claim for damages resulting from plaintiff's fraud. Plaintiff would have had the opportunity to refute those allegations. The parties did not elect to litigate. Instead, with full knowledge of all material facts, the parties elected to compromise. The "Settlement Agreement" was executed on 27 July 1973. It made specific reference to each of the earlier agreements entered into by the parties. The agreement continued:

> ". . . WHEREAS, the parties hereto desire to reach a mutually satisfactory and beneficial settlement of all their mutual rights and obligations,
>
> NOW, THEREFORE, in consideration of the mutual promises, covenants, and conditions set forth herein, and for other good and valuable consideration, the parties agree as follows. . . ."

The foregoing declaration of the intentions of the parties was followed by a detailed recital of the new rights to obligations of the parties arising from the "Settlement Agreement."

Defendants, well before they executed the settlement agreement, had knowledge of all matters they now assert in their effort to avoid their obligations arising from the settlement agreement. An essential element of actionable fraud is, therefore, missing. That element is that a party to whom the alleged false and fraudulent representation is made must reasonably rely thereon and be deceived to his injury. *Products Corporation v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587. Defendants do not even allege that at the time they executed the settlement agreement, they were relying on false representations of defendants as an inducement to execute the agreement.

The settlement agreement, executed for the parties' stated purpose of bringing about "a mutually satisfactory and bene-

ficial settlement of all their mutual rights and obligations," bars any right to recover on any claims arising out of the antecedent contracts. The judgment is affirmed.

Affirmed.

Judges HEDRICK and CLARK concur.

IN RE: LAST WILL AND TESTAMENT OF J. B. TAYLOR, DECEASED

No. 7615SC795

(Filed 6 April 1977)

Executors and Administrators § 5— administrator c.t.a. — removal by clerk improper

Findings of fact by the superior court clerk were insufficient to support his conclusions that respondent acted in bad faith in carrying out his fiduciary duties as administrator, c.t.a., that he was guilty of misconduct in the execution of his office, and that he had a private interest that might hinder or be adverse to a proper administration of the estate.

APPEAL by petitioner from *McLelland, Judge.* Judgment entered 17 June 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 10 March 1977.

On 11 March 1976 Mary Taylor, widow of J. B. Taylor, filed a petition to have D. Wayne Taylor removed as administrator c.t.a. of the estate of J. B. Taylor. After a hearing the Clerk of Superior Court made the following pertinent findings of fact:

"4. That the Honorable Thomas D. Cooper, Jr. wrote a letter to Lucius M. Cheshire, dated February 3, 1976; that said letter was introduced into evidence without objection.

"5. That the aforesaid letter asserted that the widow, Mary R. Taylor, had supplied to the administrator a list of certain items of personal property at the J. B. Taylor home and that the list had not included many items; that among said items the letter set forth a breakfront secretary, ham-

mers, axes, and numerous other items as will be reflected by said letter.

"6. That D. Wayne Taylor, Administrator C.T.A., conferred with his attorney, Mr. Thomas D. Cooper, Jr., prior to the date of said letter and that said letter was written as a result of said conference.

"7. That D. Wayne Taylor, Administrator C.T.A., testified that he had been in the J. B. Taylor's homeplace on frequent occasions before the said J. B. Taylor's death and could not remember whether he had seen the breakfront secretary referred to in the February 3rd letter at the time of Mr. Taylor's death within six months prior to J. B. Taylor's death, or within one year prior to J. B. Taylor's death.

"8. That the February 3rd letter stated that the administrator would be required by law to charge Mary R. Taylor with waste for 'her refusal to allow some of the land to be rented.' That all of the evidence was to the effect that the only refusal on anyone's part to allow the rental of any of the J. B. Taylor farm or the allotments thereon was the refusal of D. Wayne Taylor, Administrator C.T.A., to allow the tobacco allotment to be rented for the crop year immediately after the death of J. B. Taylor and that the crop allotments have not been rented since said refusal by the Administrator, C.T.A.

"9. That the letter of February 3, 1976, stated that rent would be chargeable to Mary R. Taylor for her use of the land and house.

"10. That the letter further stated that 'we would contend that ALL eating utensils, including pots and pans and cutlery belonged to the estate.'

"11. That during the course of the inquiry conducted by the Court to determine what responsibility the Administrator C.T.A. had for the assertions contained in the letter of February 3, 1976, the Administrator C.T.A., through his counsel, pleaded the lawyer-client privilege and refused to answer questions directed toward discovering the extent, if any, the Administrator C.T.A. was responsible for the assertions contained in said letter.

"12. That the petitioner, Mary R. Taylor, and the Administrator C.T.A., D. Wayne Taylor, are tenants in common

of certain lands which belonged to J. B. Taylor, deceased, at the time of his death which had vested in said parties as the result of the death of J. B. Taylor, which lands are subject to a lien for such debts of the estate of J. B. Taylor, as the personalty of said estate is insufficient to pay, and that there are insufficient personal assets with which to pay the debts of the estate."

The clerk made the following conclusions of law:

"1. That there is evidence of bad faith on the part of the Administrator C.T.A. in carrying out his fiduciary duties.

"2. That the said D. Wayne Taylor, Administrator C.T.A. has been guilty of misconduct in the execution of his office other than acts specified in G.S. 28(a)-9-2.

"3. That D. Wayne Taylor, Administrator C.T.A., has a private interest that might tend to hinder or be adverse to a fair and proper administration of the estate."

From an order of the clerk removing him as administrator c.t.a., respondent appealed to the superior court. After reviewing the record the superior court judge concluded "[A]s a matter of law that the Findings of Fact, of the Clerk did not support his Conclusions of Law and that the action of the Clerk in removing the Administrator C.T.A. based thereon was error."

From the order of the court reversing the order of the clerk removing respondent as administrator c.t.a. and directing the clerk to issue such process as is necessary to compel the disclosure by petitioner to the administrator c.t.a. of information sufficient to compile an accurate inventory of the personal property of the deceased, petitioner appealed.

Graham, Manning, Cheshire & Jackson by Lucius M. Cheshire for petitioner appellant.

Latham, Wood and Cooper by Thomas D. Cooper, Jr., and B. T. Wood for respondent appellee.

HEDRICK, Judge.

G.S. 28A-9-1(a) (3) and (4) provide:

"*Revocation after hearing.*—(a) Grounds.—Letters testamentary, letters of administration, or letters of collection

may be revoked after hearing on any of the following grounds:

(3) The person to whom they were issued has violated a fiduciary duty through default or misconduct in the execution of his office, other than acts specified in G.S. 28A-9-2.

(4) The person to whom they were issued has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration. The relationship upon which the appointment was predicated shall not, in and of itself, constitute such an interest."

Petitioner's three assignments of error present the single question of whether the findings of fact made by the clerk support his conclusions that respondent acted in bad faith in carrying out his fiduciary duties as administrator, c.t.a., that he was guilty of misconduct in the execution of his office, and that he has a private interest that might hinder or be adverse to a proper administration of the estate.

While the letter described in the findings of fact might be characterized as harassing to the petitioner and over zealous on the part of respondent, we find nothing therein tending to show a violation of respondent's fiduciary duties as administrator, c.t.a.; therefore, all of the findings of fact made by the clerk with respect to the letter are irrelevant, and do not support the conclusions that respondent acted in bad faith in carrying out his fiduciary duties or was guilty of misconduct in the execution of his office. Nor does the finding that respondent and petitioner are tenants in common of certain real property of the estate which is liable for debts of the estate to the extent that the personal property is insufficient to pay such debts support the conclusion that respondent had a private interest that might tend to hinder or be adverse to a fair and proper administration of the estate. *Morgan v. Morgan,* 156 N.C. 169, 72 S.E. 206 (1911).

We hold that Judge McLelland did not err in declaring that the findings of fact made by the clerk do not support the conclusions of law drawn therefrom and in reversing the order of the clerk removing the respondent as administrator, c.t.a. of the estate of J. B. Taylor.

Affirmed.

Judges BRITT and CLARK concur.

PEOPLE'S CENTER, INC. v. ROBERT N. ANDERSON, JR.; DONALD E. STEWART, JAMES M. WELL, RAYMOND J. GREEN, L. SUMNER WINN, JR., THOMAS F. BRIDGES, JON A. CONDORET, MORRIS V. BROOKHART, d/b/a CITY PLANNING AND ARCHITECTURAL ASSOCIATES

No. 7610SC818

(Filed 6 April 1977)

1. **Rules of Civil Procedure § 50— ruling on directed verdict — findings of fact**

The trial court did not inappropriately make findings of fact in its judgment directing a verdict for defendants where the court merely stated his reason for allowing the motion.

2. **Architects; Negligence § 8— negligence not proximate cause of damages**

The evidence was insufficient to support a jury finding that negligence by defendant architects in making inaccurate reports on the progress of a shopping center was a proximate cause of damages suffered by plaintiff because of additional expenditures to complete the shopping center after the builder abandoned the project and loss of rentals and forfeited loan fees resulting from the delay in opening the shopping center, where there was no evidence that plaintiff could have taken any action to decrease the total cost of the project or to move forward the opening date had it been accurately informed of the status of the project by defendants' progress reports.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 7 May 1976 in Superior Court, WAKE County. Heard in Court of Appeals 16 March 1977.

In this civil action plaintiff, People's Center, Inc., seeks to recover from defendants, Robert N. Anderson, Jr., *et al,* doing business as City Planning and Architectural Associates, a professional association, $838,492.64 allegedly resulting from defendants' negligence in issuing certain progress reports with respect to the construction of a shopping center in Chester, South Carolina.

The evidence offered by plaintiff at trial tends to show the following pertinent facts:

In 1969 plaintiff obtained construction and permanent loan commitments for the construction of a shopping center in Chester, South Carolina. On 15 January 1970 plaintiff and Hutchins Construction Co., Inc. entered into a written contract in which Hutchins agreed to construct the shopping center by 15 September 1970 for $850,000. The contract provided that defendants

would be the architects for the project. Defendants prepared specifications for the shopping center and sent copies to plaintiff. The construction lender, Wachovia Mortgage Co., made disbursements to Hutchins beginning on 27 January 1970 as the construction progressed. In May 1970 Hutchins' bonding company and Wachovia became concerned about Hutchins' financial condition, and the parties agreed that beginning in June all disbursements from the loan fund would be made by check payable jointly to Hutchins, plaintiff, and an attorney who would check the title of the property at the time of each disbursement for the filing of any laborer's liens. Wachovia also requested that thereafter defendants submit a progress report on the status of the construction whenever a disbursement was made. Defendants submitted progress reports, of which plaintiff received copies, on 16 July, 17 August, 10 September, 22 September, and 8 October 1970. All of them stated that work was proceeding in a satisfactory manner, and all except the one dated 17 August stated that the work was progressing on schedule. Hutchins abandoned the project on 15 October 1970. From 16 July 1970 to Hutchins' default $448,000 was disbursed from the loan fund, and the total amount spent on the project up to Hutchins' default equalled $857,221.57. After Hutchins defaulted plaintiff completed the project in May 1971 at the additional cost of either $807,000 (testimony of David McConnell) or $624,224.36 (testimony of John Rosser). Plaintiff forfeited a $20,000 loan commitment fee and a $28,287.66 finalization fee, and it lost rental income because of the delay in opening the shopping center.

Defendant offered no evidence and moved for a directed verdict. The court allowed the motion and entered a judgment directing a verdict for the defendant.

Plaintiff appealed.

Broughton, Broughton, McConnell & Boxley and Haywood, Denny & Miller, by John D. McConnell, Jr., for plaintiff appellant.

Cooper, Dodd & Pipkin by Gene Dodd, and Young, Moore, Henderson & Alvis by J. C. Moore and Charles H. Young, Jr., for defendant appellees.

HEDRICK, Judge.

[1] Plaintiff first contends it is entitled to a new trial because the court inappropriately made "findings of fact" in its judgment directing a verdict for the defendants. While the order allowing defendants' motion for a directed verdict does recite, "[T]here is evidence tending to show that defendants were negligent in making the certifications which have been identified as plaintiff's exhibits numbers 5, 14, 15, 16, 17 and 18, but that there is no evidence tending to show that such negligence proximately resulted in damage to plaintiff, as alleged in the pleadings," such a recital is not findings of fact. Judge Godwin was merely stating his reason for allowing the motion. This contention has no merit.

[2] Assuming *arguendo* that the record does contain evidence tending to show that defendants were negligent in making the progress reports complained of, the question remains as to whether the record contains any evidence that such negligence was a proximate cause of any damage allegedly sustained by plaintiff.

"It is an elementary principle that all damages must flow directly and naturally from the wrong, and that they must be certain both in their nature and *in respect to the cause from which they proceed.*" *Johnson v. Railroad,* 184 N.C. 101, 105, 113 S.E. 606, 608 (1922) (emphasis added).

> "The principle which will not allow the recovery of damages when their existence rests solely on speculation applies both to the fact of damages and to their cause. Thus, a plaintiff cannot recover damages by proving only that the defendant has unlawfully violated some duty owing to the plaintiff, leaving the trier of fact to speculate as to the damages; he must go further and prove the nature and extent of the damage suffered by the plaintiff and that the breach of duty was the legal cause of that damage. Leaving either of these damage questions to speculation on the part of the trier of fact will prevent recovery. Therefore, no recovery can be had in those cases in which it is uncertain whether the plaintiff suffered any damage. Also, no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from some

other source." 22 Am. Jur. 2d, Damages § 24 (1965). With respect to damages plaintiff, in its complaint, alleged:

"10. The contract between plaintiff and Hutchins Construction Co., Inc. required completion of the project by September 15, 1970, and not only was the same not completed by then, but within a week of the defendants' progress report dated October 8, 1970, Hutchins Construction Co., Inc. gave notice that it defaulted on its contract. In fact, plaintiff later determined that the project was no more than 50% complete at the time of the defendants' progress report of October 8, 1970, therefore making all of the defendants' said progress reports extremely incorrect and obviously negligently made; and the plaintiff, in order to complete the contracted for shopping center, which was to have cost $850,000, had to expend an additional $758,-492.64 to complete the project, and in addition to the aforesaid expenditure, the plaintiff suffered a loss of $80,000 in rentals because of the extra six months it took to complete the project after the default of Hutchins Construction Co., Inc.

"11. That as a result of the careless and negligent actions of the defendants in their professional representations, made to and relied upon by the plaintiff as herein set out, the plaintiff has been injured and damaged, and suffered losses in the amount of $838,492.64."

With respect to damages the only inference reasonably deducible from the evidence is that in addition to the $857,221.57 paid to Hutchins, plaintiff expended either $807,000 or $624,-224.36 in completing the shopping center after Hutchins abandoned the project and it lost certain rentals and forfeited certain fees due to the delay in opening the shopping center. There is no evidence in this record that plaintiff could have taken any action to decrease the total cost of the project or to move forward the ultimate opening date of the shopping center had it been fully and accurately informed of the status of the project by defendants' progress reports. The jury could have only speculated as to whether defendants' alleged negligence was the source of any damage. Indeed, as to the source of the damage, the only inference reasonably deducible from the evidence is that any damage suffered by plaintiff was caused solely by Hutchins' default.

The judgment appealed from is

Affirmed.

Judges BRITT and CLARK concur.

TED REID v. FLETA KERLEY REID

No. 7625DC765

(Filed 6 April 1977)

1. **Rules of Civil Procedure § 56— summary judgment — disputed issues not resolved**

In passing upon a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, it is not the purpose of the court to resolve disputed material issues of fact, but is instead to determine whether there exists an issue which is germane to the action.

2. **Divorce and Alimony § 11— divorce from bed and board — disputed issue — summary judgment improper**

The trial court in an action for divorce from bed and board erred in making findings of fact and granting plaintiff's motion for summary judgment where there existed a genuine issue as to the material fact of the parties' incomes and expenses.

APPEAL by defendant from *Vernon, Judge.* Judgment entered 25 November 1975 and order entered 25 November 1975 in District Court, CALDWELL County. Heard in the Court of Appeals 17 February 1977.

Plaintiff husband brought this action against defendant wife for a divorce from bed and board on the grounds of indignities and constructive abandonment. Defendant counterclaimed for alimony, alleging abandonment and indignities.

The parties agreed to a consent order which provided, among other things, that until this case was finally determined, defendant would be entitled to possession of the family home; that plaintiff would make the mortgage payments of $83.15 per month on the family home; and that plaintiff would pay $25 per month on the electric bill for the family home.

Plaintiff moved for summary judgment as to defendant's counterclaim. In support of his motion he submitted answers

to interrogatories in which he stated that he had a net income of $95.18 per week from his employment; that he also received payments of $32 per month from the Veterans' Administration; and that he had expenses of $426 to $473 per month, including $114 per month in mortgage and electricity payments for defendant's residence. He also submitted defendant's answers to interrogatories, in which she stated that she had a net income of $90.27 per week and expenses of $544.86 per month.

On 25 November 1975 the court granted plaintiff's motion for summary judgment. In its judgment it found that "plaintiff has a net weekly income of about $118.00"; that "the necessary and reasonable living expenses of the plaintiff is not less than his weekly income by any significant amount"; and that "the necessary and reasonable living expense of the defendant does not exceed her income." It concluded that defendant was not a dependent spouse within the meaning of G.S. 50-16.1.

Defendant moved to set aside the order granting summary judgment on the ground that plaintiff's answers to interrogatories were substantially incorrect. At the hearing on the motion, both parties were examined and cross-examined extensively as to their income and expenses. Defendant offered evidence tending to show that even though plaintiff had stated in his interrogatories that his net income was $95.18 per week, in reality, it was $118 per week based on a 40-hour week. The plaintiff also testified that in recent weeks he had received some income from overtime work.

On 25 November 1975 the court entered an order in which it found that although plaintiff's answers to interrogatories were incorrect as to the amount of his net income, "all other information upon which this Court based its summary judgment is substantially accurate and that the error does not significantly alter the fact sufficiently to merit a consideration of the summary judgment." The trial court therefore denied defendant's motion to set aside the summary judgment which had dismissed defendant's counterclaim for alimony. From judgment and order defendant appealed to this Court. This Court dismissed the appeal in an opinion filed 16 June 1976, reported in 29 N.C. App. 754, 225 S.E. 2d 649 (1976).

On 7 September 1976 plaintiff voluntarily dismissed his claim for divorce from bed and board. Defendant then appealed.

West, Groome & Baumberger, by Carroll D. Tuttle, for the plaintiff.

Randy D. Duncan, for the defendant.

MARTIN, Judge.

The defendant has grouped her eleven assignments of error into three arguments in her brief. She first contends that the trial court erred in granting the plaintiff's motion for summary judgment and dismissal of her counterclaim for the reason that there was a genuine issue of material fact. We agree.

[1] We note, first of all, that the trial court went far beyond the purview of summary judgment. It appears that the court considered it to be its function to make findings of fact on conflicting evidence, to make conclusions of law, and to enter final judgment between the parties. We repeat again what we have said on numerous occasions, that, in passing upon a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, it is not the purpose of the court to resolve disputed material issues of fact. *Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973); *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971). The court does not decide facts but makes a determination as to whether there exists an issue which is germane to the action. *Leasing Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 230 S.E. 2d 559 (1976); *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E. 2d 641 (1976). Stated differently, it is no part of the court's function to decide issues of fact upon a motion for summary judgment; rather its sole function is to determine whether there is an issue of fact to be tried. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Stonestreet v. Motors, Inc., supra.* If findings of fact are necessary to resolve an issue as to a material fact, then summary judgment is improper. *Leasing Inc. v. Dan-Cleve Corp., supra; Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975).

[2] In the instant case, both parties offered disputed evidence concerning, for example, incomes and expenses. The trial court, nevertheless, made "findings of fact" as to these incomes and expenses in its final judgment. In making these findings, we feel that the court passed on the credibility of the evidence and resolved disputed issues of fact rather than merely determining whether there was a genuine issue of material fact. The court,

in passing on the motion for summary judgment, therefore acted in contravention of the principles outlined above.

Even if we assume, *arguendo,* that the trial court did not act improperly in stating "findings of fact," we are, nevertheless, bound to conclude, for an additional reason, that the motion for summary judgment should not have been granted. We have stated on numerous occasions that:

> "Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, 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." (Citations omitted.) *Stonestreet v. Motors, Inc., supra* at 530, 197 S.E. 2d at 581 (emphasis added).

In the case at bar, there existed at least one issue of fact. For example, the defendant wife offered verified pleadings, interrogatories, and an affidavit tending to show that her expenses were greater than her income and that she did not have adequate means to subsist. In response to these contentions, the plaintiff answered that he was "without sufficient knowledge or information to form a belief as to their truth." Under the North Carolina Rules of Civil Procedure, this type of answer "has the effect of a denial." G.S. 1A-1, Rule 8(b). Thus, there existed a *genuine* issue as to a *material* fact and, therefore, summary judgment was improper.

Reversed and remanded.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROLAND LEE WATTS, JR.

No. 7626SC840

(Filed 6 April 1977)

Constitutional Law § 32—waiver of assigned counsel — attempted withdrawal on trial date

The trial court did not err in the denial of defendant's motion for the appointment of counsel to represent him and for a continuance

so that he might obtain a lawyer where the case was first calendared for trial on 19 May, at which time defendant informed the court that he had discharged his attorney; the court, based on defendant's statement that he earned $400 to $500 per week, found that defendant was not indigent, and defendant signed a written waiver of assigned counsel; the court granted defendant a continuance to obtain counsel; defendant delayed until the the case was called for trial on 8 July before moving to withdraw his waiver of assigned counsel; and defendant failed to show good cause for the delay in moving to withdraw the waiver of assigned counsel.

APPEAL by defendant from *Falls, Judge.* Judgment entered 8 July 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 March 1977.

Defendant was charged in a bill of indictment, proper in form, with the felonious larceny of twelve wrench sets, eight socket wrench sets, and two chain saws of the total value of $535.78 from a Zayre Store, a corporation. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

Claudia Williams, security officer for the Zayre store, located at 3200 Freedom Drive, Charlotte, North Carolina, saw defendant in the store on 13 May 1975 pushing a shopping cart with merchandise in it through the store, past the check-out counters, and out the front door without paying for the merchandise. Williams attempted to stop defendant after he went through the door, but he pushed the cart in front of her, ran to his car, got into his car and drove away. The value of the merchandise was $535.78.

Defendant offered evidence tending to establish that he was not in Charlotte on 13 May 1975 but was in Southport, North Carolina.

Defendant was found guilty as charged, and from a judgment imposing a prison sentence of ten years, he appealed.

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

Walter H. Bennett, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant contends the court erred in denying his motion to have counsel assigned to represent him and in denying

his motion to continue the case for a "couple of weeks" to give him an opportunity to obtain a lawyer. In *State v. Smith,* 27 N.C. App. 379, 219 S.E. 2d 277 (1975), in which the facts were remarkably similar to the facts in the present case, Judge Clark wrote,

> "In this case the defendant delayed until the day his case was scheduled for trial before moving to withdraw the waiver and have counsel assigned. If this tactic is employed successfully, defendants will be permitted to control the course of litigation and sidetrack the trial. At this stage of the proceeding, the burden is on the defendant not only to move for withdrawal of the waiver, but also to show good cause for the delay. Upon his failure to do so, the signed waiver of counsel remains valid and effective during trial." *Id.* at 381, 219 S.E. 2d at 279.

The record in the present case reveals that this case was calendared for trial on 19 May 1976, at which time defendant informed the court that he had discharged his attorney on 4 May 1976 and the court entered an order allowing the attorney to withdraw. Defendant stated that he was not ready for trial because he had been unable to retain new counsel. The court, based upon defendant's statement that he earned $400 to $500 per week, found and concluded that defendant was not indigent and not entitled to the appointment of counsel, and defendant signed a written waiver of his right to have assigned counsel. After the court granted defendant a continuance, the record of the 19 May 1976 proceeding reveals the following exchange between the court and the defendant:

> "THE COURT: I want you to understand this. The case will be recalendared for trial by the District Attorney—that is he will cause it to be placed again on the trial calendar at which time the case will be called for trial and will be tried, regardless of whether you have at that time a lawyer or not. Do you understand that?
>
> "MR. WATTS: Yes, sir."

Defendant delayed until his case was called for trial again during the week of 5 July 1976 to move to withdraw his waiver of assigned counsel.

Defendant failed to show good cause, or any cause whatsoever, for the delay in moving to withdraw the waiver of his

right to have assigned counsel. Defendant likewise failed to show any just cause for the case to have been continued. These assignments of error have no merit.

We have carefully examined defendant's remaining assignments of error, and find them to be without merit.

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

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. KENNETH W. ROWLAND

No. 7617SC837

(Filed 6 April 1977)

Criminal Law § 143— suspended sentence — revocation more than 5 years after suspension — error

Neither the district court nor the superior court had authority to activate a suspended sentence for violation of a condition of suspension more than five years after entry of the judgment suspending the sentence. G.S. 15-200.

APPEAL by defendant from *McConnell, Judge.* Order entered 17 May 1976 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 17 March 1977.

This is an appeal from an order of the superior court activating a suspended sentence. The following facts are not in controversy:

On 7 October 1968 defendant, Kenneth W. Rowland, was charged in a warrant with issuing a worthless check to R. W. Smith in the amount of $4,400. Upon the defendant's plea of guilty to the charge the Recorder's Court of Madison, North Carolina, entered a judgment imposing a prison sentence of two years which was suspended for five years upon condition that the defendant make restitution to Smith by 11 February 1969. On 18 January 1969 defendant wrote a letter to the Clerk of the Madison Recorder's Court advising that he had "been put

in confinement" and would not "be able to comply with the conditions of the suspension." In the letter he requested that he be brought into court as soon as possible to have the suspended sentence activated. Thereafter, on 13 August 1971, defendant was brought by prison officials before the Rockingham County District Court in Madison, North Carolina, where he again pleaded guilty to the charge contained in the original warrant. Upon defendant's second plea of guilty to the charge, the court entered a judgment on 13 August 1971 imposing a prison sentence of two years suspended on condition that "the defendant upon his release from prison, either by parole or on completion of his prison sentence, contact Mr. R. W. Smith, the prosecuting witness, or his attorney, Mr. Vernon E. Cardwell, within 30 days after his release, and make satisfactory arrangements to reimburse Mr. R. W. Smith for the worthless check in this matter in the amount of $4,400.00 as restitution for the worthless check in this matter." On 30 January 1976 the district court ordered that defendant be arrested for failure "to comply with the judgment entered by George M. Harris, Judge Presiding, on August 13, 1971, in this action charging 'Worthless Check.' " On 20 February 1976 the district court revoked the suspension of the prison sentence imposed in the judgment entered on 13 August 1971 for defendant's failure and refusal to make restitution to R. W. Smith as provided in that judgment. From the activation of the two-year prison sentence defendant appealed to the superior court.

After a hearing in the superior court, Judge McConnell made the following entry on 17 May 1976:

> "The defendant appeared before the court this day after due notice upon an inquiry into an alleged violation of condition of suspension of the prison sentence imposed in that certain JUDGMENT SUSPENDING SENTENCE appearing of record in this case issued on the 13 day of August, 1971.
>
> "From evidence presented, the court finds as fact that within the specified period of suspension, the defendant has wilfully violated the terms of the suspended sentence heretofore entered.
>
> "It is ADJUDGED that defendant has breached a valid condition upon which the execution of said sentence was sus-

pended, and it is ORDERED that such suspension be revoked and that said defendant be imprisoned:

"For the term of 2 years in the common jail of Rockingham County to be assigned to work under the supervision of the State Department of Correction."

Defendant appealed.

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

Reginald L. Yates and Robert M. Talford for the defendant appellant.

HEDRICK, Judge.

Defendant contends, and the State concedes, that Judge McConnell had no authority on 17 May 1976 to activate the suspended sentence imposed in the judgment entered in the district court on 13 August 1971.

"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time, within the above limit. . . ." G.S. 15-200.

In *State v. McBride,* 240 N.C. 619, 621, 83 S.E. 2d 488, 489 (1954) we find the following:

"The maximum period during which the execution of a sentence in a criminal case may be suspended on conditions is five years. This is fixed by statute. A suspension of sentence for a period in excess of that authorized by statute is not void *in toto.* Ordinarily it is valid to the extent the court had power to suspend or stay execution and void merely as to the excess." (Citations omitted.)

The charge purporting to support the judgment imposing the prison sentence activated by Judge McConnell on 17 May 1976 was first laid in a warrant issued on 7 October 1968 and reduced to judgment by the Madison Recorder's Court on 11 November 1968. Upon the defendant's plea of guilty to the charge set out in the warrant, the Madison Recorder's Court had authority to enter judgment and suspend the prison sentence for a period not exceeding five years. When the defendant

was brought in the District Court, Rockingham County, on 13 August 1971, the court had no authority to extend the period of suspension beyond 11 November 1973. Therefore, the judgment of the district court entered on 13 August 1971 is void to the extent that it attempts to extend the period of suspension beyond 11 November 1973, and neither the district court on 20 February 1976 nor the superior court on 17 May 1976 had authority to activate the suspended sentence for the violation of a condition of suspension.

The order of the superior court is

Reversed and the proceeding is dismissed.

Judges BRITT and CLARK concur.

DWIGHT V. PEELER v. SOUTHERN RAILWAY COMPANY

No. 7619SC801

(Filed 6 April 1977)

Railroads § 7— crossing accident — contributory negligence of bus driver

In an action to recover for injuries received when a bus plaintiff was driving collided with the engine of defendant's train at a grade crossing, plaintiff's evidence did not disclose that he was contributorily negligent as a matter of law, but presented such issue for determination by the jury, where it tended to show that the accident occurred at night; plaintiff could see beyond the crossing to the stoplight at the end of the block; plaintiff's bus struck the drawhead or coupling of the engine which extended some four feet into the street on which plaintiff's bus was traveling; there were no lights on the coupling and the engine was black; neither plaintiff nor the passengers on his bus saw the engine or any warning until after the accident; the engine's headlight was on and shining across the street at an angle; there were no flares or flagmen at the crossing and no bells or whistles were sounding; and on other occasions when a train was in the vicinity of the crossing, a warning flare was placed at the crossing.

APPEAL by plaintiff from *Albright, Judge.* Judgment entered 25 May 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 10 March 1977.

Plaintiff was injured when the bus he was driving collided with the engine of one of defendant's trains in the Town of

Landis. At the close of plaintiff's evidence, the judge granted defendant's motion for directed verdict made under Rule 50. The judge allowed the motion on the ground that plaintiff's evidence disclosed that he was contributorily negligent as a matter of law.

Finger & Park, by M. Neil Finger, Daniel J. Park and Raymond A. Parker II, for plaintiff appellant.

Woodson, Hudson, Busby & Sayers, by Max Busby; Coughenour and Linn, by Stahle Linn and Carl M. Short, Jr., for defendant appellee.

VAUGHN, Judge.

Contributory negligence is an act or omission by a plaintiff, amounting to a lack of ordinary care, concurring and cooperating with some negligent act or omission on the part of the defendant that makes the act or omission of the plaintiff a proximate cause of the injury complained of. *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854. A motion for directed verdict upon the ground of contributory negligence should be allowed only when plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. *Atwood v. Holland,* 267 N.C. 722, 148 S.E. 2d 851.

As we consider the evidence in the case before us, we are reminded that:

> "For reasons readily apparent, the Court has encountered difficulty in laying down hard and fast rules governing liability in train-automobile grade crossing accidents. 'Many cases involving injuries due to collision between motor vehicles and trains at grade crossings have found their way to this Court. No good can be obtained from attempting to analyze the close distinctions drawn in the decisions of these cases, for, as was said in *Cole v. Koonce, supra,* 214 N.C. 188, each case must stand upon its own bottom, and be governed by the controlling facts there appearing.' *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227." *Faircloth v. R. R.,* 247 N.C. 190, 193, 100 S.E. 2d 328.

Plaintiff's evidence tends to show the following: At about 10:30 p.m. on the date of the accident, plaintiff was operating a mill bus going south on Main Street. The track of defendant's industrial siding crossed Main Street in a generally northeasterly direction about midway between the intersection of Main Street with West Garden Street and Main Street with West Ryden Avenue. The tracks intersect Main Street at about a 62 degree angle. The street was concrete with asphalt patches. Beside the street there was a strip of black asphalt about 12 feet wide. Plaintiff was looking straight ahead. Visibility was good and plaintiff could see beyond the crossing to the stoplight at the end of the block. The street was clear except that there was a car stopped at the stoplight at the end of the block. That car was facing in plaintiff's direction. Plaintiff saw no lights in the vicinity of the railroad crossing. Just as Plaintiff approached the track, he saw a person off to his right point a flashlight at the ground. That person was a railroad brakeman who, after the wreck, lit a flare. Plaintiff thought the person was a rider and started to apply his brakes. About that time the right front of plaintiff's bus, just below the headlight, struck the drawhead or coupling on the train's engine. Plaintiff never saw the train or any other light until after the impact. Passengers on plaintiff's bus testified that they were looking straight ahead and did not see the train's engine or any warning until the accident. The engine was stopped on the west side of Main Street and was headed east. The drawhead or coupling on the engine is three or four feet long, about two feet thick and about three feet off the ground. The coupling stuck out on Main Street for a distance of four feet. There were no lights on the coupling and the engine was black. Plaintiff was travelling at 25-30 miles per hour. The speed limit on Main Street was 35 miles per hour. There were no flares at the crossing and no flagmen in the roadway. No bells were ringing and no whistles were blowing. An officer who arrived after the accident testified that he saw that the headlight of the train's engine was on and was shining across the street at an angle. Plaintiff had operated the bus for several years. On every other occasion when there had been a train in the vicinity of the crossing, there was always at least one warning flare at the crossing. Other witnesses testified that, in the past, there had always been a flare when the crossing was in use.

Little could be gained by a review of the numerous cases cited that arose out of grade crossing accidents. They all involve

a wide variety of factual situations. The facts in *Jernigan v. R. R. Co.*, 275 N.C. 277, 167 S.E. 2d 269, bear some similarity to those of the case at bar. There were no flares at the crossing although plaintiff had seen one shortly before the accident when the crossing was in use. The train's headlight was burning. Justice Higgins, for the Court, observed, "It is a matter of common knowledge that a locomotive headlight casts an intense but narrow beam far ahead in order that the train crew may spot defects in the rails or obstructions on the roadbed. These lights were many feet above the tracks. Their beams were focused outside the range of plaintiff's view as he approached from the west." *Jernigan v. R. R. Co., supra,* at p. 280.

We conclude that plaintiff should have been allowed to take his case to the jury. That body can resolve all conflicting inferences that arise from the evidence. Plaintiff's evidence, taken in the light most favorable to him, does not so clearly establish the defense of contributory negligence that no other conclusion can reasonably be drawn.

Reversed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. CLIFTON GREGORY

No. 7630SC843

(Filed 6 April 1977)

1. **Receiving Stolen Goods § 5— receiving stolen cigarettes — sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for receiving stolen goods where it tended to show that stolen cigarettes were delivered to and hidden in a fruit stand owned and operated by defendant; defendant was not present at the time but his night watchman was; the night watchman informed defendant that the cigarettes were there; and defendant later removed the cigarettes from the fruit stand.

2. **Criminal Law § 34— defendant's guilt of another offense — admissibility**

The trial court in a prosecution for receiving stolen cigarettes did not err in allowing into evidence testimony that defendant had received other stolen cigarettes two weeks earlier, since the evidence was relevant to show the requisite guilty knowledge by defendant.

State v. Gregory

APPEAL by defendant from *Wood, Judge.* Judgment entered 21 July 1976 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 5 April 1977.

Defendant was convicted of the felony of receiving stolen goods.

The State offered evidence tending to show the following:

In the early morning hours of 8 August 1975, Hillard Ashe, Lloyd Ashe and Robert Bryson and three females broke into a grocery store and stole, among other things, a large quantity of cigarettes. Using Lloyd Ashe's truck, they carried the cigarettes to a fruit stand owned and operated by defendant. They arrived at the fruit stand about 6:00 a.m. and carried 218 cartons of the stolen cigarettes inside. They were worth about $3.00 per carton. Defendant was not present but Ronnie Ledford, his night watchman, was there when the cigarettes were delivered. After the male thieves counted the cigarettes, they took a piece of paper and wrote the figure "$400.00," the amount they were to get for the cigarettes. They then hid the cigarettes under a counter in the stand and left. Cigarettes were not stocked for sale at defendant's stand. Defendant came to the stand about noon and Ledford told him "the cigarettes had come that morning. . . ." Ledford also told defendant who had brought the cigarettes to the stand and that they wanted their money that day. He showed defendant where the cigarettes were hidden and then left for a few hours. The cigarettes were still there when he came back. Ledford left again and returned about 6:30 p.m. Sometime later that evening he saw defendant load the cigarettes into the Chrysler automobile of a man he believed to be named Dotson.

Defendant did not testify. He offered one witness who said he did not see any cigarettes under the counter on the morning of 8 August 1975. He also called a witness named Buford Dotson who testified that he owned a Chrysler but did not receive any cigarettes from defendant.

Judgment was entered imposing a prison sentence of five years.

Attorney General Edmisten, by Associate Attorney Jane Rankin Thompson, for the State.

Creighton W. Sossomon, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's exceptions based on the alleged insufficiency of the evidence to take the case to the jury are overruled.

At the time of defendant's offense, the essential elements of the crime of receiving stolen goods were " '(a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose.' " *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214. There is ample evidence in this record of each of the essential elements of the crime.

[2] The only other assignment of error relates to the admission of evidence that defendant, about two weeks earlier, had received another lot of cigarettes from Hillard and Lloyd Ashe. On that occasion the cigarettes were delivered to defendant's fruit stand at about 2:00 a.m. Defendant arrived shortly thereafter. The witness heard defendant and the others discuss a price of $500.00. About 3:00 a.m. on that morning, defendant loaded the cigarettes in a car and left. There was no error in the admission of the evidence. Generally, evidence of other criminal activity is inadmissible if it tends only to show an accused's character or disposition. If, however, it is relevant for any other purpose it may be admitted. "Every circumstance calculated to throw light upon the supposed crime is admissible and the weight of such evidence is for the jury." *State v. Ayers,* 11 N.C. App. 333, 181 S.E. 2d 250. The evidence was relevant to show, among other things, the requisite guilty knowledge by defendant.

The charge is not brought forward. It is presumed, therefore, that the judge properly declared and explained the law arising on all of the evidence given in the case. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845.

No prejudicial error has been shown.

No error.

Chief Judge BROCK and Judge CLARK concur.

In re Cox

IN THE MATTER OF THE ESTATE OF C. F. COX (CHARLIE F. COX), DECEASED

No. 7611SC802

(Filed 6 April 1977)

Wills § 61— spouse's dissent — time for filing

So long as a widow's dissent to her spouse's will is filed within six months after the issuance of letters testamentary, or extended pursuant to G.S. 30-2(a), it is timely, regardless of whether the estate and the property passing outside the will have been appraised in accordance with G.S. 30-1(c).

APPEAL by Executor from *Graham, Judge.* Order entered in Superior Court, HARNETT County. Heard in the Court of Appeals 10 March 1977.

Testator died on 7 June 1973. At that time his wife, Pearlie T. Cox, was 77 years old. In his will he bequeathed $1 to his son and gave his wife a life estate in all his real and personal property. Remainder interests in his real and personal property were given to his two daughters. On 19 June 1973 the will was probated in common form, and letters testamentary were issued to the executor named in the will. On 26 June 1973 Mrs. Cox filed a dissent from the will. On 12 February 1974 the executor submitted a 90-day inventory showing that the estate included real property worth $58,750 and personal property worth $6,018.93. Portions of the personal property were designated "Left in constructive Trust with Mrs. Cox." A certificate of deposit for $6,000 in the name of Mr. or Mrs. C. F. Cox was found in testator's safe deposit box.

The executor moved to dismiss the dissent filed by Mrs. Cox. The clerk of court overruled the motion and ordered that three disinterested persons be appointed to appraise the estate and the property passing from testator to Mrs. Cox outside the will. The executor appealed, and the superior court affirmed the clerk's decision. The executor appealed to this Court.

Woodall & McCormick, by Edward H. McCormick, for the appellant executor.

Hoyle & Hoyle, by J. W. Hoyle, for the appellee.

MARTIN, Judge.

Appellant executor contends in his only assignment of error that the clerk erred in refusing to dismiss Mrs. Cox's dissent, and the superior court erred in affirming the clerk's decision. He argues that the controlling question is whether Mrs. Cox, the surviving spouse, could dissent from the will of her husband without first establishing the *right* to dissent. He concedes that the dissent was filed by the widow within six months after letters testamentary were issued in compliance with G.S. 30-2, but he insists that G.S. 30-2 provides that a widow is not "entitled" to dissent from the will of her deceased spouse unless the estate and the property passing to the widow outside of the will have been appraised in accordance with G.S. 30-1(c). He thus contends that the appraisal under G.S. 30-1(c) is a prerequisite to and must precede the filing of the dissent. Since more than six months expired before the order of appraisal was finally entered by the clerk in the instant case, he therefore argues that it was too late for the widow to dissent from the will.

In *Bank v. Easterby,* 236 N.C. 599, 602, 73 S.E. 2d 541, 543 (1952) the Court said:

> "The right of a widow to dissent from her husband's will is one given to her by law. And such right may be exercised by her at any time within the period fixed by statute. G.S. 30-1. Furthermore, in the exercise of such right, she is not required to assign any reason therefor."

The pertinent portion of G.S. 30-2(a) provides:

> "Any person entitled under the provisions of G.S. 30-1 to dissent from the will of his or her deceased spouse, may do so by filing such dissent with the clerk of the superior court . . . at any time within six months after the issuance of letters . . . or if litigation that affects the share of the surviving spouse is pending at the expiration of the time allowed for filing the dissent, then within such reasonable time as may be allowed. . . ."

We interpret this statute to be a limitation as to the time when the spouse must dissent and is not conditioned on her *right* to dissent which may be determined either before or after the estate is appraised pursuant to G.S. 30-1(c). So long as the dissent is filed within six months after the issuance of letters

testamentary, or extended pursuant to 30-2(a), it is timely, regardless of whether the appraisal has been conducted.

Perhaps G.S. 30-2(a) is inartfully drawn. This, however, is a matter for the General Assembly. The question involved here seems to be a matter of first impression as no authority in this respect has been brought to our attention nor have we found any authoritative assistance from our research.

The right of Mrs. Cox to dissent from the will of her deceased husband will be determined when the commissioners appointed by the clerk determine and establish the value of the estate and the property passing outside of the will to the surviving spouse as a result of the death of the testator.

Affirmed.

Judges MORRIS and VAUGHN concur.

HENRIETTA W. TILGHMAN, WIDOW; AND RONALD O'NEAL TILGHMAN AND BETTY SUE TILGHMAN, MINOR CHILDREN OF GERALD O. TILGHMAN, DECEASED, EMPLOYEE v. WEST OF NEW BERN VOLUNTEER FIRE DEPARTMENT, EMPLOYER; NON-INSURER, AND/OR CRAVEN COUNTY, EMPLOYER; NIAGARA FIRE INSURANCE COMPANY, CARRIER

No. 7610IC785

(Filed 6 April 1977)

Counties § 2; Master and Servant § 49— workmen's compensation — death of volunteer fire department employee — liability of county

There was no contractor-subcontractor relationship between a county and a volunteer fire department by reason of the county's collection of a tax within the fire district for fire protection and a contract whereby the county agreed to pay the tax proceeds to the fire department in return for the fire department's agreement to provide fire protection for the fire district, since collection of taxes by the county constituted the exercise of a public and governmental power and could not be the subject of a contract; therefore, the county could not be held liable for workmen's compensation benefits for the death of an employee of the fire department.

APPEAL by defendants Craven County and Niagara Fire Insurance Company from the opinion and award of the Full Com-

mission of the North Carolina Industrial Commission filed 9 July 1976. Heard in the Court of Appeals 9 March 1977.

This is a proceeding under the Workmen's Compensation Act. On 20 April 1964 the Craven County Board of Commissioners adopted a resolution providing that voluntary fire departments which met certain specified minimum requirements would be entitled to funding from the county. Later in 1964 defendant, West of New Bern Volunteer Fire Department, was incorporated as a non-profit corporation and qualified for county funding. In a referendum held on 6 May 1967 pursuant to G.S. 69-25.1, the voters of the West of New Bern Fire Protection District authorized the levy and collection of a special tax for fire protection. On 20 January 1972, pursuant to G.S. 69-25.5, defendant Craven County entered into a contract with defendant Fire Department providing that the proceeds of the special fire protection tax would be paid to the Fire Department, and that the Fire Department would provide adequate fire protection service for residents of the West of New Bern Fire Protection District. On 6 November 1973 decedent died as a result of an accident arising out of and in course of his employment with the Fire Department. At that time, the Fire Department's workmen's compensation insurance coverage had lapsed. However, defendant Craven County had a valid workmen's compensation insurance policy issued by defendant Niagara. Decedent was survived by his wife and children, who filed a claim for workmen's compensation death benefits. Deputy Commissioner Delbridge held that all defendants were liable for benefits, because decedent was employed by both Craven County and the Fire Department at the time of his death. Craven County and Niagara appealed to the Full Commission. In its opinion, the Full Commission held that decedent was employed only by the Fire Department at the time of his death, and the Fire Department was primarily liable for death benefits to plaintiffs. However, it further held that Craven County had violated G.S. 97-19 by subletting a contract without requiring from the subcontractor (the Fire Department) or obtaining from the Industrial Commission a certificate showing that the subcontractor had obtained workmen's compensation insurance or was financially able to act as a self-insurer. For this reason, Craven County and its compensation carrier, Niagara, were secondarily liable to plaintiffs. The Commission ordered that if the Fire Department had not begun making

payments to plaintiffs within 30 days, "then the secondary liability of the defendant, Craven County, and its compensation carrier, shall come into effect." Craven County and Niagara appealed.

Lee, Hancock & Lassiter, by C. E. Hancock, Jr., for the plaintiffs.

Teague, Johnson, Patterson, Dilthey & Clay, by C. Woodrow Teague, Robert M. Clay, and Robert W. Sumner, for Craven County and Niagara Fire Insurance Company.

Ward & Smith, P.A., by Michael P. Flanagan, for West of New Bern Volunteer Fire Department.

MARTIN, Judge.

The determinative question presented by this appeal is whether there was a contract between Craven County and the residents of West of New Bern Fire Protection District with regard to fire protection services.

The Full Commission seems to have held that when the Craven County Board of County Commissioners began levying and collecting taxes within the West of New Bern Fire Protection District, it entered into a contractual arrangement whereby the county agreed to provide adequate fire protection services to residents in the district in exchange for tax revenues to be assessed. Further, the Commission held that Craven County, through its Board of Commissioners, sublet its duty under such contract to provide fire protection to residents of the district when it entered into a contract with the West of New Bern Volunteer Fire Department.

The collection of taxes by Craven County at the instance of the residents and freeholders of the West of New Bern Fire District under authority granted by the legislature constituted the exercise of a public and governmental power and as such is not and cannot be the subject of a contract. *Wagner v. Baltimore,* 239 U.S. 207, 36 S.Ct. 66, 60 L.Ed. 230 (1915); *Williamson v. New Jersey,* 130 U.S. 189, 9 S.Ct. 453, 32 L.Ed. 915 (1889); *Plant Food Co. v. Charlotte,* 214 N.C. 518, 199 S.E. 712 (1938).

Since there could be no contract between the county and the voters of the fire district in the instant case, the relation-

ship between the county and the fire department was not that of a principal contractor and subcontractor, and therefore G.S. 97-19 is not applicable. *Green v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488 (1952).

We hold that there was no contractor-subcontractor relationship between Craven County and the West of New Bern Fire Department and therefore the opinion and award of the Industrial Commission holding Craven County liable for benefits are reversed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DARRELL SCOTT MILLER

No. 7626SC823

(Filed 6 April 1977)

1. **Criminal Law § 102— district attorney's jury argument — order of argument — no error**

   Defendant was not prejudiced by the district attorney's explanation to the jury that "the defense has the last argument when the defense does not offer evidence," particularly in view of the fact that the court, at defendant's request, instructed the jury upon how it should consider defendant's election to offer no evidence.

2. **Criminal Law §§ 145, 166— unnecessary matter in brief — costs taxed against public defender**

   The public defender is taxed with the costs of printing the unnecessary narration of the evidence in the brief.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 3 June 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 March 1977.

Defendant was indicted, tried, and convicted of felonious larceny.

The State offered the following evidence: On 12 December 1975 defendant removed two Homelite chain saws from the display rack in J. C. Penney's Eastland Mall store. The saws were still in their boxes. Defendant walked out of the store without paying for the saws, placed them in the trunk of his car, and drove away. Two employees of the store observed de-

fendant as he walked out with the saws. They followed him to the parking lot, observed his features, and recorded his auto license number. The saws were worth over $200.00. On 17 February 1976 defendant signed a written confession of the theft.

Defendant offered no evidence.

Attorney General Edmisten, by Associate Attorney Jerry B. Fruitt, for the State.

Michael S. Scofield, Public Defender, for the defendant.

BROCK, Chief Judge.

[1] Defendant presents one assignment of error for review. He contends that the trial judge committed reversible error in the denial of defendant's motion for mistrial made during the district attorney's argument to the jury.

The district attorney explained to the jury that "the defense has the last argument when the defense does not offer evidence." The trial judge denied defendant's motion for a mistrial and, at defendant's request, instructed the jury upon how it should consider defendant's election to offer no evidence.

When the judge's curative instructions are considered in the light of the overwhelming evidence of defendant's guilt, we cannot see where the rather innocuous remark to the jury by the district attorney could have affected the outcome of the case. If the remark should be considered error, we hold that it was not prejudicial beyond a reasonable doubt.

We fail to perceive why the district attorney felt it necessary to explain the order of arguments to the jury, and we suggest that it would be a better practice not to do so. However, if it is felt that an explanation is necessary of why the district attorney is addressing the jury first, a simple statement to the effect that "I am addressing you first because in this case the defense has the last argument to the jury" would be sufficient.

We find no prejudicial error in the trial proceedings.

[2] The State's evidence was fully narrated in the record on appeal. This was sufficient. However, the public defender fully repeated the narration of the evidence in his brief. This was absolutely unnecessary. There was no assignment of error to the testimony or exhibits, and therefore no need to discuss even

a part of the evidence in the brief, much less the entire evidence. The only argument in the brief is addressed to the district attorney's remark to the jury during argument for the State.

The public defender has a great responsibility, and his office and expenses are supplied by public funds. However, his position does not grant him a license to become a spendthrift with tax dollars. The absolutely unnecessary repetition of the narration of the evidence in defendant's brief consumes ten pages. The cost of printing these unnecessary pages of defendant's brief is $18.50, for which the taxpayers would otherwise be charged. The Public Defender, Twenty-Sixth Judicial District, Michael S. Scofield, will be taxed personally with the unnecessary printing costs.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROGER W. MELVIN

No. 7612SC766

(Filed 6 April 1977)

1. **Searches and Seizures § 2— consent by joint occupant**

Where two people have equal rights to the use or occupation of premises, either person may consent to a search of the premises, and evidence found therein can be used against either.

2. **Searches and Seizures § 2— legality of search — voir dire — hearsay testimony**

An officer's hearsay testimony that the person who consented to a search of certain premises told the officer that he resided there with the defendant was competent on *voir dire* to establish the legality of the search.

3. **Criminal Law § 163— exceptions and assignments of error to charge**

Alleged error in the charge was not presented for consideration on appeal where the portion of the charge excepted to is not identified in the record by brackets or any other manner, and the assignment of error merely asserts that the court erred in the charge and refers to the record page where the alleged error may be found.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 22 April 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 February 1977.

Defendant was charged by indictment with armed robbery, and he entered a plea of not guilty. He was convicted by a jury on the charge, and judgment of imprisonment for a term of 60 years was entered.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for the State.

Public Defenders John A. Decker and Pinkney J. Moser for defendant appellant

MORRIS, Judge.

Before trial, defendant moved to suppress certain evidentiary items seized by police officers after searching defendant's premises at 1126 Gregory Court in Fayetteville. The police conducted the search without a warrant but instead relied on consent to search given by one Glen T. Avery, who allegedly resided at that address with defendant. Avery did not testify on voir dire, but the trial court allowed Cumberland County Deputy Sheriff Richard Washburn to testify, over objection, that Avery had told him that he lived at 1126 Gregory Court along with defendant. After receiving all the evidence on voir dire, the trial court found

> ". . . that the search of the premises at 1126 Gregory Court was in fact a consent search; that there is no evidence that is believable that Glen T. Avery did not reside at least for some period of time at those premises and that his property was located in said premises, and that he was a person who had a right to grant entry to said premises. . . ."

The court then denied defendant's motion to suppress and permitted the introduction of the evidence in question.

Defendant claims that the trial judge erred in permitting Washburn's testimony and in overruling the motion to suppress. He contends that since Avery did not testify on voir dire (although he did subsequently testify at trial) the only evidence establishing the fact that Avery resided with him was the hearsay statements to that effect made by Avery to investigating officers. Defendant argues that this evidence was an inadequate basis on which to overrule his motion. We disagree.

[1, 2] Where two people have equal rights to the use or occupation of premises, either person may consent to a search of the premises, and evidence found therein can be used against either. *State v. Crawford,* 29 N.C. App. 117, 223 S.E. 2d 534 (1976); *State v. Little,* 27 N.C. App. 54, 218 S.E. 2d 184, *cert. den.,* 288 N.C. 512, 219 S.E. 2d 347 (1975). Moreover, the hearsay testimony on voir dire establishing joint occupation of Avery and defendant was competent evidence. In *United States v. Matlock,* 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974), the United States Supreme Court noted that ". . . the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence." 415 U.S. at 172-73, 39 L.Ed. 2d at 250, 94 S.Ct. at 994. At issue in *Matlock* was whether evidence which would have been excluded at trial could be properly received on voir dire to establish consent to search. The Court held that the trial judge could properly receive the hearsay evidence on voir dire.

Moreover, we note that although defendant objected to the testimony of Deputy Washburn, two other deputies testified without objection on voir dire that Avery had told them that he resided at 1124 Gregory Court. It is well established in North Carolina that when evidence is admitted over objection but the same evidence is subsequently admitted without objection, the benefit of the objection is lost. 1 Stansbury, N. C. Evidence, § 30, p. 79 (Brandis Rev. 1973) and cases cited therein. Therefore, we fail to see how defendant could have been prejudiced by the admission of Washburn's testimony. These assignments are overruled.

[3] Defendant's only other assignment of error is to a portion of the charge of court. The portion of the charge to which defendant excepts is not bracketed, and he does not indicate in any other manner in the record the phrases or sentences which he contends are objectionable. The assignment of error as to this exception merely says "Did the trial court err in its instructions to the jury? EXCEPTION No. 4 (R p 43)." The Supreme Court and this Court have repeatedly held that this treatment is not sufficient to present an alleged error for consideration on appeal. *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729 (1966); *Vail v. Smith,* 1 N.C. App. 498, 162 S.E. 2d 78 (1968). Even so, we find that the language to which defendant refers in his brief, while not necessary, certainly does not

constitute an expression of opinion as to "whether a fact is fully or sufficiently proven" in violation of G.S. 1-180.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. STEPHEN BERNARD PHARR

No. 7619SC777

(Filed 6 April 1977)

Criminal Law § 119— alibi instruction — insufficient request

Defense counsel's oral request for an instruction on alibi which was made at the end of the trial court's charge was not sufficient to require the court to give the instruction in that it failed to comply with the applicable statute, G.S. 1-181.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 29 April 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 8 March 1977.

Upon a plea of not guilty, defendant was tried on a charge of second-degree rape. The State's evidence tended to show:

During the early morning hours of 7 March 1976, the victim, Doris Ann Johnson, went to the Club Disco in Statesville. She left the club around 2:30 or 3:00 a.m. and began walking home. An acquaintance, Junior Davidson, came by in his car, asked her if she wanted a ride home and she accepted his invitation. Instead of going to her home they rode around for several hours and ended up in Rowan County. While there Davidson refused to take her home so she left his car and began walking. She stopped at the home of Jan Parker, called her brother over the telephone but he refused to come and get her. She then continued walking towards Statesville and, at about 7:00 a.m., the defendant and another man, later identified as James Avery, drove up in a yellow Volkswagen. They forced her into the car and drove onto a dirt road where they held her on the ground and raped her.

Defendant's evidence tended to show: He and James Avery reside in Cleveland, N. C. On the night of March 6 and early

morning of March 7, they were at a party in Salisbury. They left about 2:00 a.m. and went to a club in Statesville. After leaving the club, they went to the Waffle House, visited a friend of defendant and returned home around 7:15 or 7:30 a.m. Defendant immediately went to bed and slept until 1:00 p.m. that day.

The jury found defendant guilty of second-degree rape and from judgment imposing a prison sentence of 20 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Burke, Donaldson & Holshouser, by Arthur J. Donaldson, for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error is that the trial court erred in failing to give the jury instructions on alibi. The assignment is without merit.

"An alibi is simply a defendant's plea or assertion that at the time the crime charged was perpetrated he was at another place and therefore could not have committed the crime." *State v. Hunt,* 283 N.C. 617, 619, 197 S.E. 2d 513, 515 (1973). In *Hunt,* the Supreme Court held that the trial judge is required to give instructions as to the legal effect of alibi evidence *only* upon the defendant's special request that such instructions be given.

G.S. 1-181 provides that requests for special instructions to the jury must be in writing, entitled in the cause, and signed by the counsel submitting them. It also provides: "Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made."

The record discloses that defense counsel, at the end of the trial court's charge, orally requested that the court instruct the jury with respect to alibi. The request was not sufficient to require the court to give the instruction in that it failed to comply with the applicable statute, G.S. 1-181. To grant the request was

discretionary with the trial judge and we perceive no abuse of discretion.

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

No error.

Judges HEDRICK and CLARK concur.

CALVIN W. CHESSON, AS TRUSTEE IN BANKRUPTCY OF MODULAR CORPORATION OF AMERICA, A CORPORATION v. JAMES C. GARDNER AND WIFE, MARIE THOMAS GARDNER

No. 7626SC744

(Filed 6 April 1977)

Bills and Notes § 20— no failure of consideration

The evidence supported the trial court's determination that there had been no failure of consideration for a promissory note executed by defendants where there was evidence that the note was under seal and was given as payment for shipping costs on modular units delivered by the payee to defendants' motel construction site.

APPEAL by defendants from *Falls, Judge.* Judgment entered 20 April 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 February 1977.

Plaintiff is the trustee in bankruptcy of Modular Corporation of America (MCA). He brought this action to recover on a promissory note executed by defendants to MCA.

Defendants admitted they executed the note and that it had not been paid. They alleged, however, that there had been a failure of the consideration of which the note was given.

The case was tried by the judge without a jury and judgment for the plaintiff was entered.

Cole & Chesson, by Calvin W. Chesson, for plaintiff appellee.

Biggs, Meadows, Batts and Winberry, by Charles B. Winberry, for defendant appellants

VAUGHN, Judge.

The judge's findings of fact are comparable to the verdict of a jury. They are conclusive on appeal if there is any competent evidence to support them. *Trust Co. v. Gill, State Treasurer,* 286 N.C. 342, 211 S.E. 2d 327.

The note in question was a negotiable instrument and was under seal. The judge was, therefore, faced with a presumption of consideration. The burden of rebutting that presumption was on defendants. Whether defendants carried that burden was for the trier of the facts. *Little v. Oil Co.,* 12 N.C. App. 394, 183 S.E. 2d 290. The weight of the evidence is for the judge and he can fail to find facts in favor of a party even though there is evidence to support such favorable findings.

The presumption of consideration is bolstered by plaintiff's evidence:

On 15 February 1973, MCA and the defendant James C. Gardner, entered into a contract whereby MCA agreed to sell him a number of modular motel rooms and set them in place at a motel site in Virginia where Gardner was constructing a motel. In addition to the fixed price for each motel room, the contract called for Gardner to pay a delivery charge of $223.00 for each room. Plaintiff's evidence tends to show that all of the units had been delivered to the site by the end of August, 1973. Plaintiff's evidence further tends to show that MCA was paid the full contract price for the modular units, including the final five percent that was due only after final inspection and approval by defendants. That final payment was made in November, 1973. The project was being financed by a Virginia lender. When MCA submitted a bill for shipping charges there were not enough project funds available from the lender to pay that bill. Work on the project had been stopped because funds from the lender were not available. On 27 December 1973, defendants executed the note that is the subject of the lawsuit as payment for the unpaid part of the shipping cost. Subsequently, the lender foreclosed on the motel property and MCA went into bankruptcy.

Defendant Gardner testified that, according to his recollection, the note was given in settlement of the balance due on the contract and for some additional units that were purchased. If the note was given in payment of the shipping charges he

could not remember that fact. He argued that in August, 1974, he did testify in bankruptcy court that he would pay the note when due, if he was financially able to do so. He also offered the testimony of a construction engineer who inspected the property in April, 1974, after the foreclosure. The engineer's testimony tended to show that the modular units were poorly constructed.

The court made findings of fact, based on competent evidence, in favor of plaintiff. The findings are, therefore, conclusive on appeal. The findings of fact support the conclusion of law. The judgment, therefore, is affirmed.

Affirmed.

Judges MORRIS and MARTIN concur.

BENJAMIN BALDWIN, EMPLOYEE, PLAINTIFF APPELLANT v. N. C. MEMORIAL HOSPITAL, EMPLOYER, DEFENDANT APPELLEE SELF-INSURED

No. 7614IC976

(Filed 6 April 1977)

Master and Servant § 65— workmen's compensation — permanent partial disability of back — incapacity to work

Plaintiff's argument that his age, failure to complete high school, excess weight, and lack of training for any other employment coupled with his back disability made him unemployable and that he should therefore be considered totally disabled and compensated under the provisions of G.S. 97-29 is without merit, since the award for plaintiff's 50% permanent disability of the back was made pursuant to G.S. 97-31 which provided that compensation made thereunder should be in lieu of all other compensation.

APPEAL by plaintiff from an award of the North Carolina Industrial Commission filed 27 July 1976. Heard in the Court of Appeals 10 March 1977.

Plaintiff was injured by accident arising out of and in the course of his employment. The Commission found as a fact that:

"'11. As a result of the fall, plaintiff's preexisting back condition has been aggravated to the extent that he now

has a fifty percent permanent partial disability of the back.' "

The Commission made conclusions of law as follows:

"2. As a result of this injury, plaintiff was temporarily totally disabled until June 1, 1974, at which time he reached maximum improvement. Defendant has therefore paid plaintiff all the temporary disability to which he is entitled.

3. As a result of this injury, plaintiff has sustained a fifty percent permanent partial disability of the back, for which he is entitled to $56.00 per week for 150 weeks, beginning on June 1, 1974."

An award, consistent with the foregoing, was then entered.

Attorney General Edmisten, by Associate Attorneys Sandra M. King and Elisha H. Bunting, Jr., for the State.

Felix B. Clayton and William Land Parks, by Felix B. Clayton, for plaintiff appellant.

VAUGHN, Judge.

The award for plaintiff's fifty percent permanent disability of the back was made pursuant to G.S. 97-31 which, in pertinent part, is as follows:

"In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and *shall be in lieu of all other compensation,* including disfigurement, to wit: . . .

* * *

(23) For the total loss of use of the back, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered *'total industrial disability'* and compensated as for total loss of use of the back." (Emphasis added.)

The essence of plaintiff's argument on appeal is as follows: There was evidence tending to show that plaintiff is 59 years old, did not finish high school, is overweight and is untrained for any other employment. Plaintiff argues that when these conditions were coupled with the back disability, it made him unemployable and, therefore, he should be considered totally disabled and compensated under the provisions of G.S. 97-29.

The argument runs contrary to the express terms of the statute. Plaintiff's back disability makes his right to an award subject to G.S. 97-31. An award under G.S. 97-31 is "in lieu of all other compensation." Plaintiff, in his brief, does not attempt to distinguish his case from the cases where this Court has rejected the very argument he now advances. Indeed, they are not mentioned. In *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E. 2d 660, *cert. den.*, 281 N.C. 154, 187 S.E. 2d 585, at p. 578, this Court said:

> ". . . The General Assembly, when it enacted G.S. 97-31 and, in 1955, made it applicable to the partial loss of use of the back, provided that compensation payable thereunder was 'in lieu of all other compensation.' 'The language of G.S. 97-31 is clear, and its provisions are mandatory.' *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956). The fact that an injury is one of those enumerated in the schedule of payments set forth under G.S. 97-31 precludes the Commission from awarding compensation under any other provision of the Act."

Similar language and a like result may be found in *Dudley v. Motor Inn*, 13 N.C. App. 474, 186 S.E. 2d 188. The award of the Commission is affirmed.

Affirmed.

Judges MORRIS and MARTIN concur.

CARVUS ANDREW BYRD, JR. v. JOHN F. ALEXANDER, NORTH CAROLINA COMMISSIONER OF MOTOR VEHICLES

No. 7611SC814

(Filed 6 April 1977)

Appeal and Error § 39— record on appeal — time for filing after clerk's certification

Appeal is dismissed for failure of the appellant to file the record on appeal in the appellate division within ten days after certification by the clerk of the trial tribunal as required by App. R. 12(a).

APPEAL by plaintiff from *Clark (Giles), Judge.* Judgment entered 4 June 1976 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 16 March 1977.

On 22 December 1974 plaintiff was arrested and charged with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. He refused to take the breathalyzer test. On 7 February 1975 plaintiff was served with notice of revocation of his driving privileges for a period of six months for refusal to submit to the breathalyzer test.

Pursuant to G.S. 20-16.2(d) plaintiff requested and received a hearing before a Department of Motor Vehicles hearing officer on 9 April 1975. Following the hearing, on or about 19 April 1975 plaintiff received a new notice of revocation of his driving privileges for a period of six months, effective 3 May 1975, for refusal to take the breathalyzer test. In the meantime, on or about 3 April 1975 plaintiff was found not guilty of driving under the influence on the occasion out of which arose his refusal to take the breathalyzer test.

On 29 April 1975 plaintiff instituted this proceeding under G.S. 20-25 for a hearing *de novo* in the superior court. On 29 April 1975 a preliminary injunction was issued enjoining the Department of Motor Vehicles from revoking plaintiff's driving privileges until the matter could be heard in superior court. The cause was heard *de novo* before Judge Clark on 4 June 1976. At that time judgment was entered dissolving the 29 April 1975 restraining order and affirming the Department's revocation order.

Plaintiff appealed.

T. Yates Dobson, Jr., and Wallace Ashley, Jr., for the plaintiff.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for the Department of Motor Vehicles.

BROCK, Chief Judge.

The record on appeal in this case was certified by the clerk of superior court on 3 September 1976. App. R. 12(a) requires that appellant shall file the record on appeal in the appellate division within ten days after certification by the clerk of the trial tribunal. The record on appeal in this case was filed in the Court of Appeals on 1 October 1976, more than ten days after certification.

Perhaps it is well to repeat again what was said in *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E. 2d 836 (1976), and *In re Allen*, 31 N.C. App. 597, 230 S.E. 2d 423 (1976):

> "The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.
>
> "The North Carolina Rules of Appellate Procedure are mandatory. 'These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . .' App. R. 1(a)."

Appeal dismissed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. BRUCE YOUNGBAR

No. 769SC806

(Filed 6 April 1977)

Criminal Law § 151— appeal — time for making entry

Defendant's notice of appeal which was not entered until the 35th day after the last day of the session at which judgment was rendered was not timely, and the purported appeal is dismissed. G.S. 15-180.3(2).

PURPORTED appeal by defendant from *McLelland, Judge.* Judgment entered 5 May 1976 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 15 March 1977.

Defendant was tried and convicted of (1) felonious breaking and entering and (2) felonious larceny. The two charges were consolidated for a judgment of imprisonment for a term of five years.

Attorney General Edmisten, by Associate Attorney Sandra M. King, for the State.

Thomas F. East for the defendant.

BROCK, Chief Judge.

This case was called for trial on 4 May 1976 and was concluded by a guilty verdict and the entry of judgment on 5 May 1976. The record on appeal discloses that Judge McLelland signed appeal entries on 11 June 1976 and set the times from that date for the service of proposed record on appeal and the service of proposed alternative record on appeal. There is no showing of notice of appeal being given prior to 11 June 1976. This notice of appeal dated 11 June 1976 was not filed until 17 June 1976 and does not show service on the district attorney.

The session of court during which defendant was tried was a two-week session commencing on 26 April 1976. Defendant's case was tried during the second week of the session. The two-week session expired by limitation on 7 May 1976. Actually in this instance the session expired 7 May 1976 by adjournment. Defendant's notice of appeal was not entered until 11 June 1976, the 35th day after the last day of the session at which judgment was rendered.

General Statute 15-180.3(2) provides that notice of appeal in criminal actions may be given by "[f]iling notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after the last day of the session at which [judgment is] rendered." The right of appeal is statutory, and the time limitation of the statute is jurisdictional. This purported appeal must be dismissed for lack of jurisdiction.

Appeal dismissed.

Judges PARKER and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 APRIL 1977

BEACH v. BEACH No. 7625DC758	Caldwell (76CVD123)	Affirmed
BROWN v. BROWN No. 7621SC787	Forsyth (75CVS3037)	Vacated and Remanded
GWALTNEY v. GWALTNEY No. 7726DC68	Mecklenburg (76CVD8604)	Affirmed
HILL v. HILL No. 7610DC767	Wake (76CVD661)	Vacated and Remanded
PLEASANTS, INC. v. JOHNSON No. 765DC783	New Hanover (74CVD4208)	Reversed
STATE v. BELLAMY No. 7613SC800	Brunswick (76CR340)	No Error
STATE v. CROSBY No. 7626SC826	Mecklenburg (76CR5004)	No Error
STATE v. DEESE No. 763SC717	Carteret (74CR6681)	Affirmed
STATE v. HILL No. 7620SC812	Union (76CR0630)	No Error
STATE v. HUNTER No. 764SC794	Onslow (76CR3167)	No Error
STATE v. JACOBUS No. 7610SC839	Wake (75CR24959)	No Error
STATE v. JORDAN No. 7622SC740	Iredell (75CR12785)	No Error
STATE v. McKINNEY No. 7618SC793	Guilford (76CR20102)	New Trial
STATE v. METCALF No. 7628SC847	Buncombe (76CR11178)	No Error
STATE v. O'DONOHUE No. 7627SC761	Gaston (76CR5785)	No Error
STATE v. PARKS No. 7626SC807	Mecklenburg (75CR69853) (75CR69854)	Dismissed
STATE v. SMITH No. 7614SC778	Durham (76CR2694)	No Error

STATE v. STARR No. 7625SC748	Caldwell (75CR5558) (75CR5562) (75CR5563) (75CR5564)	No Error
STATE v. WHITAKER No. 766SC769	Halifax (75CR11489)	No Error
STATE v. WILLS No. 7614SC822	Durham (75CR28388)	New Trial
UTILITIES COMM. v. EDMISTEN, Atty. General No. 7610UC734	Utilities Comm. (G- 9, Sub 152) (G- 5, Sub 116) (G-21, Sub 147)	Affirmed
YOUTH CAMP v. LYON No. 7617DC830	Stokes (75CVD8)	Affirmed

APPENDIX

AMENDMENTS TO
RULES OF APPELLATE PROCEDURE

AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO THE COURT OF APPEALS

1. Rule 18, "Taking Appeal; Record on Appeal—Composition and Settlement" is hereby amended:

(1) by striking the word "and" in line 3 of Subsection (a) and by inserting in line 3 after the word "Insurance" a comma and the words "and the Disciplinary Hearing Commission of The North Carolina State Bar"; and

(2) by adding two new paragraphs following the first paragraph in Subsection (b) to read as follows:

"The time and methods for taking appeals from the Disciplinary Hearing Commission of The North Carolina State Bar are: Either party to the proceeding, within 30 days after receipt of a copy of the Order of the Commission, which is to be sent by Registered or Certified Mail, may appeal from the decision of the Commission to the Court of Appeals for alleged errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions.

"In case of an appeal from the decision of the Commission to the Court of Appeals, the appeal shall operate as a supersedeas; and any discipline imposed by the Commission shall be stayed pending determination of the appeal."

(3) by striking the period at the end of the word "agency" in line 10 of Subsection (d) (3) and inserting a comma and the words "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar to settle the record on appeal in appeals from that agency."

(4) by adding after the word "Commission" in line 2 of the third paragraph of Subsection (d) (3) the words "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar."

2. Rule 19, "PARTIES TO APPEAL FROM AGENCIES," is hereby amended by adding a new paragraph to read as follows:

> "(d) **From the Disciplinary Hearing Commission of The North Carolina State Bar.** The complainant in the original complaint before the Disciplinary Hearing Commission, each of the other parties to the proceeding, the Chairman of the Hearing Committee or the Chairman of the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests."

These amendments to Article IV of the Rules of Appellate Procedure were adopted by the Supreme Court in Conference on June 21, 1977, to become effective immediately upon adoption. The amendments shall be promulgated by publication in the next succeeding Advance Sheets of the Supreme Court and the Court of Appeals.

Exum, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and second numbers in the N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 1. Open and Running Accounts

An account for services furnished by plaintiff to defendant did not qualify as mutual, open and current within the meaning of G.S. 1-31 because of the absence of reciprocal demands and other characteristics of mutuality. *Electric Service, Inc. v. Sherrod,* 338.

ADOPTION

§ 5. Operation and Effect of Decrees

In a proceeding to require respondent to reveal to petitioner, an adopted child, the identity of her natural parents, G.S. 48-25(c) did not require that the natural parents be served with summons and notice of petitioner's motion. *In re Spinks,* 422.

In a proceeding to require respondent to reveal to petitioner, an adopted child, the identity of her natural parents, trial court erred in failing to determine the best interests of the child, and the court's conclusion that it could consider only "the benefit or lack thereof resulting from the revelation of this information to the petitioner and/or society" failed to support the order of disclosure. *Ibid.*

AGRICULTURE

§ 16. Powers of Milk Commission

A milk distributor's action against individual members of the Milk Commission seeking a declaratory judgment as to the validity of a requirement that plaintiff pay its producers for reconstituted buttermilk at the Class I price is dismissed for failure to exhaust administrative remedies and to bring the action against the real parties in interest. *Biltmore Co. v. Hawthorne,* 733.

APPEAL AND ERROR

§ 7. Parties Aggrieved

Plaintiff was not aggrieved by an order holding his mother in contempt of court. *Goodson v. Goodson,* 76.

Appellants who are custodians of the child in question were aggrieved parties with standing to appeal from the order of the district court changing custody of the child. *In re Kowalzek,* 718.

§ 9. Moot Questions

Appeal of a person involuntarily committed to a mental health care facility was not moot although the commitment period had expired. *In re Hogan,* 429.

§ 39. Time of Docketing

Appeal is dismissed for failure to file record on appeal within 10 days after certification by the clerk. *Byrd v. Alexander,* 782.

§ 42. Matters Properly Included in the Record

Trial court erred in refusing to permit counsel to insert in the record the answers to questions to which objections were sustained. *Goodson v. Goodson,* 76.

APPEARANCE

§ 1. What Constitutes an Appearance

A letter sent by defendant's vice president to plaintiff's attorney and an assistant clerk of court constituted an "appearance" by defendant in the case. *Roland v. Motor Lines*, 288.

ARCHITECTS

Evidence was insufficient to support a finding that negligence by defendant architects in making inaccurate reports on the progress of a shopping center was a proximate cause of damages suffered by the owner of the shopping center. *People's Center, Inc. v. Anderson*, 746.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

Officer had probable cause to arrest defendant without a warrant for the felony of manslaughter arising out of an automobile collision. *S. v. Stewardson*, 344.

In a prosecution of defendant for assaulting a law officer while the officer was making a warrantless arrest of defendant's companion, conflicting evidence raised for jury determination the factual question of whether the law officer was properly discharging a duty of his office. *S. v. Bradley*, 666.

§ 6. Resisting Arrest

A person has the right to resist an unlawful arrest and may flee from an unlawful arrest. *S. v. Williams*, 204.

In a prosecution for assaulting a police officer in the performance of his duties, the jury should have been instructed as to defendant's rights if the policeman's entry into defendant's motel room was illegal. *S. v. Hagler*, 444.

ASSAULT AND BATTERY

§ 11. Indictment and Warrant

Indictment charging an assault "with a stick, a deadly weapon" was insufficient to charge an assault with a deadly weapon. *S. v. Palmer*, 166.

§ 15. Instructions

In prosecution for assault on an officer while the officer was arresting defendant's companion for driving under the influence, the court should have instructed on the question of whether the officer had reasonable grounds to believe the companion was driving the vehicle. *S. v. Bradley*, 666.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Findings of fact were not required to support an award of attorney's fees in an action for child custody and support. *Goodson v. Goodson*, 76.

ATTORNEY AND CLIENT — Continued

§ 9. Persons Liable for Compensation of Attorney

Trial court properly taxed attorney's fees for collection of a note against endorsers of the note. *Trust Co. v. Broadcasting Corp.*, 655.

§ 10. Disbarment Procedure

Trial court erred in holding a hearing on the disbarment of an attorney based on the attorney's conduct in a manslaughter case without giving the attorney notice and reasonable time to prepare his defense. *In re Palmer*, 449.

AUTOMOBILES

§ 1. Authority to Revoke License

Petitioner's guilty plea to a charge of driving under the influence and limitation of his driving privileges did not exempt him from the requirement of G.S. 20-16.2 that his driver's license be revoked for refusal to submit to a breathalyzer test. *Creech v. Alexander*, 139.

§ 2. Grounds and Procedures for Suspension or Revocation of Driver's License

Evidence was sufficient to support trial court's finding that defendant's refusal to take a breathalyzer test was without just cause or excuse. *Creech v. Alexander*, 139.

A person previously convicted of driving while under the influence was not eligible for limited driving privileges upon his conviction of driving with a blood alcohol content of .10% or more by weight. *Helms v. Powell*, 266.

Court's conclusion that the Commissioner of Motor Vehicles had no authority to suspend petitioner's license for his refusal to take a breathalyzer test was not supported by appropriate findings where the court failed to make findings as to whether the arresting officer had reasonable grounds to arrest defendant for driving under the influence. *Powell v. Bost*, 292.

§ 54. Passing Vehicles Traveling in the Same Direction

Trial court's instruction on the duty of a motorist to sound his horn before passing correctly embodied the common law duty to use reasonable care. *Bell v. Wallace*, 370.

§ 72. Sudden Emergencies

Evidence in an action for damages arising from an automobile accident was sufficient for the jury where defendant raised the defense of sudden incapacitation of her intestate. *Smith v. Garrett*, 108.

Trial court properly refused to instruct the jury on the doctrine of sudden emergency where such emergency was the result of plaintiff's negligence. *Bell v. Wallace*, 370.

§ 78. Contributory Negligence in Passing Vehicles Traveling in Opposite Direction

Evidence was insufficient to be submitted to the jury on the issue of plaintiff's contributory negligence where there was no evidence that plain-

AUTOMOBILES — Continued

tiff was operating his vehicle on the wrong side of the road. *Miller v. Houpe*, 103.

§ 79. Contributory Negligence in Intersectional Accident

Evidence was sufficient for the jury to find that the driver on the dominant highway was negligent in failing to take action to avoid a collision with a car which entered the highway from a servient road. *Snider v. Dickens*, 388.

§ 89. Sufficiency of Evidence of Last Clear Chance

Jury verdict finding defendant was not negligent rendered moot the question of whether the court erred in failing to submit the issue of last clear chance to the jury. *Cockrell v. Transport Co.*, 172.

Evidence was insufficient to require submission of an issue of last clear chance to the jury. *Bell v. Wallace*, 370.

§ 90. Instructions in Automobile Accident Cases

Trial court's instruction on the increased duty of care required of a driver on a dominant highway when unusual conditions obstruct his view of an intersection was proper. *Snider v. Dickens*, 388.

§ 97. Owner's Liability for Negligent Operation by Driver

Joint ownership of an automobile does not render one joint owner liable for an injury caused by another joint owner who is using the vehicle for his or her own purpose and is unaccompanied by the other joint owner. *Strickland v. King*, 222.

§ 112. Competency and Relevancy of Evidence in Manslaughter Case

Trial court in a manslaughter prosecution did not err in allowing a deputy sheriff to give his opinion as to the speed of defendant's vehicle. *S. v. Jones*, 408.

§ 113. Sufficiency of Evidence of Manslaughter

Evidence was sufficient for the jury in a prosecution for involuntary manslaughter while driving on the highway under the influence of intoxicating liquor. *S. v. Stewardson*, 344.

Evidence was sufficient to be submitted to the jury in a prosecution for manslaughter where it tended to show that defendant struck another vehicle at a high rate of speed and caused the death of two passengers in that vehicle. *S. v. Jones*, 408.

§ 122. "Highway" Within Purview of Driving Under the Influence Statute

Petitioner was operating his vehicle on a public highway at the time of his arrest for drunken driving where he was operating the vehicle under a bridge between the right-of-way lines of a U. S. highway. *Smith v. Powell, Comr. of Motor Vehicles*, 563.

§ 126. Competency and Relevancy of Evidence of Driving Under the Influence

Breathalyzer test results would not be rendered inadmissible by the fact that defendant's arrest was illegal. *S. v. Stewardson*, 344.

Breathalyzer test results were not inadmissible because the trial judge

BURGLARY AND UNLAWFUL BREAKINGS — Continued

they were taken from the apartment were circumstances sufficient to permit the jury to conclude that defendant was the thief. *S. v. Hagler*, 444.

COMPROMISE AND SETTLEMENT

§ 1. Nature, Elements, Validity and Effect

A settlement agreement barred defendants' right to recover on claims based on alleged fraud by plaintiff in the procurement of the original contracts between the parties. *Texaco, Inc. v. Brown*, 738.

§ 3. Practice and Procedure

In defendant's third-party action against third-party defendant contractor for indemnification for any amount recovered from defendant by plaintiff for blasting damages, trial court did not err in allowing a witness of defendant to testify regarding third-party defendant's offer to effect certain repairs on plaintiff's property. *Sales Co. v. Board of Transportation*, 97.

CONSTITUTIONAL LAW

§ 12. Regulation of Trades and Professions

Constitutionality of statute allowing the issuance of licenses as registered land surveyors to professional engineers upon application could not be tested in an action for injunctive relief brought by registered land surveyors. *Loughlin v. Board of Registration*, 351.

Ordinance giving the city council unbridled authority to grant or deny a license for operation of a restaurant in the city is unconstitutional. *Restaurants, Inc. v. City of Kinston*, 588.

§ 20. Equal Protection

Respondent's contention in a juvenile delinquency proceeding that the lack of community based residential care in his county which would result in commitment outside the county denied him equal protection of the law was unfounded. *In re Frye*, 384.

§ 21. Right to Security in Person and Property

Detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment, and when fingerprints are obtained from an accused while he is illegally detained, the taking of such fingerprints constitutes an unreasonable seizure of a person in violation of the Fourth Amendment. *S. v. Walls*, 218.

Where defendant objected to evidence with respect to his fingerprints taken by police at a time when he was not under arrest, trial court erred in failing to conduct a voir dire to determine if defendant's constitutional rights were violated at the time his fingerprints were taken. *Ibid.*

§ 22. Religious Liberty

Court's consideration of a child's spiritual welfare in determining custody did not violate constitutional provisions relating to the separation of church and state. *Dean v. Dean*, 482.

CONSTITUTIONAL LAW — Continued

§ 29. Right to Trial by Duly Constituted Jury

Defendant failed to show that blacks were systematically and arbitrarily excluded from the jury pool. *S. v. Pearson,* 213.

§ 32. Right to Counsel

Trial court did not err in refusing to allow defendant to withdraw his waiver of assigned counsel on the day the case was set for trial. *S. v. Watts,* 753.

§ 33. Self-incrimination

An officer's testimony that defendant did not mention an alleged affair with a rape victim did not violate defendant's right to remain silent. *S. v. Fisher,* 722.

§ 34. Double Jeopardy

Constitutional prohibition against double jeopardy applies to successive juvenile proceedings. *In re Drakeford,* 113.

CONTRACTS

§ 6. Contracts Against Public Policy

In an action by plaintiff to recover from defendants a commission of 10% of the total construction cost of defendants' home, trial court erred in granting summary judgment for defendants where there were genuine issues as to whether plaintiff was a general contractor or whether the contract was in excess of his contractor's license. *Helms v. Dawkins,* 453.

§ 13. Divisible Contracts

Where the contract between the parties entitled plaintiff to earn commissions which could then be used to buy shares in defendant's company, the contract was divisible into two related parts and was therefore not subject to the statute of frauds. *Turner v. Investment Co.,* 565.

§ 16. Conditions Precedent, Concurrent and Subsequent

Trial court correctly decided that defendant's obligations under the contract sued on were not conditional on the continuance of a separate licensing agreement between the parties. *Carding Specialists v. Gunter & Cooke,* 485.

§ 19. Novation and Substitution

Jury question was presented as to whether an addendum to a contract for sale of a house constituted a novation which abrogated a provision in the original contract that the furnace would be in good repair at the time of closing. *Penney v. Carpenter,* 147.

§ 27. Sufficiency of Evidence

Evidence was sufficient to support the jury's finding that plaintiff was entitled to earn commissions which could then be used to buy shares in defendant's company, and plaintiff was entitled to sue for commissions earned and forego the stock. *Turner v. Investment Co.,* 565.

§ 29. Measure of Damages for Breach of Contract

Where the parties' contract provided that money owed by defendant to plaintiffs was payable in goods, plaintiffs ordered goods from defend-

CONTRACTS — Continued

ant, but defendant failed to ship them, plaintiffs' damages amounted to the fair market value of the number of units plaintiffs were entitled to at the time they were entitled to receive them, plus interest from that time. *Carding Specialists v. Gunter & Cooke*, 485.

COUNTIES

§ 2. Governmental and Private Powers

A county was not liable for compensation benefits for the death of an employee of a volunteer fire department which had contracted with the county to provide fire protection for a fire district. *Tilghman v. Fire Department*, 767.

COURTS

§ 9. Jurisdiction of Superior Court After Orders of Another Superior Court Judge

Superior court erred in entering summary judgment for defendants where another superior court judge had previously denied motions of both parties for summary judgment. *Biddix v. Construction Corp.*, 120.

CRIME AGAINST NATURE

§ 2. Prosecutions

Nonsuit should have been granted where there was no evidence outside defendant's confession which had any probative value in establishing the fact that the crime charged was committed. *S. v. Kraus*, 144.

CRIMINAL LAW

§ 21. Preliminary Proceedings

Defendant was not entitled to a preliminary hearing where an indictment was returned before the date of the scheduled hearing. *S. v. Dangerfield*, 608.

Due process did not require that defendant be given a preliminary hearing. *S. v. Page*, 478.

§ 22. Pleas

Evidence of plea negotiation between defendant and the arresting officer was properly admitted. *S. v. Lewis*, 298.

§ 26. Plea of Former Jeopardy

Juvenile was subjected to double jeopardy where a petition alleging she assaulted a fellow student with a razor blade was dismissed for lack of evidence and she was thereafter adjudicated delinquent upon another petition based on the same incident alleging she committed an affray by assaulting a fellow student with a razor blade. *In re Drakeford*, 113.

Imposition of separate sentences for defendant's conviction of possession with intent to deliver a controlled substance and delivery of the same controlled substance did not violate the prohibitions against former jeopardy. *S. v. Lewis*, 298.

CRIMINAL LAW — Continued

§ 34. Evidence of Defendant's Guilt of Other Offenses

Although defendant had been acquitted of larceny of a witness's furniture, the witness's testimony concerning furniture stolen from him which had been found on defendant's premises was competent to show a common scheme of receiving stolen property. *S. v. Cumber*, 329.

Trial court in a first degree murder prosecution properly admitted evidence that defendant had been charged with receiving goods stolen by the murder victims. *S. v. Hyatt*, 623.

Trial court in a rape case properly admitted testimony that defendant committed crimes of rape and crime against nature one week before the commission of the crime for which he was on trial. *S. v. Gainey*, 682.

Defendant in a rape prosecution was not prejudiced by the admission of a fingerprint card made in 1966. *Ibid.*

Trial court in a prosecution for receiving stolen cigarettes did not err in allowing into evidence testimony that defendant had received other stolen cigarettes two weeks earlier. *S. v. Gregory*, 762.

§ 35. Evidence that Offense was Committed by Another

The trial court in a manslaughter prosecution did not err in denying defendant the right to incriminate another person as the driver of the vehicle causing death instead of defendant. *S. v. Jones*, 408.

§ 48. Silence of Defendant as Implied Admission

An officer's testimony that defendant did not mention an alleged affair with a rape victim did not violate defendant's right to remain silent. *S. v. Fisher*, 722.

§ 50. Expert and Opinion Testimony

State's evidence was sufficient in a rape case to establish chain of custody of a slide to permit a pathologist to testify as to his analysis of the slide. *S. v. Gainey*, 782.

§ 51. Qualification of Experts

If evidence indicates that a witness is qualified, the court's admission of his testimony is presumed to be such a finding. *S. v. Hill*, 261.

§ 60. Fingerprint Evidence

Detentions for the sole purpose of obtaining fingerprints are subject to the constraints of the Fourth Amendment, and when fingerprints are obtained from an accused while he is illegally detained, the taking of such fingerprints constitutes an unreasonable seizure of a person in violation of the Fourth Amendment. *S. v. Walls*, 218.

Where defendant objected to evidence with respect to his fingerprints taken by police at a time when he was not under arrest, trial court erred in failing to conduct a voir dire to determine if defendant's constitutional rights were violated at the time his fingerprints were taken. *Ibid.*

Defendant in a rape prosecution was not prejudiced by the admission of a fingerprint card made in 1966 where the card did not disclose any arrest, indictment or conviction of defendant. *S. v. Gainey*, 682.

CRIMINAL LAW — Continued

§ 66. Evidence of Identity by Sight

Trial court properly concluded that an assault victim's in-court identification of defendant was based solely on her observation of him at the crime scene. *S. v. Pearson,* 213.

Witness's in-court identification of defendant was not tainted by a pretrial photographic identification. *S. v. Hansley,* 270; *S. v. Lewis,* 471.

Pretrial lineup was not impermissibly suggestive and in-court identification was properly permitted. *S. v. McDonald,* 457.

In-court identification was not inadmissible on the ground that defendant's arrest was illegal. *Ibid.*

In-court identification testimony was not required to be suppressed because the State did not comply with procedures of Art. 14 of G.S. Ch. 15A in conducting a lineup since that Article has no application where defendant has already been arrested when the lineup takes place. *S. v. McDonald,* 457.

§ 70. Tape Recordings

Defendant was not prejudiced by admission of portions of a tape recording which did not corroborate testimony of any witnesses. *S. v. Jeeter,* 131.

§ 73. Hearsay Testimony

Testimony that a murder victim told the witness that a third person was trying to kill her was properly excluded as hearsay. *S. v. Dangerfield,* 608.

§ 75. Test of Voluntariness of Confession; Admissibility

Evidence was sufficient to support the trial court's findings that an oral statement of defendant which was reduced to writing was voluntarily made. *S. v. McRae,* 243.

Although trial court originally ruled that defendant's in-custody statements were inadmissible in the State's case in chief because defendant had not been given the Miranda warnings, the court properly allowed the statements on rebuttal where the court determined after a second voir dire that the statements were volunteered and thus admissible under Miranda. *S. v. Medley,* 284.

Trial court in a manslaughter prosecution properly permitted a deputy sheriff to testify that defendant told him immediately after the automobile accident that he was the driver. *S. v. Jones,* 408.

Court erred in admission of defendant's confession where the State failed to show affirmatively that defendant knowingly and intelligently waived his right to have counsel present during the questioning. *S. v. Starling,* 593.

Statements made by defendant while in custody were properly admitted in evidence where there was no custodial interrogation and the statements were voluntary. *S. v. Kessack,* 536.

Defendant was not subjected to custodial interrogation, and a waiver of counsel was not required, where defendant was questioned in his own home in the presence of his wife at a time when he was not in custody. *S. v. Parrish,* 636.

CRIMINAL LAW — Continued

§ 76. Determination and Effect of Admissibility of Confession

Where no conflicting evidence is offered on voir dire and the uncontradicted testimony establishes that evidence of a confession is admissible, it is not error for the judge to admit the evidence without making specific findings of fact. *S. v. Kessack*, 536.

§ 79. Declaration of Codefendant

The trial court did not err in failing to instruct the jury to consider a confession made by a testifying codefendant, which implicated defendant, only against the confessing codefendant, since defendant did not object to the evidence or request a limiting instruction. *S. v. Kessack*, 536.

§ 84. Evidence Obtained by Unlawful Means

Trial court erred in denying defendant's motion to suppress marijuana taken during a search of his person which was not incident to a legal arrest. *S. v. Williams*, 204.

Defendant was not entitled to another voir dire on the legality of a search of her premises where the legality of the search had been determined in a prior trial of defendant for another crime. *S. v. Cumber*, 329.

Items were lawfully seized without a warrant from defendant's residence and automobile where defendant, as a condition of his probation, waived his right to object to a warrantless search in the presence of his probation officer. *S. v. Craft*, 357.

Trial court properly determined that an officer's discovery of stolen lawn furniture in plain view on defendant's premises while executing a warrant to search for stolen liquor was inadvertent, although the officer had previously been informed by an unreliable informant that the furniture was on defendant's premises. *S. v. Cumber*, 329.

Statute requiring that a motion to suppress evidence made before trial be supported by an affidavit is not unconstitutional. *S. v. Gibson*, 584.

§ 86. Credibility of Defendants

In a prosecution for defendant's third offense of driving under the influence, trial court did not err in allowing defendant to be cross-examined about two prior convictions for driving under the influence which were elements of the offense charged and which defendant had admitted out of presence of the jury. *S. v. Guinn*, 595.

§ 91. Continuance

Statement by the district attorney in a prior case about a defendant's failure to testify did not prejudice defendant and entitle him to a continuance. *S. v. McRae*, 243.

Trial court properly denied defendant's motion for continuance of his second trial so that his counsel might have time to review the record of his first trial. *S. v. Rogers*, 274.

Trial court did not err in denying defendant's motion for continuance made after the case was called for trial. *S. v. Hyatt*, 623.

§ 92. Consolidation of Counts

Three defendants were not deprived of evidence corroborating their alibis by the consolidation of their trials for breaking and entering and larceny. *S. v. Craft*, 357.

CRIMINAL LAW — Continued

§ 102. Conduct of District Attorney

Defendant was not prejudiced by the district attorney's explanation to the jury that the defense has the last argument when the defense does not offer evidence. *S. v. Miller*, 770.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court properly denied defendant's untimely request for special instructions on reasonable doubt and defendant's right not to testify. *S. v. Rogers*, 274.

§ 113. Statement of Evidence and Application of Law Thereto

In the absence of a request, trial court was not required to instruct the jury that he had no opinion with regard to the evidence. *S. v. Dangerfield*, 608.

§ 117. Charge on Credibility of Witness

Trial court properly instructed on the duty of the jury to scrutinize carefully defendant's testimony. *S. v. Fisher*, 722.

§ 119. Request for Instructions

Defense counsel's oral request for an alibi instruction which was made at the end of the trial court's charge failed to comply with G.S. 1-181. *S. v. Pharr*, 775.

§ 126. Unanimity of Verdict

When instructing the jury that the verdict must be unanimous, trial court is not required to charge that no juror should surrender his conscientious convictions in order to reach a verdict. *S. v. McRae*, 243.

Instruction on unanimity of the verdict was erroneous where it was susceptible to the interpretation that when there is a majority vote, the minority should then cast their votes with the majority and make the verdict unanimous. *S. v. Cumber*, 329.

§ 134. Form and Requisites of Sentence

Trial court erred in sentencing the youthful offender defendant as one other than a "committed youthful offender" without first finding that defendant would derive no benefit from treatment and supervision as a committed youthful offender. *S. v. Matre*, 309.

§ 142. Suspended Sentences

In a prosecution of a dentist for attempting to obtain property by false pretense, the trial court did not abuse its discretion by conditioning defendant's suspended sentence upon his pledge not to accept patients referred to him by State agencies. *S. v. Page*, 478.

§ 143. Revocation of Suspension of Sentence

Neither the district court nor superior court had authority to activate a suspended sentence for violation of a condition of suspension more than five years after entry of the judgment suspending the sentence. *S. v. Rowland*, 756.

§ 145. Costs

The cost of printing unnecessary record on appeal is taxed against defense counsel. *S. v. Kessack*, 536.

CRIMINAL LAW — Continued

§ 145.1. Probation

Defendant's consent to warrantless searches was a valid condition of his probation. *S. v. Craft*, 357.

§ 151. Appeal Entries

Defendant's notice of appeal which was not entered until the 35th day after the last day of the session at which judgment was rendered was not timely. *S. v. Youngbar*, 784.

§ 159. Form and Requisites of Transcript

Trial court did not err in ordering that a voir dire held in the trial of defendant for another crime be included in the record of the present case where such voir dire was the basis for the court's ruling that no voir dire was necessary to determine the legality of a search. *S. v. Cumber*, 329.

§ 166. The Brief

The public defender is taxed with the costs of printing the unnecessary narration of the evidence in the brief. *S. v. Miller*, 770.

DAMAGES

§ 16. Instructions on Damages

In an action for damages sustained when defendant's fish were lost during the overflow of a pond, trial court's instructions on damages were improper. *Town of Mars Hill v. Honeycutt*, 249.

DEEDS

§ 12. Estates Created by Construction of the Instrument

Language in a deed which was found only in the same paragraph as the description was ineffectual and did not create a valid right of reentry on the stated conditions since an unqualified fee was provided by the granting clause. *Waters v. Phosphate Corp.*, 305.

DIVORCE AND ALIMONY

§ 1. Jurisdiction

The right of plaintiff, a N. C. resident, to seek alimony in the N. C. courts was not impaired by defendant's action for divorce instituted in a Georgia court. *Webber v. Webber*, 572.

§ 13. Separation for Statutory Period

Plaintiff did not meet his burden of showing that he and defendant lived separate and apart for one year preceding the institution of an action for absolute divorce. *Ponder v. Ponder*, 150.

§ 16. Alimony Without Divorce

Trial court erred in entering summary judgment for plaintiff on defendant's counterclaim for alimony where there existed a genuine issue as to the material fact of the parties' income and expenses. *Reid v. Reid*, 750.

DIVORCE AND ALIMONY—Continued

§ 19. Modification of Decrees

The wife could obtain a modification of the amount of permanent alimony ordered by a consent judgment in a divorce action upon a showing of changed circumstances. *Seaborn v. Seaborn,* 556.

§ 23. Child Support

Evidence supported court's finding that plaintiff had the ability to pay child support of $110 per month. *Wyatt v. Wyatt,* 162.

Partial listing of legal expenses was an insufficient finding of fact as to the reasonable worth of attorney's fees to support award of attorney's fees in an action for child support. *Ibid.*

A parent is entitled to credit toward the amount of child support ordered by a court decree for expenditures incurred in behalf of the child when equitable considerations exist which would create an injustice if such credit were not allowed. *Goodson v. Goodson,* 76.

§ 24. Child Custody

Order contained insufficient findings of fact and conclusions of law to support award of child custody, support and visitation rights. *Montgomery v. Montgomery,* 154.

Court's consideration of a child's spiritual welfare in determining custody did not violate constitutional provisions relating to the separation of church and state. *Dean v. Dean,* 482.

The fact that a mother had given birth to two illegitimate children and was rearing them in her home was a sufficient change in circumstances to justify a change in custody. *Ibid.*

The absence of an express finding of fitness in an order awarding child custody will not be fatal where such a finding is implicit in the findings which the court does make. *In re Williamson,* 617.

Though evidence in a child custody proceeding revealed that the mother had not always conducted herself in an exemplary manner, such evidence did not compel a finding by the court that the mother was not a fit and proper person to have custody of her daughters. *Ibid.*

EASEMENTS

§ 3. Creation of Easement by Implication

Plaintiff acquired an easement by implication in a road across defendant's lands. *McGee v. McGee,* 726.

ELECTRICITY

§ 8. Contributory Negligence

Evidence showed plaintiff contributorily negligent as a matter of law in coming in contact with an uninsulated wire. *Lambert v. Power Co.,* 169.

EQUITY

§ 2. Laches

Plaintiffs could be guilty of laches even though their action for ejectment was brought within any applicable period of limitation. *McRorie v. Query,* 311.

FALSE PRETENSE — Continued

§ 2. Indictment and Warrant

The prosecutor and grand jury did not err in proceeding under the criminal statute making it a felony to attempt to obtain property from another by false pretenses, rather than under the statute defining powers of the State Board of Dental Examiners to punish administratively a dentist who fraudulently obtained fees. *S. v. Page*, 478.

FRAUD

§ 11. Competency and Relevancy of Evidence

Evidence of misrepresentations as to the acreage of a farm sold to plaintiffs was not inadmissible under the parol evidence rule in an action based on fraud. *Parker v. Bennett*, 46.

§ 12. Sufficiency of Evidence

Trial court erred in granting summary judgment for defendants in an action to recover damages or to rescind a sale of land on the ground of alleged fraudulent misrepresentations as to acreage of the land. *Parker v. Bennett*, 46.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

The description of land and an easement contained in a sales agreement and an attached property sketch was not patently ambiguous. *Prentice v. Roberts*, 379.

§ 5. Contracts to Answer for the Debt of Another

An oral promise of a general contractor of a motel construction project to pay for electrical supplies furnished by plaintiff to the electrical subcontractor for the project came within the main purpose rule and was enforceable. *Supply Co. v. Motel Development*, 199.

HOMICIDE

§ 15. Relevancy and Competency of Evidence

In a prosecution for second degree murder of a three year old, trial court did not err in allowing medical experts to use the term "battered child syndrome" and in allowing them to define it. *S. v. Periman*, 33.

In a prosecution for involuntary manslaughter, evidence of violence at the scene of the crime and of the condition of the victim's body was competent. *S. v. Waite*, 279.

Evidence of a conversation between a deceased attorney and another attorney concerning civil litigation between defendant and his brother was irrelevant in a homicide prosecution. *S. v. Wike*, 475.

§ 17. Evidence of Threats, Motive and Malice

Testimony by defendant's sister that he told her he would do like a brother of defendant who had killed another brother was competent as evidence of a prior threat against the brother defendant killed. *S. v. Wike*, 475.

HOMICIDE — Continued

§ 21. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for homicide of a three year old who died as a result of a beating. *S. v. Periman*, 33.

Evidence was sufficient for the jury in a case where the death resulted from shooting. *S. v. Hill*, 261.

Evidence was sufficient for the jury in a prosecution for involuntary manslaughter of defendant's infant son. *S. v. Waite*, 279.

State's evidence was sufficient to support a verdict finding defendant guilty of voluntary manslaughter of his illegitimate nine month old son. *S. v. Foust*, 301.

State's evidence was sufficient to support a verdict finding defendant guilty of second degree murder of his wife. *S. v. Dangerfield*, 608.

Evidence was sufficient for the jury in a first degree murder case. *S. v. Hyatt*, 623.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court's instruction on presumptions of unlawfulness and malice did not fail to require the State to prove each and every element of the offense in violation of the Mullaney decision. *S. v. Hill*, 261.

HUSBAND AND WIFE

§ 11. Construction and Operation of Separation Agreement

Injunctive relief was not available to the former wife to compel her former husband to make payments necessary for her support as provided only in the separation agreement and not in a divorce judgment. *Riddle v. Riddle*, 83.

An issue of material fact existed as to whether defendant refused to provide plaintiff with a replacement vehicle pursuant to a separation agreement between them. *Ibid.*

§ 12. Revocation and Rescission of Separation Agreement

Where a separation agreement provided that a husband would provide support for the wife until she died or remarried, the action of the wife in cohabiting with another man would not constitute a valid defense to the husband for failure to comply with the agreement. *Riddle v. Riddle*, 83.

Defendant's failure to sign deeds conveying property to plaintiff as required by their separation agreement was breach of an executed, not executory, provision, and defendant's duty to convey was not voided by the subsequent reconciliation of the parties. *Whitt v. Whitt*, 125.

INDICTMENT AND WARRANT

§ 7. Form, Requisites and Sufficiency of Indictment

Motion alleging the signature of the grand jury foreman failed to attest the concurrence of 12 grand jurors in the finding of a true bill was a motion to dismiss, and the motion was properly denied where not made at or before arraignment. *S. v. Ellis*, 226.

INFANTS

§ 9. Grounds for Awarding Custody of Minor

The fact that a mother had given birth to two illegitimate children and was rearing them in her home was a sufficient change in circumstances to justify a change in child custody. *Dean v. Dean,* 482.

Order of the district court changing custody of the child in question is fatally defective and must be vacated. *In re Kowalzek,* 718.

§ 10. Commitment of Minors for Delinquency

Juvenile was subjected to double jeopardy where a petition alleging she assaulted a fellow student with a razor blade was dismissed for lack of evidence and she was thereafter adjudicated delinquent upon another petition based on the same incident alleging she committed an affray by assaulting a fellow student with a razor blade. *In re Drakeford,* 113.

Proceedings before a district court judge in which the judge found that respondent had broken and entered a residence and had committed larceny and had received stolen goods constituted a valid adjudicatory hearing despite the wording of the order postponing "adjudication and disposition." *In re Fewell,* 295.

Evidence in a delinquency hearing was sufficient to show that respondent committed a breaking and entering. *In re Frye,* 384.

Respondent's contention in a juvenile delinquency proceeding that the lack of community based residental care in his county which would result in commitment outside the county denied him equal protection of the law was unfounded. *Ibid.*

An adjudication of delinquency based on the juvenile's admission of the allegations of the petition must affirmatively show that the admission was made understandingly and voluntarily. *In re Johnson,* 492.

§ 11. Child Abuse

In a prosecution for second degree murder of a three year old, trial court did not err in allowing medical experts to use the term "battered child syndrome" and in allowing them to define it. *S. v. Perlman,* 33.

INJUNCTIONS

§ 2. Inadequacy of Legal Remedy

Injunctive relief was not available to the former wife to compel her former husband to make payments necessary for her support as provided only in the separation agreement and not in a divorce judgment. *Riddle v. Riddle,* 83.

§ 11. Injunctions Against Public Agencies

Superior court properly enjoined enforcement of portions of "new" motor vehicle accident regulations which were the same as the old regulations previously enjoined pending trial on the merits. *Insurance Co. v. Ingram,* 552.

INSANE PERSONS

§ 1. Commitment of Insane Persons to Hospitals

Admission of a written report signed by a physician who was not present at the commitment hearing denied respondent her right of confrontation and cross-examination. *In re Hogan,* 429.

INSANE PERSONS — Continued

Finding that respondent was "preoccupied with religious subjects" furnished no support for the court's finding that respondent was mentally ill or imminently dangerous to herself or others. *Ibid.*

Finding that respondent had delusions as to the extent of danger of the KKK, that she misinterpreted stimuli, and that she was out of touch with reality were insufficient to support conclusion that she was imminently dangerous to herself or others. *Ibid.*

INSURANCE

§ 1. Control and Regulation

Superior court properly enjoined enforcement of portions of "new" motor vehicle accident regulations which were the same as the old regulations previously enjoined pending trial on the merits. *Insurance Co. v. Ingram,* 552.

§ 41. Inception of Sickness or Disability

Trial court properly determined that plaintiff was not afforded coverage under a disability insurance policy where the date of the accident or sickness giving rise to the claim occurred more than six months prior to the issuance of the policy. *Burkette v. Insurance Co.,* 464.

§ 43.1. Hospital Expense Policy

In an action to recover hospital room expenses from defendant under two insurance policies, the period of limitation ran from the time written proof of loss was furnished in accordance with requirements of the policies plus the sixty days during which the policies prohibited a claimant from filing suit. *Carter v. Insurance Co.,* 580.

§ 44. Action to Recover Benefits on Disability Insurance

An accommodation maker of a note which included the premium for a credit disability policy providing for payment of installments of the note if the accommodated comaker became disabled was a real party in interest who could maintain an action on the disability policy. *Bank v. McKenzie,* 68.

§ 76. Automobile Fire Policies

Evidence of cost of all repairs to a tractor damaged by fire, the purchase price of the tractor, and the fair market value of the tractor before and after the fire was relevant to show that the cost of repairs was less than the cash value or replacement cost within the provisions of the insurance policy limiting insurer's liability under the policy. *Lawrence v. Insurance Co.,* 414.

§ 85. Liability Insurance—Other Vehicles Used by Insured

A car purchased by insured and his son and used by them, but for which they did not yet have the certificate of title or license tags, was furnished for the regular use of insured and his son and was therefore not insured under the "non-owned" clause of insured's policy. *Gaddy v. Insurance Co.,* 714.

INTEREST

§ 3. Truth in Lending Act

When the amount of a debtors' obligation to the lender was increased, the second transaction was a new transaction which was subject to the disclosure requirements of the Truth in Lending Act. *Lowery v. Finance America Corp.*, 174.

A lender violated the Truth in Lending Act by excluding the cost of credit life and disability insurance from the amount of the finance charge disclosed to the borrower for the reason that the insurance disclosures were not clear, conspicuous and in meaningful sequence. *Ibid.*

A repayment schedule in a disclosure statement was insufficient where the total number of payments was not expressed in a single figure and the final clause was so unclear as to obscure the preceding disclosures. *Ibid.*

A lender violated the Truth in Lending Act by inaccurately disclosing the nature of the security interest in after-acquired household goods. *Ibid.*

Section of the Truth in Lending Act absolving a creditor from liability for an unintentional error relates only to clerical errors. *Ibid.*

Borrowers were entitled to recover the statutory penalty and reasonable attorney's fees where a lender's disclosure statements were defective. *Ibid.*

JUDGMENTS

§ 4. Construction and Operation of Judgment

Judgment was sufficient to impose a laborer's and materialman's lien although it contained no provision expressly declaring the monetary award a lien on the lands referred to therein. *Investors, Inc. v. Berry*, 642.

§ 10. Construction and Operation of Consent Judgment

Where a 1945 consent judgment of nonsuit had never been set aside as to the present plaintiffs, there was no pending action in which summary judgment could be entered for defendants. *Howard v. Boyce*, 699.

§ 14. Jurisdiction to Enter Default Judgment

A letter sent by defendant's vice president to plaintiff's attorney and an assistant clerk of court constituted an "appearance" by defendant in the case, and only the judge could thereafter enter default judgment against defendant. *Roland v. Motor Lines*, 288.

§ 37. Matters Concluded in General

Plaintiffs' action for a money judgment for damages resulting from defendants' alleged breach of a contract between the parties was barred by plaintiffs' prior action to obtain a money judgment based on a judicial enforcement of the contract which resulted in a judgment for defendants. *Blanton v. Maness*, 577.

§ 50. Actions on Domestic Judgments

There is no procedure now recognized in N. C. by which a judgment may be "renewed." *Investment Co. v. Toler*, 461.

Where plaintiff properly brought an independent civil action to recover the amount of its prior judgment against defendants plus interest, in-

clusion of the improper request that the former judgment "be renewed" in the prayer for relief did not render the complaint fatally defective. *Ibid.*

JURY

§ 7. Challenges

The State may not peremptorily challenge a juror already accepted after the defendant has exhausted his peremptory challenges. *S. v. Lee*, 591.

Trial court did not err in denial of defendant's challenge for cause of a juror who stated he felt persons arrested or charged with crimes were probably guilty. *S. v. Parrish*, 636.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractor

Where damages to the owner from a contractor's breach of the contract were in excess of all amounts otherwise due to the contractor, there were no funds owed by the owner to the contractor to which a first tier subcontractor's lien could attach. *Builders Supply v. Bedros*, 209.

§ 8. Enforcement of Lien

Where a default judgment obtained by one defendant purportedly enforcing its materialmen's lien against another defendant did not refer to the property which was the subject of the lien or relate back to the date when labor and materials were first furnished, such judgment amounted only to a money judgment which did not relate back to the date when labor and materials were first furnished and which failed to make defendant's lien prior to plaintiffs' deed of trust. *Miller v. Lemon Tree Inn.* 524.

Judgment was sufficient to impose a laborer's and materialman's lien although it contained no provision expressly declaring the monetary award a lien on the lands referred to therein. *Investors, Inc. v. Berry*, 642.

An assistant clerk of court had authority to enter a default judgment establishing a laborer's and materialman's lien on certain lands and ordering that execution issue on such lands. *Ibid.*

Superior Court of Mecklenburg County had jurisdiction to declare a laborer's lien on realty located in Watauga County. *Ibid.*

LANDLORD AND TENANT

§ 5. Lease of Personal Property

An agreement in which plaintiff agreed to lease a corporation equipment, appliances and furniture for use in its apartment building was a true lease, not a security agreement subject to the filing requirements of the Uniform Commercial Code. *Acceptance Corp. v. David*, 559.

LARCENY

§ 5. Presumptions and Burden of Proof

Mullaney v. Wilbur, 421 U.S. 684, does not affect the doctrine of possession of recently stolen property. *S. v. Hales*, 729.

LARCENY — Continued

§ 7. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution of four defendants for larceny of a Pepsi-Cola drink box. *S. v. Ellis*, 226.

Evidence was sufficient for the jury in a prosecution for larceny under the theory of possession of recently stolen property. *S. v. Craft*, 357.

In a prosecution for breaking and entering and larceny, the fact that defendant lived in the same rooming house as the victim and that defendant was in possession of the victim's personal appliances very soon after they were taken from his apartment were circumstances sufficient to permit the jury to conclude that defendant was the thief. *S. v. Hagler*, 444.

Evidence that stolen goods were found in defendant's barn the next day following a break-in was sufficient for the jury. *S. v. Hales*, 729.

LIBEL AND SLANDER

§ 9. Qualified Privilege

In a defamation action where defendant supported his summary judgment motion by establishing the affirmative defense of qualified privilege, summary judgment was properly entered against plaintiff who relied simply on the allegations of his complaint to show malice. *Towne v. Cope*, 660.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time From Which Statute Begins to Run

The six year statute of limitations did not apply to an action for the negligent installation of roofs on additions to plaintiff's existing facilities. *Ports Authority v. Roofing Co.*, 400.

Statute extending time of accrual of a cause of action based on a hidden defect does not apply to contract actions. *Ibid.*

Plaintiff's claim against a roofing subcontractor for damages caused by negligent installation of roofing materials was barred by the three year statute of limitations. *Ibid.*

Claim against a general contractor for negligent installation of roofs was improperly dismissed where it does not appear whether plaintiff's claim was barred before enactment of the statute which extended the time of accrual of actions based on a hidden defect and whether the statute extended the time for plaintiff's claim. *Ibid.*

In an action to recover hospital room expenses from defendant under two insurance policies, the period of limitation ran from the time written proof of loss was furnished in accordance with the requirements of the policies plus the sixty days during which the policies prohibited a claimant from filing suit. *Carter v. Insurance Co.*, 580.

§ 6. Accrual of Cause of Action on Accounts

Trial court's conclusion, in an action on an account, that none of the account was barred by the statute of limitations was not supported by the findings of fact. *Electric Service, Inc. v. Sherrod*, 338.

MALICIOUS PROSECUTION

§ 13. Sufficiency of Evidence

Evidence was sufficient for the jury in plaintiff's action for malicious prosecution. *Hawkins v. Hawkins*, 158.

MASTER AND SERVANT

§ 49. "Employees" Within Meaning of Workmen's Compensation Act

Findings by the Industrial Commission were insufficient to support its conclusion that defendant insurer was estopped to deny that a pulpwood cutter was acting as an employee of two defendant woodyards at the time of his death by accident while cutting pulpwood. *Allred v. Woodyards, Inc.*, 516.

A county was not liable for compensation benefits for the death of an employee of a volunteer fire department which had contracted with the county to provide fire protection for a fire district. *Tilghman v. Fire Department*, 767.

An owner-operator of a truck leased to an ICC franchise holder is the employee of the lessee within the meaning of the N. C. Workmen's Compensation Act. *Thompson v. Transport Co.*, 693.

§ 56. Causal Relation Between Employment and Injury

Injuries sustained by the owner-operator of a truck while he was preparing to make a journey for his employer arose out of and in the course of his employment. *Thompson v. Transport Co.*, 693.

§ 62. Injuries On the Way to or From Work

Injuries received by plaintiffs in a collision between automobiles driven by fellow employees while they were leaving work on a private road maintained by the employer arose out of and in the course of their employment. *Strickland v. King*, 222.

§ 65. Back Injury

Plaintiff whose award of 50% permanent disability of his back was made pursuant to G.S. 97-31 was not entitled to any other compensation. *Baldwin v. Hospital*, 779.

§ 68. Occupational Disease

The Industrial Commission erred in concluding that under G.S. 97-53(13) as it existed during the first six months of 1971 serum hepatitis was an occupational disease. *Booker v. Medical Center*, 185.

§ 75. Medical Expenses

Evidence was sufficient to support the Industrial Commission's finding that the treatment obtained by plaintiff after his condition changed for the worse was obtained with a view of tending to lessen plaintiff's period of disability, and defendant was properly held responsible for payment of all medical expenses. *Schofield v. Tea Co.*, 508.

§ 77. Review of Award for Change of Condition

Evidence in a workmen's compensation proceeding was sufficient to support the Industrial Commission's finding that plaintiff had a change of condition for the worse and at the time of the hearing had not reached

MASTER AND SERVANT — Continued

maximum improvement or the end of the healing period. *Schofield v. Tea Co.*, 508.

In a hearing before the Industrial Commission on plaintiff's claim of a change in his condition, medical testimony revealed that plaintiff was suffering from the same symptoms which, according to testimony in an earlier hearing, were unrelated to his injury. *Gaddy v. Kern*, 671.

§ 79. Persons Entitled to Payment

Statute provides for the continuation of compensation death benefits after 400 weeks to all dependent children until such children reach the age of 18 years. *Caldwell v. Realty Co.*, 676.

§ 83. Cancellation of Compensation Policies

Even though the employer had settled with the employee, the Industrial Commission had jurisdiction to determine whether the employer's workmen's compensation policy had been effectively cancelled before the date of the employee's injury. *Spivey v. General Contractors*, 488.

§ 87. Exclusion of Common Law Action

The Workmen's Compensation Act will not be construed to give an employee injured in an automobile accident on the employer's premises an option to file under the Act or to sue a negligent fellow employee because of the existence of compulsory automobile liability insurance. *Strickland v. King*, 222.

§ 89. Common-law Right of Action Against Third Person Tortfeasor

Industrial Commission had authority to issue an order for distribution of a $55,000 wrongful death settlement, including a requirement that the liability carrier pay $28,500 to the Workmen's Compensation carrier in settlement of its subrogation interest, notwithstanding the liability carrier had already paid the total $55,000 to deceased employee's administrator and the widow may have spent her entire share of the settlement. *Williams v. Insurance Repair Specialists*, 235.

§ 93. Prosecution of Claim and Proceedings Before the Commission

The Industrial Commission properly substituted an award of $800 for permanent partial disability to plaintiff's hand for the hearing commissioner's award of $400 for serious bodily disfigurement. *Thompson v. Transport Co.*, 693.

§ 107. Reserve Funds Under Employment Security Act

Where contributions of three corporations to the Unemployment Insurance Fund were erroneously paid for years through the account of a sole proprietorship, the Employment Security Commission had authority to set up accounts retroactively in the name of each corporation, to allocate to each account the contributions previously paid on the wages of employees of each corporation, to make proper charges against each account, and to compute the appropriate rate at which each corporation should have paid contributions. *Employment Security Comm. v. Young Men's Shop*, 23.

MORTGAGES AND DEEDS OF TRUST

§ 32. Deficiency

Where the note and deed of trust in question did not indicate that the indebtedness was for the balance of purchase money for real estate, G.S. 45-21.38 did not, even by implication, apply to prohibit plaintiff mortgagee from suing defendant mortgagor on the underlying debt or note. *Gambill v. Bare*, 597.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

Petitions for referendums on annexation were not petitions "stating that the signers are opposed to annexation" within the meaning of the act prohibiting annexation of an area in Cumberland County upon petition signed by a majority of the registered voters of the area. *Armento v. City of Fayetteville*, 256.

§ 20. Injuries in Connection With Water Supply

Evidence of plaintiff's negligence in maintaining a water main in unstable ground was sufficient for the jury, but evidence of defendant's contributory negligence in maintaining a pond at a height above the water main was insufficient for the jury. *Town of Mars Hill v. Honeycutt*, 249.

§ 29. Nature and Extent of Municipal Police Power

Ordinance giving the city council unbridled authority to grant or deny a license for operation of a restaurant in the city is unconstitutional. *Restaurants, Inc. v. City of Kinston*, 588.

§ 30. Building Permits

Installation of a mobile home constitutes the construction of a building within the meaning of the statute requiring a building permit. *Mecklenburg County v. Westbery*, 630.

Landowners did not acquire a vested right to construct a storage structure on their lands pursuant to a building permit which was revoked. *Ibid.*

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses Relating to Narcotics

Imposition of separate sentences for defendant's conviction of possession with intent to deliver a controlled substance and delivery of the same controlled substance did not violate the prohibitions against former jeopardy. *S. v. Lewis*, 298.

§ 4. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for possession of heroin found on the floorboard of a car driven and controlled by defendant. *S. v. Rogers*, 274.

§ 4.5. Instructions

Trial court did not err in giving an additional instruction on constructive possession at the request of the jury without again instructing on knowing possession. *S. v. Rogers*, 274.

NEGLIGENCE

§ 5. Dangerous Instrumentalities

Contract between defendant Board of Transportation and third-party defendant contractor specified strict liability, regardless of negligence, by the contractor to the Board for any damages caused by blasting. *Sales Co. v. Board of Transportation*, 97.

§ 8. Proximate Cause

Evidence was insufficient to support a finding that negligence by defendant architects in making inaccurate reports on the progress of a shopping center was a proximate cause of damages suffered by the owner of the shopping center. *People's Center, Inc. v. Anderson*, 746.

§ 24. Pleading Damages

Plaintiff's complaint for negligent installation of roofs did not fail to state a claim in tort because the measure of damages alleged was not the tort standard of loss of fair market value but was the contract standard of cost of repairs. *Ports Authority v. Roofing Co.*, 400.

§ 34. Sufficiency of Evidence of Contributory Negligence for Jury

In an action to recover damages for negligence in the manufacture and installation of a mobile home, trial court did not err in failing to submit to the jury an issue of contributory negligence. *Sims v. Manufacturing Corp.*, 193.

NOTICE

§ 1. Necessity of Notice

In a proceeding to require respondent to reveal to petitioner, an adopted child, the identity of her natural parents, G.S. 48-25(c) did not require that the natural parents be served with summons and notice of petitioner's motion. *In re Spinks*, 422.

NUISANCE

§ 7. Damages

In an action to recover for flood damages allegedly caused by a nuisance created when defendants placed a culvert in the bed of a stream on their property, trial court properly instructed the jury that plaintiff could not recover if the damage was caused by something further downstream. *Pendergrast v. Aiken*, 89.

PARENT AND CHILD

§ 2. Liability of Parent for Injury or Death of Child

The mother of unemancipated minor children whose death allegedly resulted from her deceased husband's operation of an automobile was not entitled to maintain an action in her individual capacity against her deceased husband's estate to recover medical and funeral expenses and an amount equal to the value of the children's lives to plaintiff. *Christenbury v. Hedrick*, 708.

PARENT AND CHILD — Continued

§ 7. Duty to Support

A parent is entitled to credit toward the amount of child support ordered by a court decree for expenditures incurred in behalf of the child when equitable considerations exist which would create an injustice if such credit were not allowed. *Goodson v. Goodson*, 76.

Findings of fact were not required to support an award of attorney's fees in an action for child custody and support. *Ibid.*

§ 9. Prosecutions for Nonsupport

In a prosecution of defendant for wilful failure to support his children, evidence was sufficient for the jury to find that defendant was employed and had an income. *S. v. Buff*, 395.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 5. Licensing and Regulation of Dentists

The prosecutor and grand jury did not err in proceeding under the criminal statute making it a felony to attempt to obtain property from another by false pretenses, rather than under the statute defining powers of the State Board of Dental Examiners to punish administratively a dentist who fraudulently obtained fees. *S. v. Page*, 478.

§ 11. Malpractice

Physician's issuance of a prescription for a drug did not constitute the "sale" of the drug within the meaning of the Uniform Commercial Code provisions applicable to implied warranties of fitness and merchantability. *Batiste v. Home Products Corp.*, 1.

PLEADINGS

§ 34. Amendment as to Parties

Trial court erred in allowing substitutions for deceased parties more than four years after the deaths of the parties by amendment of the original complaint rather than by supplemental pleadings. *Deutsch v. Fisher*, 688.

Attempted substitutions for deceased parties by supplemental pleadings were improper where the trial court made no finding that the supplemental pleadings were "just" and substituted parties received no notice. *Ibid.*

PROCESS

§ 9. Personal Service on Nonresident Individuals in Another State

Trial court properly concluded that service of process was properly effected on out-of-state defendant by registered mail. *Lewis Clarke Associates v. Tobler*, 435.

The return receipt of registered mail, without the accompanying affidavit showing the circumstances warranting use of service by registered mail, was insufficient to prove service of process by mail on a nonresident defendant. *Dawkins v. Dawkins*, 497.

SALES — Continued

Plaintiff's complaint failed to state a claim for relief against a drug store based on negligence in the sale of an oral contraceptive drug to plaintiff. *Ibid.*

SCHOOLS

§ 5. Budgets and Expenditures

County commissioners acted within their authority in refusing to approve a school superintendent's local salary supplement requested by a board of education. *Board of Education v. Board of Commissioners*, 13.

Trial court's definition of "necessary expense" in operation of schools was too narrow. *Ibid.*

§ 11. Liability for Torts

Industrial Commission had no jurisdiction over a claim for damages resulting from a collision with a school bus where one other than the authorized driver of the bus was operating it at the time of the collision. *Withers v. Board of Education*, 230.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

An officer had probable cause to make a warrantless search of defendant's vehicle. *S. v. McKay*, 61.

Trial court erred in denying defendant's motion to suppress marijuana taken during a search of his person which was not incident to a legal arrest. *S. v. Williams*, 204.

A knife seized incident to a lawful arrest was properly admitted in a juvenile delinquency hearing. *In re Johnson*, 492.

§ 2. Consent to Search Without Necessary Warrant

Items were lawfully seized without a warrant from defendant's residence and automobile where defendant, as a condition of his probation, waived his right to object to a warrantless search in the presence of his probation officer. *S. v. Craft*, 351.

An officer's hearsay testimony that the person who consented to a search of premises told the officer he resided there with defendant was competent on voir dire. *S. v. Melvin*, 772.

§ 3. Requisites and Validity of Search Warrant

Affidavit based on information received from a confidential informant contained sufficient underlying circumstances showing the credibility of the informant or the reliability of his information. *S. v. Cumber*, 329.

Information contained in a police officer's affidavit supporting his application for a search warrant was sufficient to establish probable cause. *S. v. Gibson*, 584.

§ 4. Search Under the Warrant

Trial court properly determined that an officer's discovery of stolen lawn furniture in plain view on defendant's premises while executing a warrant to search for stolen liquor was inadvertent, although the officer

SEARCH AND SEIZURE — Continued

had previously been informed by an unreliable informant that the furniture was on defendant's premises. *S. v. Cumber*, 329.

Defendant was not entitled to another voir dire on the legality of a search of her premises where the legality of the search had been determined in a prior trial of defendant for another crime. *Ibid.*

STATE

§ 1.5. Open Meetings

Official meetings of the faculty of the U.N.C. School of Law are required to be open to the public. *Student Bar Association v. Byrd*, 530.

TORTS

§ 7. Release from Liability

Trial court erred in dismissing plaintiff's claim against defendant for property damages resulting from an automobile accident on the ground plaintiff had ratified his insurance carrier's settlement of defendant's claim against plaintiff. *Seawell v. Yow*, 307.

TRESPASS

§ 6. Competency and Relevancy of Evidence

In an action to recover the value of growing timber allegedly cut and removed from plaintiffs' lands by defendants, defendants waived their right to have the jury consider evidence with respect to the boundary line between the lands of plaintiffs and the lands of defendants. *Dawson v. Sugg*, 650.

TRIAL

§ 10. Expression of Opinion on Evidence by Court During Trial

Where a witness testified he was not undertaking to tell the jury that he knew the cause of a tractor fire, trial judge's comment that he thought "that's exactly what he had done" did not constitute a prejudicial expression of opinion on the evidence. *Lawrence v. Insurance Co.*, 414.

§ 58. Findings and Judgment of the Court

The trial judge had authority to enter summary judgment for defendant out of session and absent an agreement by the parties. *Towne v. Cope*, 660.

TROVER AND CONVERSION

§ 1. Nature and Essentials of Action for Possession of Personalty

Evidence was sufficient for the jury in an action to recover for the wrongful conversion of a mobile home. *Hawkins v. Hawkins*, 158.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Physician's issuance of a prescription for a drug did not constitute the "sale" of the drug within the meaning of Uniform Commercial Code provisions applicable to implied warranties of fitness and merchantability. *Batiste v. Home Products Corp.*, 1.

WILLS — Continued

of appointment" was exercised by a provision of the wife's will devising property "over which I have or may have any power of appointment." *Bank v. Moss,* 499.

§ 61. Dissent of Spouse and Effect Thereof

So long as a widow's dissent to her spouse's will is filed within six months after the issuance of letters testamentary, or extended pursuant to G.S. 30-2(a), it is timely regardless of whether the estate and property passing outside the will have been appraised in accordance with G.S. 30-1(c). *In re Cox,* 765.

WITNESSES

§ 8. Cross-examination

Trial court in a custody case erred in ruling that the mother's present husband was not a hostile witness and in denying plaintiff's right to ask the witness leading questions. *Goodson v. Goodson,* 76.

WORD AND PHRASE INDEX

PRINTED BY
COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA