NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 14

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RALEIGH
1972

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1972

FRANKLIN GILLISPIE, BY HIS GUARDIAN AD LITEM, FLORENCE TROXLER, PLAINTIFF v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, DEFENDANT v. THOMASVILLE COCA-COLA BOTTLING COMPANY, THIRD PARTY DEFENDANT

No. 7222SC7

(Filed 29 March 1972)

1. **Food § 2; Sales § 17— explosion of soft drink bottle — fitness for intended purpose**

In this action to recover for breach of warranty for personal injuries sustained when two soft drink bottles allegedly exploded as they were being carried by plaintiff to the checkout counter in defendant's self-service store, the jury would be justified in finding that the bottles exploded because they were inadequate for the purpose for which they were intended—namely, as containers of a soft drink—where plaintiff's evidence tended to show that he handled the bottles normally from the time he took possession of them until they exploded, and there is nothing in plaintiff's evidence indicating that his conduct contributed to the explosions.

2. **Food § 2; Sales § 6; Uniform Commercial Code § 15— implied warranty of fitness — applicability to container**

Before adoption of the Uniform Commercial Code, an implied warranty of fitness did not extend to a container in which a product came from the producer; however, an implied warranty of fitness has now been extended by the Uniform Commercial Code to include a product's container. G.S. 25-2-314.

3. **Food § 2; Sales § 6; Uniform Commercial Code § 15— soft drink bottle — implied warranty of merchantability — liability of seller for personal injuries**

If soft drinks are sold in a container which is inadequate, the seller has breached his implied warranty of merchantability and is liable for personal injury proximately caused by this breach.

4. **Sales § 6; Uniform Commercial Code § 15— warranties — sale of goods**

Warranties arise under the Uniform Commercial Code only upon a sale of goods.

5. **Sales §§ 1, 6; Uniform Commercial Code § 15— when sale occurs — delivery — payment — implied warranties**

Under G.S. 25-2-401(2) the time of payment is not determinative of the question of when a sale takes place; if there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise under G.S. 25-2-314.

6. **Sales § 1; Uniform Commercial Code § 11— self-service store — when sale occurs**

The presence of soft drinks on the shelves of a self-service store constituted an offer for sale and delivery at a stated price; a sale occurred within the meaning of the Uniform Commercial Code when the purchaser took the drinks into his possession with the intention of paying for them at the cashier's counter.

7. **Sales § 1; Uniform Commercial Code § 16— self-service store — purchaser's acquisition of title**

As long as a purchaser in a self-service store has a product in his possession, intending to pay for it, he has title to the product, the seller's interest at that point not being "title" but a security interest to enforce payment; when the purchaser changes his mind and returns to the shelf a product which he has picked up with the intention of buying it, title is revested in the seller.

8. **Food § 2; Sales § 17; Uniform Commercial Code § 15— exploding soft drink bottles — breach of warranty — action against seller**

In this action to recover for breach of warranty for personal injuries sustained when two soft drink bottles allegedly exploded as they were being carried by plaintiff to the checkout counter in defendant's self-service store, plaintiff's evidence would support jury findings that plaintiff purchased the drinks by taking them into his possession with the intention of paying for them, that the warranty of implied merchantability of the bottles was breached by defendant, and that such breach proximately caused plaintiff's injuries.

APPEAL by plaintiff from *Beal, Special Judge,* May 1971 Civil Session of Superior Court held in DAVIDSON County.

Civil action to recover for personal injuries sustained by plaintiff when two bottles of Sprite allegedly exploded as they were being carried by him to the checkout counter in defendant's self-service store.

Plaintiff sued the original defendant for breach of warranty. Defendant answered, denied the essential allegations in

the complaint, and alleged that the bottles broke as a result of coming in contact with the floor when plaintiff negligently fell or dropped them. Defendant also cross claimed against the third party manufacturer for indemnification in the event plaintiff recovered.

At pretrial conference the court ordered the issues between plaintiff and the original defendant tried separately from the issues between the original defendant and the third party defendant.

Plaintiff's evidence tended to show that he went to defendant's store to get a carton of Coca-Cola and a carton of Sprite bottle drinks. He picked up a carton of each and walked toward the checkout counter, carrying the carton of Sprite in his left hand and the carton of Coca-Cola in his right hand. He was walking directly to the checkout counter where he intended to pay for the drinks. When he reached a point about 20 to 25 feet from the shelf where he had picked up the drinks and about 10 feet from the checkout counter, two of the Sprite bottles exploded and plaintiff sustained a laceration to his left wrist.

At the conclusion of plaintiff's evidence defendant's motion for a directed verdict was allowed. Plaintiff excepted and appealed.

Hugh B. Rogers, Jr., and Charles F. Lambeth, Jr., for plaintiff appellant.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for defendant appellee.

GRAHAM, Judge.

Plaintiff bases his claim solely upon breach of implied warranty.

[1] The evidence tends to show that plaintiff handled the bottles of Sprite normally from the time he took possession of them until they exploded. There is no evidence presently before us which would indicate that plaintiff's conduct contributed in any way to the explosions. Therefore, the jury would be justified in finding that the bottles exploded because they were inadequate for the purpose they were intended; namely, as containers of the Sprite soft drink.

[2] Before adoption of the Uniform Commercial Code (G.S. 25-2-101 *et seq.,* effective 1 July 1967), the law in this jurisdiction was that in an implied warranty of fitness did not extend to a container in which a product came from the producer. *Prince v. Smith,* 254 N.C. 768, 119 S.E. 2d 923. The first question before us is whether an implied warranty of fitness has now been extended by the Uniform Commercial Code to include a product's container such as the one involved here. We hold that it has.

G.S. 25-2-314 provides in pertinent part:

"(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 . . .

(c) are fit for the ordinary purposes for which such goods are used; and . . .

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

In the official comment following this section it is stated:

"(e) applies only where the nature of the goods and of the transaction requires a certain type of container, package or label."

[3] The nature of bottled drinks, such as Sprite, requires a container which is adequate to contain the drink without breaking or exploding when handled with ordinary care. Another way of putting it is that under this section, soft drinks are not merchantable if inadequately contained. If they are sold in a container which is inadequate, the seller has breached his implied warranty of merchantability and he is liable for personal injury proximately caused by this breach. The fact that it is the container, rather than the product inside, which causes injury, does not make the injury any less a result of the seller's breach of warranty.

[4] A second question presented is whether a sale had taken place at the time the bottles allegedly exploded. Warranties arise under the Uniform Commercial Code only upon a sale of goods. 46 N.C.L. Rev. 451. "A 'sale' consists in the passing of title from the seller to the buyer for a price (§ 25-2-401)." G.S. 25-2-106(1). "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading." G.S. 25-2-401(2).

In the case of *Insurance Co. v. Hayes,* 276 N.C. 620, 632, 174 S.E. 2d 511, 518, it was noted: "The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems. This departure is evidenced by G.S. 25-2-401 which, in effect, holds that title to goods passes from the seller to the buyer when the goods are delivered to the buyer."

Various cases decided before the adoption of the Uniform Commercial Code in the respective jurisdictions held that a sale of an article in a self-service store is not completed until payment has been made. *Lasky v. Economy Grocery Stores,* 319 Mass. 224, 65 N.E. 2d 305; *Loch v. Confair,* 361 Pa. 158, 63 A. 2d 24; *Day v. Grand Union Co.,* 280 App. Div. 253, 113 N.Y.S. 2d 436.

The above cases generally followed the prevailing rule that where a sale is shown to be for cash, title does not vest in the buyer until the seller has received payment in cash. Cases reaching contrary results include: *Sanchez-Lopez v. Fedco Food Corp.,* 211 N.Y.S. 2d 953; *Lucchesi v. H. C. Bohack Co., Inc.,* 8 U.C.C. Rep. 326.

[5] We are of the opinion that under G.S. 25-2-401(2) the time of payment is not determinative of the question of when a sale takes place. If there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise under G.S. 25-2-314.

[6] The presence of the drinks on the shelves in defendant's self-service store constituted an offer for sale and delivery at a stated price. If plaintiff took the drinks into his possession with the intention of paying for them at the cashier's counter, there was no further act of delivery necessary on the part of the seller. All that remained was for plaintiff to pay for the drinks—an act delayed until he reached the cashier's counter primarily for the convenience of the seller.

[7] Defendant calls attention to the custom in self-service stores which permits a customer to return goods to the shelf without liability if he changes his mind about a purchase before reaching the checkout counter. However, even a right to return delivered goods to the seller does not necessarily delay passage of the title until that right has expired. G.S. 25-2-401(4) provides: "A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller." The result is that when a purchaser in a self-service store changes his mind and returns to the shelf a product which he has picked up with the intention of buying, title is revested in the seller. However, as long as the purchaser has the product in his possession, intending to pay for it, he has title to the product. The seller's interest at that point is not "title" but a security interest to enforce payment. "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." G.S. 25-2-401(1).

[8] The evidence presented would support a jury finding that plaintiff purchased the Sprite drinks by taking them into his possession with the intention of paying for them. Should the jury so find, the questions would then become: Was the warranty of implied merchantability breached by defendant, and if so, did the breach proximately cause the injuries sustained by the plaintiff? We are of the opinion the evidence is sufficient to go to the jury on these questions.

Reversed.

Judges CAMPBELL and BRITT concur.

Watson v. Chilton

ALVIN CODELL WATSON, ADMINISTRATOR CTA OF THE WILL OF J. SANFORD CHILTON; BETTY JUNE WATSON CHILTON, WIDOW OF J. SANFORD CHILTON; AND MOODY FUNERAL HOME, INC., TRUSTEE UNDER THE WILL OF J. SANFORD CHILTON v. ERNEST CHILTON AND WIFE, PEARL CHILTON; HOWARD CHILTON AND WIFE, EVELYN CHILTON; MARION CHILTON AND WIFE, GRACE CHILTON; ANNA CHILTON MATTHEWS, WIDOW; ETHEL CHILTON NICHOLS AND HUSBAND, HARVEY NICHOLS; SAVANNAH CHILTON NORMAN AND HUSBAND, HARVEY NORMAN; LOTTIE CHILTON WESTMORELAND AND HUSBAND, HOWARD WESTMORELAND

No. 7217SC21

(Filed 29 March 1972)

1. **Adverse Possession § 2— possession under void will — permissiveness**

Where a devise of a life estate in land was void because the land passed by the entireties to testator's widow, and all the evidence showed that the members of testator's family assumed that the purported devisee took a life estate in the land under the will, the devisee's possession of the land as a claimant under the will was permissive and not hostile.

2. **Adverse Possession § 11.5— by child against parent**

Adverse possession cannot be predicated on the possession by a child against a parent unless the parent has had some clear, definite and unequivocal notice of the child's intention to assert an exclusive ownership in himself.

3. **Adverse Possession § 7— by tenant in common**

Where respondent went into possession of land under a purported devise of a life estate in the land by his father, when in fact the land passed by the entireties to respondent's mother, and title to the land thereafter passed under the residuary clause of the mother's will to all of her children in equal shares, respondent did not acquire by adverse possession title to the land by his possession thereof for more than twenty years after his mother's death, since the possession of one tenant in common is presumed to be the possession of all, and there is no evidence of any act manifesting to the co-tenants that respondent's possession was hostile to them.

APPEAL by respondents from *Seay, Judge,* 28 June 1971 Session of SURRY County Superior Court.

This is a partitioning proceeding wherein petitioners seek a sale of the lands in question for division. The petition alleged that the respondents, children of Martha Chilton and W. L. Chilton, together with J. Sanford Chilton, deceased, also a child of Martha and W. L. Chilton, owned the land as tenants

in common, each child owning an 1/8 interest; and that petitioners owned the 1/8 interest of Sanford Chilton as devisees under his will. Answer was filed for the respondents, and verified by all respondents except Anna Chilton Matthews. The answer denied the petitioners' allegation of ownership. By further answer, it was averred that Howard Chilton owned the lands, having acquired title by adverse possession. The answering respondents, with the exception of Howard Chilton, averred that they have no interest in the land, acknowledged that Howard Chilton and his privies are the owners, and released and relinquished unto him and his heirs all right, title and interest in the property.

By agreement the matter was heard by the court without a jury. There is no dispute as to the adequacy of description, location, or boundaries of the property. The following facts are not in dispute:

By deed dated 28 January 1935, Matilda F. Lawson and husband, James W. Lawson, conveyed the property to W. O. McGibony, Trustee, securing a note evidencing an indebtedness to the Land Bank Commissioner. Default having been made by grantors, the property was sold at auction, bid in by W. L. Chilton and wife, M. S. Chilton, and by deed dated 23 November 1937, W. O. McGibony, Trustee, conveyed the property to W. L. Chilton and wife, M. S. Chilton. M. S. Chilton and Martha S. Chilton are one and the same person. W. L. Chilton died in 1939. By the Fourth Article of his will, he devised the property to Howard Chilton for life, with remainder to Howard's "lawful children in fee simple." The will was probated and Martha S. Chilton, Marion Chilton, and W. H. Norman qualified as Executors. Martha Chilton died in 1954 leaving a will. She bequeathed specifically certain shares of corporate stock and devised to Sanford Chilton her home and two acres of land for his lifetime. All the rest and residue of her property she devised to her children, share and share alike. All her children survived her: J. Sanford Chilton, Howard Chilton, Ernest Chilton, Marion Chilton, Anna Chilton Matthews, Ethel Chilton Nichols, Savannah Chilton Norman, and Lottie Chilton Westmoreland. J. Sanford Chilton died in 1968 leaving a last will and testament under which all of his property was devised to his wife, Betty June Chilton, petitioner herein, for life with remainder to Moody Funeral Home, Trustee, also a petitioner.

Petitioners claim an 1/8 undivided interest in the property, contending that W. L. Chilton did not own the property and could not devise it; that his will did not require an election on the part of Martha S. Chilton, and none was made; that the property passed under the residuary clause of the will of Martha S. Chilton, surviving tenant by the entirety; and that the 1/8 interest of J. Sanford Chilton acquired under his mother's will was devised by him to petitioners.

Howard Chilton contends that he went into possession of the property in 1939 under his father's will and has acquired title by adverse possession either for seven years under color of title or for more than 20 years since his father's death in 1939.

At trial, and before any evidence was offered, the parties stipulated that the origin in title to the property as to all parties is the deed of W. O. McGibony, Trustee, to W. L. Chilton and his wife, Martha S. Chilton. Petitioners introduced into evidence that deed, the will of Martha S. Chilton, the will of J. Sanford Chilton and rested. Respondents' motion for dismissal was denied.

Respondent's record evidence consisted of the will of W. L. Chilton, the deed of trust of Lawson to McGibony, Trustee, and a plat of the property. Their oral evidence consisted of the testimony of some 12 witnesses as to the use of the property by Howard Chilton. These witnesses included Howard Chilton, some of his brothers and sisters, a tenant, two employees of the Agriculture Stabilization and Conservation Committee, and some neighbors. At the end of all the evidence, the respondents' motion to dismiss was again denied. Their motion for peremptory ruling was also denied. Respondents tendered two sets of requests for findings of fact and conclusions. These were denied.

The court found facts, made conclusions of law, and entered judgment in favor of petitioners. Respondent excepted to certain of the findings and conclusions, and to the entry of the judgment and appealed.

R. Lewis Alexander, and Faw, Folger, and Sharpe, by Thomas M. Faw, for petitioner appellees.

Gardner and Gardner, by John W. Gardner, and William G. Reid, for respondent appellants.

MORRIS, Judge.

Respondents (with the exception of Anna Chilton Matthews) have taken the position that Howard Chilton is the owner of the land in question. In their answer they state that he has acquired title by adverse possession. Interestingly enough, they also state that by their verified answer they release and relinquish all of their right, title, and interest therein to him.

As we understand Howard Chilton's position, it is that he claims that his father's will, devising the property to him for life, constituted color of title which ripened into title in him after seven years adverse possession. This, he says, occurred prior to his mother's death and at her death he owned the property, and it could not pass under her residuary clause. In the alternative, he contends that he had acquired title by adverse possession of over 20 years without color of title.

There is authority in this State that a will defectively probated, but where the defect in the probate (only one witness) "was not so obvious but what it might have misled a man of ordinary capacity," was color of title for the land disposed of therein. *McConnell v. McConnell,* 64 N.C. 342 (1870). There the devisee went into possession claiming under the will. Later, when his title was attacked because of the invalidity of the will, he relied on acquisition of title by adverse possession under color of title.

[1] There is also authority for the principle that where one enters into possession of lands claiming as a devisee under a will where that devise was void does not claim adversely but rather permissively or mistakenly. See *Barrett v. Williams,* 217 N.C. 175, 176, 7 S.E. 2d 383 (1940), where Chief Justice Stacy said:

> "If he entered into possession of the *locus in quo,* claiming it, *pro hac vice,* as devisee under his father's will—and there is some evidence of this—then his possession and those claiming under him up to the time of his death would be permissive rather than adverse to plaintiff's rights under the ulterior limitation."

The clear and obvious inference from all the pleadings and evidence in this case is that all the members of the family assumed that Howard Chilton took a life estate in the property

under W. L. Chilton's will with the remainder to Howard's children. Howard Chilton's evidence was to that effect as was the evidence of his brothers and sister and daughter.

[2] Additionally, the general rule is that an adverse possession cannot be predicated on the possession of a child as against its parent. "In order that a possession by a parent against a child, or vice versa, may become adverse, the owner must have had some clear, definite, and unequivocal notice of the adverse claimant's intention to assert an exclusive ownership in himself." 3 Am. Jur. 2d, Adverse Possession, § 148, p. 230. The character of the possession—whether it is adverse—is for the jury. Here the court as the trier of facts found that it was not.

[3] Respondents claim that the evidence supports no other inference or finding but that Howard Chilton acquired title by adverse possession for more than 20 years after his mother's death against his brothers and sisters—tenants in common under their mother's will. Regardless of whether his claim is under color of title for seven years or under claim of right, without color of title, for 20 years, he must show his possession to have been *actual, open, visible, notorious, continuous* and *hostile* to the true owner's title and to all persons for the full statutory period. *Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235 (1953).

But the possession of one tenant in common is presumed to be the possession of all tenants. *Tharpe v. Holcomb,* 126 N.C. 365, 35 S.E. 608 (1900). We think what was said there is applicable here:

> "The evidence is that 'Angeline (defendant's vendor) entered into possession of the land, claiming it as her own under the will of Elcana Elliott, . . . claiming it adversely to all others, claiming it as her own under said will.' This proof shows only quiet, undisturbed possession, and that is not inconsistent with a holding for all the tenants in common. It does not indicate a hostile attitude of the occupant towards his cotenants as contemplated by the statute, Code, section 141. To that end, there must be some act done between the parties from which the jury or court can see that a hostile relation exists—that the defendant's intent to hold alone is manifested to the cotenants. Then the statute begins to run. If the cotenants attempt to

assert their claim, as to enter, or to demand an account for rents, etc., which is resisted by the occupant, then his possession becomes adverse, and, if it continues for seven years, his title will ripen against his cotenants . . . " 126 N.C., at 366-367.

Respondents, having asserted title in Howard Chilton by adverse possession, had the burden of proving that issue. *Board of Education v. Lamm,* 6 N.C.App. 656, 171 S.E. 2d 48 (1969), affirmed 276 N.C. 487 (1970); *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70 (1969). Here the court was the trier of the facts. It was his duty to consider and weigh all the competent evidence before him, pass upon the credibility of the witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn therefrom. Here the court concluded the respondents had not met their burden of proof. He found facts which are supported by the evidence and the inferences which can reasonably be drawn therefrom. The findings are, therefore, conclusive on appeal. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.,* 279 N.C. 313, 182 S.E. 2d 373 (1971). The conclusions of law are supported by the findings of fact.

The judgment of the Superior Court is

Affirmed.

Judges CAMPBELL and PARKER concur.

PEGGY L. REDDING v. F. W. WOOLWORTH COMPANY

No. 7221SC41

(Filed 29 March 1972)

1. Trial § 33— instructions — statement of the evidence

The trial judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried.

2. Negligence §§ 37, 53; Trial § 33— instructions on negligence — failure to declare and explain law arising on the evidence

In an action by plaintiff invitee to recover for injuries allegedly suffered in defendant's store when plaintiff was struck and then attempted to avoid being struck again by objects which twice flew

from a planter being assembled by defendant's employee, the trial judge failed to declare and explain the law arising on the evidence in violation of G.S. 1-180 where he instructed the jury only that defendant's failure to use "due care" in maintaining safe premises or its failure to use "due care" in assembling the planter would constitute negligence, but nowhere in the charge did the judge instruct the jury what specific acts or omissions arising under the pleadings and evidence would constitute negligence.

APPEAL by defendant from *Johnston, Judge,* 30 August 1971 Regular Civil Session of Superior Court held in FORSYTH County.

Pertinent parts of plaintiff's evidence may be summarized as follows: Plaintiff had just placed her young son on a hobbyhorse in the front part of defendant's store, a short distance from the cash registers. She was suddenly struck in the neck by a flying object which caused her to jerk her neck. Concerned that the object could have struck her child in the eye, she attempted to remove her child from the hobbyhorse, but before she could do so she was struck a second time. On the second occasion she was struck in the hair on the side of her head. When struck the second time, plaintiff threw herself backwards and heard her neck pop. She felt severe pain and nausea. The first object that struck her was generally described as a round, wooden object somewhat larger than a silver dollar with something sharp in the middle. Plaintiff did not describe the object which hit her on the second occasion but believed it was the same object which struck her on the first occasion. Plaintiff offered evidence as to subsequent pain and physical disability which she contended resulted from the preceding events.

Defendant offered evidence tending to show, among other things, the following: At the time of the alleged accident, defendant's employee was assembling a wooden planter. The assembly was being performed on a check-out counter at the front of the store about seven or eight feet from where plaintiff was standing. After the handle had been attached to one side of the planter or bucket, it was necessary to squeeze or apply pressure on the handle to bring it down some four or five inches in order to attach it to the other side of the planter. As defendant's employee applied such pressure, the knob attaching the end of the handle first secured flew off. Upon hearing plaintiff's complaints, all work on the planter was stopped.

The wooden knob came off only once. It was much smaller than the object described by plaintiff. Detailed testimony describing the planter and the manner of its assembly was offered, including testimony that if one of the screws were tightened too tight it would strip the knob and cause it to come off. The knob, which was originally preserved in order to make a complaint to defendant's supplier because it was defective, was offered in evidence. Defendant's store had a receiving room for the receipt of freight which was approximately 20 x 40 feet. This room was designated for the use of employees only. Defendant did not use the receiving room for assembling merchandise but, instead, customarily assembled its merchandise in the area where it was to be sold so that defendant's employees so engaged would also be available to make sales.

From judgment entered pursuant to the jury's verdict awarding plaintiff damages in the amount of $9,000.00, defendant appealed.

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

Deal, Hutchins and Minor by Fred S. Hutchins, Jr., for defendant appellant.

VAUGHN, Judge.

[1] The only assignments of error brought forward by defendant are directed to the charge of the court. The thrust of defendant's argument is that the court failed to declare and explain the law arising on the evidence given in the case as required by Rule 51(a) of the North Carolina Rules of Civil Procedure. A reading of the charge discloses that the trial judge generally defined the terms "burden of proof," "greater weight of the evidence," "negligence," "due care," and "proximate cause." He did not attempt to recapitulate the evidence except in a brief statement of the contentions of the parties. The judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried. As to the first issue, the court's only reference to the evidence and his only instructions as to how the law should be applied to the evidence presented by either plaintiff or defendant was as follows:

"Now, Members of the Jury, on the 4th day of November, 1966, the defendant operated within the City of Winston-Salem a variety store, and it was in business to serve the public; and on this occasion the plaintiff was a business invitee of that company. That is stipulated by the parties.

"The Court instructs you that while a company, such as the defendant, and operating in the manner that it was operating, is not an insurer of the safety of its business invitees, it does have the duty to use due care to keep that portion of the premises designed for the use of business invitees, such as customers, in a reasonably safe condition so as to avoid endangering or injuring such customers.

"Now, Members of the Jury, the Court instructs you that if the defendant on this day failed to use due care to keep that portion of its premises designed for the use of customers in a reasonably safe condition so as to avoid injuring its invitees, then it would be guilty of negligence.

"The Court further instructs you, Members of the Jury, that on this day that Wayne Arnold was an employee of the defendant; and it is stipulated by the parties that on that date that he was a servant and employee of the defendant; and under that stipulation the defendant would be responsible for his acts.

"The Court further instructs you, Members of the Jury, that the defendant's employee Arnold had the duty to use due care in assembling this planter to avoid injuring the customers that were in the store; and if the defendant's employee, Wayne Arnold, failed to use due care in assembling the planter to avoid injuring the plaintiff, then he would be guilty of negligence.

"Now, Members of the Jury the Court has been reviewing certain facts if you, the jury, find them to be facts, that would constitute negligence on the part of the defendant. It is not suggesting that you find any such facts, because you are the sole triers of the facts. It has merely stated to you certain facts, if you find them to be facts, that would constitute negligence on the part of the defendant."

[2] The decisions of the Supreme Court of North Carolina are consistently to the effect that a mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient. *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19; *Realty Agency, Inc. v. Duckworth and Shelton, Inc.,* 274 N.C. 243, 162 S.E. 2d 486. Although we regret the necessity of prolonging the litigation, we are constrained to hold that the able trial judge failed to adequately explain and apply the law to the specific facts pertinent to the issues involved. An opinion in the present case on an earlier appeal is reported in 9 N.C. App. 406, 176 S.E. 2d 383. On that appeal this Court explained why it was error to have entered a directed verdict for defendant on the evidence appearing in that record.

In *Griffin v. Watkins,* 269 N.C. 650, 153 S.E. 2d 356 defendants assigned as error the following portion of the court's instructions to the jury.

> "(I)f plaintiff has satisfied you from the evidence and by its greater weight that the defendants were negligent in any one or more of the following respects, i.e.: *that they failed to exercise due care;* that they failed to have the lights on as provided by statute if it was thirty minutes after sunset or the visibility was less than two hundred feet; or (that) they parked on the highway when it was practical or reasonably practical to park off the highway as provided by section 20-161 of the General Statutes; and . . . (that) the negligence in any one or more of those respects was a proximate cause of the collision and the injury and damage resulting to the plaintiff, then it would be your duty to answer the first issue Yes in favor of the plaintiff. (Emphasis added.)"

The Court held the instructions to be erroneous. Justice Sharp, speaking for the Court, said:

> "Failure to exercise due care is the failure to perform some specific duty required by law. To say that one has failed to use due care or that one has been negligent, without more, is to state a mere unsupported conclusion. '(N)egligence is not a fact in itself but is the legal result of certain facts.' *Shives v. Sample,* 238 N.C. 724, 726, 79 S.E. 2d 193, 195. *In his charge, the trial judge must tell the jury what specific acts or omissions, under the pleadings and*

> *evidence, constitute negligence, that is, the failure to use due care.* [Emphasis added.] Defendants justly complain that this instruction gave the jury *carte blanche* to find them *generally* careless or negligent for any reason which the evidence might suggest to them."

In *Griffin* the error in the quoted portion of the charge was that, upon a finding that defendants were negligent in that they failed to exercise "due care" in the operation of an automobile, the jury was instructed to answer the negligence issue "Yes." In the present case the jury was told only that defendant's failure to use "due care" (in maintaining safe premises) or its failure to use "due care" (in assembling a planter) would constitute negligence and that, if they so found, they would answer the issue "Yes." In *Griffin* the instruction was held to erroneously give the jury *carte blanche* to find defendant generally careless or negligent in the operation of the automobile. The instructions in the present case would also seem to give the jury unlimited authority to find the defendant generally negligent for any reason the evidence might suggest to them. It was error for the judge to fail to explain to the jury what bearing their findings as to the facts would have on the issue of defendant's negligence. *Atkins v. Moye,* 277 N.C. 179, 186, 176 S.E. 2d 789. "Liability for negligence arises from the application of well-settled general principles of law to the facts of specific cases; it is not to be determined solely by the jury; the judge has his function and his duty; actionable negligence is a mixed question of law and fact—no less of law, to be determined by the judge, than a fact, to be determined by the jury." *Nichols v. Fibre Co.,* 190 N.C. 1, 128 S.E. 471.

In *Miller v. Lucas,* 267 N.C. 1, 147 S.E. 2d 537, we find the following:

> "Lucas, administrator, assigns as error the judge's instruction to the jury on the first issue, to wit, was plaintiff injured and her automobile damaged by the negligence of defendant's intestate V. W. Doss, as alleged in the complaint. On this issue the judge charged to this effect: If the jury is satisfied by the greater weight of the evidence that Doss in the operation of his automobile with the trailer attached was negligent, as the court has defined negligence for you, that is if he was operating his automobile in a

manner other than the manner in which a reasonable and prudent man would have driven it under similar conditions, or if you are satisfied that his driving was a violation of the reckless driving statute, which the court will now read to you, that will be negligence, and if you are satisfied by the evidence that the negligence of this defendant or his violation of either section of the reckless driving statute proximately caused or was a proximate cause of the collision, it would be your duty to answer the first issue, Yes; if you are not so satisfied you would answer it, No. *Nowhere in the charge did the judge instruct the jury what facts it was necessary for them to find to constitute negligence on Doss's part.* This charge left the jury unaided to apply the law to the facts relating to the first issue as shown by plaintiff's evidence and by Doss's administrator's evidence. [Emphasis added.]

"The provisions of G.S. 1-180 require that the trial judge in his charge to the jury 'shall declare and explain the law arising on the evidence in the case,' and unless this mandatory provision of the statute is observed, 'there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented.' *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375. This Court has consistently ruled that G.S. 1-180 imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to meet the statutory requirements. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331, where 14 of our cases are cited; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913. In *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; this Court said, quoting from Am. Jur.: 'The statute requires the judge "to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved." 53 Am. Jur., Trial, section 509.' This assignment of error is good."

For failure of the trial judge to declare and explain the law arising on the evidence in the case as required by statute

and the decisions of the Supreme Court of North Carolina, there must be a new trial.

New trial.

Judges BROCK and BRITT concur.

JAMES RALPH WATKINS, T/A SEAFOOD BOX, DURHAM, NORTH CAROLINA v. STATE OF NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL

No. 7210SC138

(Filed 29 March 1972)

1. **Intoxicating Liquor § 2— beer and wine license — supervision of premises — sale to intoxicated person**

The sale of wine on one occasion by the licensee's employee to an allegedly intoxicated person did not establish a failure of the licensee to give the licensed premises proper supervision.

2. **Intoxicating Liquor § 2— beer and wine license — sale to intoxicated person — knowledge of intoxication**

A finding that the licensee's employee sold wine to an intoxicated person, without a finding that the employee "knowingly" made the sale to an intoxicated person, is insufficient to sustain an order suspending retail beer and wine license.

Judge HEDRICK dissenting.

APPEAL by petitioner from *Braswell, Judge,* 13 September 1971 Session of Superior Court held in WAKE County.

This proceeding originated by notice dated 26 May 1971 to James Ralph Watkins, T/A Seafood Box, 1102 Gann Street, Durham, North Carolina, to appear before the State Board of Alcoholic Control in Raleigh on 18 June 1971 to show cause why his retail beer and wine permits should not be revoked or suspended for:

"1. Knowingly selling and/or allowing the sale of wine to Haywood Lee Clay, a person in an intoxicated condition, on your retail licensed premises on or about May 25, 1971, 9:15 a.m. in violation of G.S. 18-78.1(2).

"2. Failing to give your retail licensed premises proper supervision on or about May 25, 1971, 9:15 a.m. G.S. 18-78.

"3. No longer considered to be a suitable person or place to hold a State retail beer and/or wine permit. G.S. 18-136 and G.S. 18-109(7)j."

At the hearing on 30 June 1971 before Larry H. Flinchum, Assistant Director-Hearing Officer, Linver Pridgeon, a State ABC Officer assigned to Durham County, testified that on 25 May 1971, at approximately 9:15 a.m., he observed one colored male come out of the front door of the Seafood Box Store at 1102 Gann Street, Durham, North Carolina; that this colored male was in an intoxicated condition; that he arrested Mr. Clay for being publicly drunk; that he looked into a bag, which Mr. Clay possessed, and that he found two fifth bottles of Roma Rocket Wine; that he took Mr. Clay back to the Seafood Box and asked Mr. Clay to point out to him who had sold Mr. Clay the wine; that Mr. Clay identified Roy Wilson Ennis, Jr., an employee of the store; that Mr. Ennis did not deny to him the selling of this wine to Mr. Clay; and that he then left the Seafood Box and took Haywood Clay to jail and charged him with being publicly drunk.

The permittee, James Ralph Watkins, offered evidence tending to show that his employee, Roy Wilson Ennis, Jr., sold the wine to Haywood Clay, but that Clay was not intoxicated.

The hearing officer made the following pertinent findings of fact and recommendation:

"From material and credible evidence, it is a concluded fact that the permittee did allow the sale of wine to Haywood Lee Clay, through his employee, Roy Wilson Ennis, Jr. and Haywood Clay being a person in an intoxicated condition on the retail licensed premises on or about May 25, 1971 at 9:15 a.m. in violation of G.S. 18-78.1(2).

"It is further found as a fact that the permittee, through his employee, did fail to give his retail licensed premises proper supervision on or about May 25, 1971 at 9:15 a.m. G.S. 18-78.

RECOMMENDATION OF LARRY H. FLINCHUM
ASSISTANT DIRECTOR-HEARING OFFICER,
N. C. BOARD OF ALCOHOLIC CONTROL

"It is recommended that the permits be suspended for a period of 60 days."

From an order of the State Board of Alcoholic Control, dated 19 July 1971, approving and adopting as its own the findings of fact and recommendation of Larry H. Flinchum, Assistant Director-Hearing Officer, and the suspension of his beer and wine permits for a period of 60 days effective 2 August 1971, the petitioner, James Ralph Watkins, T/A Seafood Box, Durham, North Carolina, appealed to the Wake Superior Court. From a judgment of the Superior Court, dated 15 September 1971, affirming the order of the State Board of Alcoholic Control, the petitioner appealed to the Court of Appeals.

Arthur Vann for petitioner-appellant.

Attorney General Robert Morgan, by Assistant Attorney General Mrs. Christine Y. Denson, for respondent-appellee.

BROCK, Judge.

[1] There is no substantial evidence in the record before us to support the Board's finding "that the permittee, through his employee, did fail to give the retail licensed premises proper supervision on or about May 25, 1971 at 9:15 a.m. G.S. 18-78." *Food Stores v. Board of Alcoholic Control,* 268 N.C. 624, 151 S.E. 2d 582. With the exception of evidence tending to show that on this single occasion two bottles of wine were sold for off-premises consumption to Haywood Lee Clay, a person alleged to have been intoxicated, all of the evidence was to the contrary. The uncontradicted evidence was that permittee had held beer and wine permits since April, 1964, and that the Board had never had any occasion to warn or accuse the permittee of a single violation of its rules prior to the instant case. There is nothing to suggest that petitioner's employee, Roy Ennis, was subject to any of the disqualifications enumerated in G.S. 18-78 (repealed effective 1 October 1971 and in part reenacted as G.S. 18A-43). The uncontradicted evidence was that the employee had been instructed not to sell beer or wine to a person who was intoxicated and that he had refused to sell beer or wine to persons who were intoxicated. The evidence discloses that the employee was well acquainted with Clay and had refused to sell Clay wine when he felt that Clay was intoxicated. We note that the charge of public drunkenness, lodged against Clay by the Board's only witness, Pridgeon, was nol-prossed. The uncontradicted evidence was that Clay was a disabled war veteran with bullet wounds in his head and leg;

that his eyes stay red and "be running"; that he has received treatment at the Veterans Hospital for his eyes and that as a result of three bullet wounds in his leg, it always "drags behind." The permittee's employee testified:

> " . . . On the morning of May 25, 1971 when Mr. Clay came in, there wasn't much conversation held; something about a pretty day or nice weather. He went back and got the wine and come up and laid the money down and left. I've seen Mr. Clay in there several times; he comes in quite often to buy wine. In my opinion he was not intoxicated. I observed him walking; he walked to the walk-in cooler and then come back toward me. I was at the counter. He got his own wine. No staggering. I knew Mr. Clay had a bad walk. I don't think he had drunk anything that morning. I did not get close enough to smell his breath. His eyes were red and watery like they always are. He didn't have any worse walk than usual; his foot drags behind. . . . There was nothing to create in my mind any impression that this man was under the influence of any alcohol."

To paraphrase the Supreme Court in *Food Stores v. Board of Alcoholic Control, supra,* surely a sale of wine on one occasion to a person under the circumstances described by the record in this case is not a failure to give the licensed premises proper supervision.

[2] In a separate count, the Board charged the permittee with "knowingly selling . . . wine to Haywood Lee Clay, a person in an intoxicated condition . . . . " We do not concede that when the "whole record test" is applied that this record would support a finding that permittee violated former G.S. 18-78.1(2), which makes it unlawful to "*knowingly* sell such beverages to any person while such person is in an intoxicated condition." (Emphasis added.) We need not, however, make a determination as to whether the whole record would sustain such a finding for the reason that, in fact, the Board did not so find. The Board found only that "[f]rom material and credible evidence, it is a concluded fact that the permittee did allow the sale of wine to Haywood Lee Clay, through his employee, Roy Wilson Ennis, Jr. and Haywood Clay being a person in an intoxicated condition on the retail licensed premises on or about May 25, 1971 at 9:15 a.m. in violation of G.S. 18-78.1(2)." Only a finding

that the permittee or his employee *knowingly* sold the wine to an intoxicated person would be sufficient to sustain the order suspending the permit. In our opinion the Board's "concluded fact" is insufficient to show a violation of the statute under which the Board was proceeding, G.S. 18-78.1(2) [now G.S. 18A-34(a)(2)].

Reversed.

Judge VAUGHN concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In my opinion the findings, conclusions and decisions of the State Board of Alcoholic Control are supported by competent, material and substantial evidence in view of the entire record as submitted. *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499 (1965); *Wholesale v. ABC Board,* 265 N.C. 679, 144 S.E. 2d 895 (1965); *Keg, Inc. v. Board of Alcoholic Control,* 277 N.C. 450, 177 S.E. 2d 861 (1970).

I vote to affirm the decision of the superior court.

CHARLES W. DAVIS, ADMINISTRATOR OF THE ESTATE OF GENETTA ALLENE DAVIS RAY v. VIRGINIA COWAN CONNELL

No. 7219SC24

(Filed 29 March 1972)

1. Pleadings § 32; Rules of Civil Procedure § 15— amendment of answer during trial

In an action for wrongful death allegedly caused by the negligence of defendant in unlawfully attempting to pass a truck plaintiff's intestate was meeting, thereby causing plaintiff's intestate to apply her brakes suddenly in an attempt to avoid a head-on collision and to skid into the opposite lane where she collided with the oncoming truck, the trial court did not abuse its discretion in permitting defendant to amend her answer during the trial to allege that the collision was caused by defective brakes on intestate's automobile which caused the automobile to pull to the left when the brakes were applied, and that plaintiff's intestate had knowledge of such defect, where the motion was made before trial and was con-

sidered at a pretrial conference, and before allowing the amendment at the trial, the court conducted a voir dire examination at which time defendant presented testimony tending to support the allegations in her amended answer. G.S. 1A-1, Rule 15(a).

2. Negligence § 34— contributory negligence — consideration of evidence

In determining whether there was sufficient evidence to go to the jury on the issue of contributory negligence, the evidence must be considered in the light most favorable to defendant.

3. Automobiles § 88— contributory negligence — sufficiency of evidence

In an action for wrongful death allegedly caused by defendant's negligence in unlawfully attempting to pass a truck plaintiff's intestate was meeting, thereby causing plaintiff's intestate to apply her brakes in an attempt to avoid a head-on collision and to skid into the opposite lane where she collided with the oncoming truck, the trial court properly submitted an issue of contributory negligence to the jury where defendant's evidence tended to show that plaintiff's intestate was operating her automobile with brakes which she had reason to know were defective and would pull the automobile to the left when applied, the evidence of both parties indicated that when plaintiff's intestate applied the brakes the automobile skidded to the left, and defendant's evidence tended to show that she had pulled her automobile back into the right lane of traffic and cleared the opposite lane before plaintiff's intestate lost control of her automobile causing it to cross into the path of the truck.

4. Automobiles § 21— sudden emergency

Under the doctrine of sudden emergency, one who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.

5. Automobiles § 21— sudden emergency — person creating the emergency

The principle of sudden emergency is not available to one who by his own negligence has brought about or contributed to the emergency.

6. Automobiles § 90— failure to charge on sudden emergency

In this wrongful death action wherein plaintiff alleged and presented evidence tending to show that his intestate lost control of her automobile and skidded into the path of an oncoming truck as a result of being suddenly confronted with the danger of a head-on collision with the vehicle in which defendant was unlawfully attempting to pass the truck, the trial court committed prejudicial error in failing to relate the doctrine of sudden emergency and the evidence pertinent thereto to the issue of plaintiff's contributory negligence.

APPEAL by plaintiff from *Collier, Judge*, 14 June 1971 Session of Superior Court held in MONTGOMERY County.

Plaintiff's intestate was killed at approximately 8:45 a.m. on 3 July 1969 when the Falcon automobile she was operating on Highway #27 between Troy and Biscoe crossed over the center line and collided with a truck proceeding in the opposite direction. In this action for wrongful death, plaintiff alleges that the collision was caused by the negligence of defendant in unlawfully attempting to pass a line of vehicles, including the truck plaintiff's intestate was meeting, thereby causing plaintiff's intestate to apply her brakes suddenly in an attempt to avoid a head-on collision and to skid into the opposite lane into the path of the truck.

The evidence offered by the plaintiff tended to show the following: In the vicinity of the collision, Highway #27 is a two-lane asphalt highway, 20 feet in width, and running generally east-west between Biscoe and Troy. The shoulder of the eastbound lane is 7 feet and the shoulder of the westbound lane is 5 feet. There is an embankment approximately 10 feet high on each side of the highway. Proceeding in an easterly direction toward the collision scene, the highway is uphill for approximately three-quarters of a mile. A solid yellow line in the eastbound lane extends approximately 450 feet to the crest of the hill and the unobstructed view of a motorist proceeding up the hill is less than 500 feet.

Defendant was driving her Pontiac automobile in an easterly direction. About the time defendant reached the yellow line, she pulled from a line of traffic into the left lane for the purpose of passing a car and a truck in front of her. She got past the car and continued until her car was even with the truck. As defendant's car came abreast of the truck, and while it was still in the area of the yellow line in her lane, plaintiff's intestate came over the hill toward defendant, immediately applied brakes, and skidded to the left into the truck. Fletcher King, driver of the truck, stated that he was traveling about 40 miles an hour when defendant started to pass him. He testified further: "The Falcon car was about three car lengths from me when I first saw it. It had not begun to skid when I first saw it. The second I looked, it started. It was that quick. When I looked and saw the Falcon about three car lengths from me, the Pontiac at that time was along my window, straight across my window. The front of the Pontiac was even with my window."

Mrs. Helen Miller, driver of the car which defendant passed, testified:

> "She passed me when my automobile was in this area here of the solid yellow line. She completed her passing of me. She got up even with the Dodge Truck operated by Mr. Fletcher King. As she got around me, she was still in the solid yellow line zone. As she passed me, as I said, I was going up the hill on a yellow line and I couldn't see any farther than what was in front of me. I couldn't see the other way if anything was coming. As I proceeded toward the crest of the hill, she was passing me, trying to pass the truck. I slowed up so that if she wanted to get back in, she could. Then I heard a crash. Relative to the Dodge Truck Mr. King was operating, she got up even with that. After that, I just heard the crash. That was the crash of the Falcon. She was trying to get back in, and when I say 'she' I mean Mrs. Connell. She did not get all the way back in. I skidded to keep from hitting her as the rear end of her car was sitting across the yellow line."

Defendant offered evidence tending to show that on occasions prior to the collision, Mrs. Ray's car had pulled to the left when brakes were applied. (Plaintiff presented rebuttal evidence that the car had been inspected and found without defect a short time before the collision.) Defendant's evidence also conflicted with that of plaintiff in various other respects.

Issues of negligence, contributory negligence and damages were submitted to the jury and the first two issues were answered in the affirmative. Judgment was entered upon the verdict and plaintiff appealed.

Ottway Burton for plaintiff appellant.

Brown, Brown & Brown by R. L. Brown, Jr., for defendant appellee.

GRAHAM, Judge.

[1] Plaintiff contends the court erred in permitting defendant to file an amendment to her answer during the course of the trial. The amendment alleges that the collision was caused by defective brakes on the Falcon automobile; that plaintiff's intestate knew the brakes were defective, and that her negli-

gence in operating the automobile in such a condition was a proximate cause of her death.

G.S. 1A-1, Rule 15(a) provides that leave to amend pleadings shall be freely given when justice so requires. Subsection (b) of Rule 15 provides in part: "If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

Defendant filed her motion to amend on 21 May 1971, and alleged therein that her counsel had first received information regarding defective brakes on the Falcon automobile on 3 May 1971; that the information was partly confirmed on 8 May 1971 and was finally confirmed on 21 May 1971. The motion was considered at pretrial conference on 26 May 1971 but a ruling on the motion was expressly held in abeyance until trial. Before allowing the amendment at the trial, the court conducted a voir dire examination at which time defendant presented testimony tending to support the allegations in her amended answer. In our opinion the court was acting well within its discretionary powers in allowing the amendment under these circumstances.

[2] Plaintiff next assigns as error the submission of the issue of contributory negligence to the jury. In determining whether there was sufficient evidence to go to the jury on this issue, the evidence must be considered in the light most favorable to defendant. *Jones v. Holt,* 268 N.C. 381, 150 S.E. 2d 759; *Butler v. Wood,* 267 N.C. 250, 148 S.E. 2d 10.

[3] Defendant's evidence was sufficient to permit a finding that plaintiff's intestate was operating her Falcon automobile with brakes which she had reason to know were defective and would pull the car to the left when applied. The evidence of both parties indicated that when plaintiff's intestate applied brakes the car skidded to the left. Moreover, defendant's evidence would support a finding that she had pulled her automobile back into the right lane of traffic and cleared the opposite lane before plaintiff's intestate lost control of her auto-

mobile causing it to cross into the path of the truck. We hold this evidence to be sufficient to require the submission of the second issue to the jury and overrule plaintiff's assignment of error with respect thereto.

Plaintiff challenges various portions of the court's jury charge and contends that the court failed to adequately relate the principles of law involved to the evidence in the case. This contention is well taken.

[4] The theory of plaintiff's claim, as set forth in the complaint, is that his intestate lost control of her automobile as a result of being suddenly confronted with the danger of a head-on collision with defendant's vehicle. The evidence, when considered in the light most favorable to plaintiff, supports this theory and compels application of the doctrine of sudden emergency to the issue of plaintiff's negligence. This doctrine, simply stated, is that "'[o]ne who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have done.'" *Cockman v. Powers,* 248 N.C. 403, 407, 103 S.E. 2d 710, 713.

In *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785, it is stated:

> "The rule is well established with us . . . that when a plaintiff is required to act suddenly and in the face of real, or under a reasonably well-founded apprehension of, impending and imminent danger to himself caused by defendants' negligence . . . he is not required to act as though he had time for deliberation and the full exercise of his judgment and reasoning faculties."

[5] The court instructed the jury that evidence of defendant's negligence was to be considered in the light of the sudden emergency doctrine but neglected to apply the doctrine to the issue of plaintiff's contributory negligence. The doctrine does not arise on the issue of defendant's negligence because the sudden emergency, if any, faced by defendant was clearly attributable to her negligence in unlawfully attempting to pass the vehicles in front of her. The principle of sudden emergency is not available to one who by his own negligence has brought about or contributed to the emergency. *Johnson v. Simmons,* 10 N.C. App. 113, 177 S.E. 2d 721, and cases cited.

[6] On the other hand, the doctrine does arise on the evidence relating to plaintiff's negligence and is crucial to the theory of his case. Its importance was illustrated when the jury was readmitted to the courtroom to ask a question during deliberation. The foreman asked: "Does the law read that the operator of a car has to have a car under control at all times with no exceptions?" In answering this question the court reiterated general principles relating to the duty of a driver to maintain a proper lookout and to maintain his vehicle under proper control but did not mention the doctrine of sudden emergency and did not relate the principles of law to the evidence in the case. This could have left the jury under the impression that plaintiff's intestate was deemed negligent under the law even if her car went out of control as a consequence of prudent action on her part to avoid a head-on collision.

The failure of the court to relate the doctrine of sudden emergency and the evidence pertinent thereto to the proper issue constitutes prejudicial error requiring a new trial. *Day v. Davis,* 268 N.C. 643, 151 S.E. 2d 556; *Hunt v. Truck Supplies* and *Davis v. Truck Supplies,* 266 N.C. 314, 146 S.E. 2d 84.

New trial.

Judges CAMPBELL and BRITT concur.

ELEANOR DORIS PETERSON v. WINN-DIXIE OF RALEIGH, INC., AND PEPSI-COLA COMPANY OF FAYETTEVILLE, INC.

No. 7212SC17

(Filed 29 March 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — consideration of the record**

In ruling on a motion for summary judgment, the court must look at the record in the light most favorable to the party opposing the motion.

2. **Rules of Civil Procedure § 56— summary judgment — affidavit statements not based on personal knowledge**

Statements in plaintiff's affidavit as to why she "thinks" cartons of soft drinks in a grocery store display fell cannot be considered in ruling on defendant's motion for summary judgment, the

statements not being made on personal knowledge and plaintiff not having affirmatively shown that she is competent to give an opinion as to why the drinks fell.

3. **Rules of Civil Procedure § 56— motion for summary judgment — reliance on complaint**

Plaintiff may not rely on the bare allegations of her complaint where defendants' motions for summary judgment are supported as provided in Rule 56.

4. **Negligence § 57— injury from soft drink display in grocery store — summary judgment**

Summary judgment was properly allowed in favor of defendants, a soft drink company and a grocery company, in an action to recover for injuries allegedly sustained by plaintiff when she picked up a carton of soft drinks from a self-service display in a grocery store and some of the cartons of bottles fell to the floor, where plaintiff offered no competent evidence of negligence by defendants in the arrangement or maintenance of the display, and defendants' evidence indicated a careful and proper arrangement of the display and proper, periodic inspection and maintenance of the display.

APPEAL by plaintiff from *Cooper, Judge,* 21 June 1971 Session of Superior Court held in CUMBERLAND County.

Plaintiff instituted this action to recover damages for personal injury alleged to have been caused by negligence of the defendants in the setting up and maintenance of a soft-drink display provided for customers' use in self-service purchasing of soft-drinks in six-bottle cartons in the Winn-Dixie Store at Talleywood Shopping Center in Fayetteville.

After answers were filed by defendants, plaintiff took the deposition of the manager of the Winn-Dixie store involved and the deposition of the route salesman of Pepsi-Cola who served the Winn-Dixie store involved. Defendants took the deposition of plaintiff. Thereafter, defendants filed motions for summary judgment and after due notice the motions were heard upon the pleadings, the three depositions and arguments of counsel. The trial court rendered summary judgment for defendants and plaintiff appealed.

A. Maxwell Ruppe for the plaintiff.

Teague, Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for Winn-Dixie of Raleigh, Inc.

Quillin, Russ, Worth & McLeod, by Walker Y. Worth, Jr., for Pepsi-Cola Company of Fayetteville, Inc.

BROCK, Judge.

[1] When a motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1. Therefore, in this case we must view the record in the light most favorable to plaintiff.

The record, in the light most favorable to plaintiff, tends to establish the following: On 30 March 1968, defendant Winn-Dixie operated a retail, self-service grocery store in Talleywood Shopping Center in Fayetteville, and maintained for sale soft-drinks supplied by defendant Pepsi-Cola. On 29 March 1968, defendant Pepsi-Cola through its agent filled the soft-drink display in the Winn-Dixie store with 16 ounce "Pepsis," 10 ounce "Pepsis," 10 ounce "Mountain Dew," and 10 ounce "Diet Pepsis," all in six-bottle cartons. The cartons were stacked two and three cartons high. The bottom row of cartons sat upon a shelf. A plastic strip was placed on top of the bottom cartons and the second row of cartons sat upon the plastic strip. Another plastic strip was placed on the top of the second cartons and the third row of cartons sat upon the plastic strip. The plastic strip was so constructed that as each carton was removed the strip rolled back to the front edge of the next carton, thereby exposing the carton immediately under the one that had been removed. The cartons were stacked four to five in depth from back of the display to the store aisle.

Defendant Pepsi-Cola's agent testified:

> "I filled up the display on March 29, 1968. I stacked the drinks directly on top of each other. I did not offset them. On the following Monday, it was mentioned to me that a lady had gotten cut by some drinks that had fallen on March 30, 1968. I checked my display the following Monday but did not find anything unusual about it . . . ."

At about 4:00 p.m., on 30 March 1968, plaintiff was shopping in the Winn-Dixie Store at Talleywood Shopping Center. She reached over to get a carton of Pepsi-Cola and, when she picked them up, some cartons fell to the floor and the broken glass cut her leg. Plaintiff testified in part:

> "When I picked it up, the flap went back, and under the celluloid was another carton of Pepsis. The cartons that fell were the ones under and beside the one I picked up.

I didn't feel anything unusual when I picked up the carton of Pepsis. I didn't feel the carton catch on anything. I think the flap knocked the rest of them, the way they were stacked. What other reason would they fall?"

"As to what made the others fall, the only thing that could have done it was the way they were stacked. I am sure it must have been. Something was wrong, don't you think?"

"I looked at the drink display where the Pepsis were located. I did not see anything unusual about the Pepsi-Cola display, but then I wasn't looking for it. There was nothing unusual staring me in the face. I continued looking at the display until I took the carton off the display. I saw the Pepsi display from the time I approached it until I picked up the carton of Pepsis but did not notice anything unusual about the Pepsi display or the way they were stacked."

"I did not notice anything different about the stacking of these bottles on this occasion from other occasions when I have gone to the Pepsi display and removed a carton of Pepsis but since that time I have noticed different things about the way Pepsis were stacked."

Plaintiff also testified as to what she guessed was wrong:

"The cartons that fell were improperly stacked somewhere. I didn't see the improper stacking, but what else did it, could it be? I didn't look for it either. I formed my opinion as to the cause of the cartons to fall from the way they were laying on the floor all around. It had to be improperly stacked."

"I have been in there several times and bought Pepsis regularly. I did not notice anything unusual about them this day. I wasn't looking for something to be wrong. I went in like I usually do and picked up a carton. It fell because of the way it was stacked, it had to be."

She also testified as to some observations made, somewhere and sometime, after the date of the accident:

"I have noticed that one would be sitting in place like this and then two would be sitting like this, or either one would be sitting half way on the edge, against another. Whether that is different from what they were in March

I did not look to see. I did not examine them before I got hurt."

"As to whether I am guessing, I have my reasons which are that I have been back later and observed them still stacked wrong. It was very dangerous. As to the way they were stacked, there is two here and one sitting right that way and sitting to where they can fall easily; they are not stacked straight upon each other."

The local manager of Winn-Dixie testified that, in the morning of the day plaintiff was cut, he checked the soft-drink display and that, as far as he knew, the "Pepsis" were stacked in a normal fashion.

[2] G.S. 1A-1, Rule 56(e), provides that "[s]upporting and opposing affidavits shall be made on *personal knowledge,* shall set forth such *facts as would be admissible* in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein (emphasis added)." It seems obvious that plaintiff's affidavit (in the form of her deposition in this case) was not made on personal knowledge when she states why she *thinks* the drinks fell. Also, it seems obvious that plaintiff has not affirmatively shown that she is competent to give an *opinion* as to why the drinks fell. These phases of her affidavit cannot be considered in her opposition to summary judgment, because they do not comply with the rules. Stripped of the phrases which cannot be considered, plaintiff's affidavit shows that she saw nothing wrong with the arrangement of the soft-drink display. Her assertion that the accident would not have occurred unless something had been wrong with the soft-drink display is nothing more than a lay effort to apply the doctrine of *res ipsa loquitur* to a situation which is clearly not appropriate for the application of the doctrine.

[3] The allegations of plaintiff's complaint are artfully set forth to allege facts sufficient to survive a motion to dismiss, but defendants' motions for summary judgment are supported as provided in Rule 56; therefore, plaintiff may not rely on the bare allegations of her complaint. *Haithcock v. Chimney Rock Co.,* 10 N.C. App. 696, 179 S.E. 2d 865. "The purpose of the Summary Judgment procedure . . . is to ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is en-

titled to judgment as a matter of law." *Haithcock v. Chimney Rock Co., supra.*

[4] When we consider only those portions of the affidavits which can properly be considered under Rule 56, it seems clear that plaintiff has no evidence of negligence in the arrangement or maintenance of the soft-drink display. Defendants' evidence indicates a careful and proper arrangement of the display and a proper, periodic inspection and maintenance.

In our opinion, the trial judge was correct in entering summary judgment for defendants.

No error.

Judges HEDRICK and VAUGHN concur.

ABE GREENBERG v. MR. & MRS. HENRY W. BAILEY (BERTHA MAY CARDEN BAILEY)

No. 7214DC109

(Filed 29 March 1972)

1. **Frauds, Statute of § 2; Vendor and Purchaser § 1— memorandum of sale — separate related writings**

In order to comply with the statute of frauds, it is not necessary that all of the provisions of the contract be set out in a single instrument, the memorandum being sufficient if the contract provisions can be determined from separate but related writings. G.S. 22-2.

2. **Frauds, Statute of § 2; Vendor and Purchaser § 1— sale of land — sales record sheet and plat — sufficiency as memorandum of sale**

A sales record sheet signed by defendants showing that on a specified date a 70' x 130' lot was sold for defendants by an auction company to plaintiff for $10,000 and setting forth the terms of payment as $1,000 cash with the $9,000 balance to be paid upon delivery of a deed within 60 days, and a plat specifically describing the property which was attached to the sales record sheet and other exhibits by the auctioneer at the time they were executed, *held* sufficient, when considered together, to show all of the essential elements of a contract of sale.

3. **Vendor and Purchaser § 2— contract to sell land — return of purchaser's deposit by seller's agent**

Defendants will not be relieved of their contract to sell land to plaintiff by the fact that their agent mistakenly refunded plaintiff's

cash deposit after defendants had refused to close the sale or to accept the deposit or the total consideration for the land.

4. **Frauds, Statute of § 2; Vendor and Purchaser § 1— auctioneer— agent of seller and buyer**

An auctioneer at a sale is, at the time and for that purpose, the agent of both seller and buyer.

5. **Vendor and Purchaser § 1— auction sale of land — confirmation by owner — delivery to buyer**

In receiving the sellers' written confirmation of a sale of their property by auction, the auctioneer was acting for the buyer as well as the seller, and it was unnecessary that the written confirmation be actually delivered to the buyer in order for the contract of sale to be binding upon the parties.

APPEAL by defendants from *Lee, District Judge,* 2 August 1971 Session of District Court held in DURHAM County.

Plaintiff seeks specific performance of an alleged written contract to convey real property arising out of an auction sale held 27 February 1971. The cause was heard pursuant to stipulation by District Judge Lee without a jury.

The property in question is a lot, 70' x 130', located at the intersection of Roxboro Road and Woodland Drive in Durham County and adjoining property owned by the estate of Julius Cleveland Carden. Feme defendant is a beneficiary of the Carden estate. Attorneys William Y. Manson and E. C. Bryson, Jr., were appointed as commissioners to sell the Carden estate property. They retained R. B. Butler Auction Company, Inc., to auction the property and an auction sale was advertised for 27 February 1971.

About three weeks before the Carden sale, defendants authorized the auction company to sell their lot at the time of that sale. Plaintiff was the high bidder on defendants' lot and also on the Carden property. Immediately after the sale, plaintiff signed a written certification (plaintiff's Exhibit B) that he had purchased the lot, "Subject to Confirmation by the Owner" and that he promised to pay the amount of his bid ($10,000.00), payable ten percent cash, with the balance to be paid upon delivery of the deed. Defendants, on the date of the sale, signed two paperwritings. The first (plaintiff's Exhibit C) provides as follows:

"This sheet represents a true and accurate record of all sales conducted this day, February 27, 1970, for the said

Mr. and Mrs. Henry W. Bailey with total sales amounting to $10,000.00; and all monies in the amount of $1,000.00; has been turned over to the said Attorney E. C. Bryson, Jr. and receipt for this money is hereby granted to the R. B. Butler Auction Co. in full. All above property being confirmed by the owners or the undersigned agents by deposits accepted by us. The R. B. Butler Auction Co. and Robert H. Chandler is hereby released from any further liabilities that may incur as a result of this sale.

This the 27th day of February 19____.

SEAL Mrs. Henry W. Bailey

SEAL Henry W. Bailey"

The second instrument signed by defendants (plaintiff's Exhibit D) is as follows:

"SALES RECORD AND SETTLEMENT SHEET

Sale Conducted For Mr. & Mrs. Henry W. Bailey

Date _____ 19____

Lot. No.	*In Block*	*Purchaser*	*Price Paid*	*Cash Payments*
70x130		Abe Greenberg	$10,000.00	$1,000.00

Notes Given — $9,000.00

Remarks Balance Cash on Del. of Deed in 60 Days.

Amount Due R. B. Butler Auction Co. $600.00 Commission for Sales Services Rendered this day February 27, 1971—To be paid out of Proceeds of Sale by Attorney Ed Bryson, Jr.

Mrs. Henry W. Bailey

Henry W. Bailey"

On the date of the sale, the auctioneer stapled together plaintiff's Exhibits B, C, D and E (a plat fully describing the lot sold), and the auction company retained possession of the instruments until they were delivered to plaintiff after defendants refused to convey the lot.

Defendants testified that their agreement with the auction company was that if the sale of the Carden property did not go through, neither would the sale of their lot. The sale of the Carden property was not confirmed, and, upon learning this, defendants advised the auction company that they would not sell their lot. Plaintiff's evidence tended to show that the sale of defendants' lot was unrelated to that of the Carden property; that defendants agreed at all times to confirm the sale of their lot on the day of the sale irrespective of what happened with respect to the Carden sale; and that defendants did confirm the sale by signing plaintiff's Exhibits C and D.

The court found facts favorable to plaintiff, concluded that Exhibits B, C, D and E, when considered together, constitute a sufficient memorandum of sale, and ordered defendants to convey the property and plaintiff to pay the agreed purchase price.

Nye & Mitchell by Charles B. Nye for plaintiff appellee.

C. Horton Poe, Jr., for defendant appellants.

GRAHAM, Judge.

Defendants assign as error the court's conclusion that Exhibits B, C, D and E constitute a sufficient memorandum of sale to comply with the statute of frauds. This assignment of error is overruled.

[1] "All contracts to sell or convey any lands . . . or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged. . . . " G.S. 22-2. To comply with the statute it is not necessary that all of the provisions of a contract be set out in a single instrument. "The memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related writings." *Hines v. Tripp,* 263 N.C. 470, 474, 139 S.E. 2d 545, 548. "The writings must disclose, at least with sufficient definiteness to be aided by parol, the terms of the contract, the names of the parties, and a description of the property." 4 Strong, N. C. Index 2d, Frauds, Statute of, § 2, p. 62.

[2] Exhibit D, entitled Sales Record and Settlement Sheet is sufficient to show that, on the date of the auction, a 70′ x 130′

lot was sold for defendants by the auction company to plaintiff for the sum of $10,000.00. The terms of payment are set forth as $1,000.00 cash, with the balance of $9,000.00 to be paid upon delivery of deed within 60 days. A specific description of the property is furnished by the plat (Exhibit E) which was physically attached by the auctioneer to the sales record and the other exhibits at the time they were executed. The male defendant conceded on cross-examination that the 70′ x 130′ lot shown on Exhibit E is the lot referred to in Exhibit D.

We hold that these exhibits, when construed together, are sufficient to show all of the essential elements of a contract of sale. The property sold is described, the parties are named, and the terms of the sale are clearly set forth. Our attention is directed to no essential feature of the contract which is left uncertain by the instruments which defendants admit they executed.

[3] Defendants contend they should be relieved of their obligation under the contract because E. C. Bryson, Jr. mistakenly refunded to plaintiff the $1,000.00 cash payment intended for defendants' lot. This payment, which was included in a check for $5,000.00 given as a deposit on both sales, was returned when it was learned that the Carden sale would not be confirmed. Mr. Bryson testified that it slipped his mind that $1,000.00 of the check returned had been deposited as a cash payment on defendants' lot.

Plaintiff's Exhibit C establishes that Bryson was defendants' agent for the receipt of the cash deposit. At the time he returned the check to plaintiff, defendants had refused to close the sale or to accept the $1,000.00 cash payment or the total consideration for the lot. Plaintiff stands ready to comply with the contract. Under these circumstances, defendants are in no position to contend that "the deal is off" because the cash deposit was inadvertently returned by their agent.

Defendants argue that Exhibit B constitutes at most an offer by plaintiff to purchase, and that since plaintiff did not receive defendants' "purported written acceptance," as represented by Exhibits C, D and E, until after defendants' rejection of the offer had been communicated to him, no contract came into existence. This argument is untenable.

[4, 5] An "auctioneer at a sale is, at the time and for that purpose, the agent of both seller and buyer. . . . " *Smith v. Joyce,* 214 N.C. 602, 605, 200 S.E. 431, 434. The written instruments confirming the sale were delivered to the auctioneer and kept by the auction company as a part of its original records of the sale. In receiving the confirmation, the auctioneer was acting for the buyer as well as the seller and it was unnecessary that the instruments be actually delivered to the buyer in order for the contract of sale to be binding on the parties. When an owner sells real property through an agent, the owner is not required to sign the agreement or to communicate with the purchaser. *Lewis v. Allred,* 249 N.C. 486, 106 S.E. 2d 689. Likewise, when a purchaser buys real property through an agent it is not necessary that the agent deliver to him the written acceptance of his offer in order for a binding agreement to arise. "[A] principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof." *Norburn v. Mackie,* 262 N.C. 16, 24, 136 S.E. 2d 279, 285.

We have carefully reviewed all of defendants' assignments of error, including several we deem unnecessary to discuss. In our opinion no prejudicial error has been shown.

Affirmed.

Judges CAMPBELL and BRITT concur.

ROBERT D. JOHNSON v. MARY E. JOHNSON

No. 7223DC47

(Filed 29 March 1972)

1. **Pleadings §§ 17, 32— failure to reply to counterclaim — defense to counterclaim — filing of reply conforming to evidence**

In the husband's action for absolute divorce wherein the wife counterclaimed for alimony *pendente lite*, counsel fees and possession of the home, and the husband filed no reply to the counterclaim, the trial court acted within its discretion in allowing the husband to introduce as a defense to the wife's counterclaim evidence that the wife was habitually intoxicated, and in allowing the husband to file a reply to the counterclaim conforming to the evidence already presented.

2. **Trial § 3— continuances — discretion of court**

The granting of a continuance is within the discretion of the trial court and its exercise will not be reviewed in the absence of manifest abuse of discretion.

3. **Trial § 3— failure to reply to counterclaim — defense to counterclaim — filing of reply during trial — denial of continuance**

In the husband's action for absolute divorce wherein the wife counterclaimed for alimony *pendente lite*, counsel fees and possession of the home, and the husband filed no reply to the counterclaim, the trial court did not abuse its discretion in the denial of the wife's motion for continuance on the ground of surprise after the husband had been allowed to introduce as a defense to the wife's counterclaim evidence that the wife was habitually intoxicated, and to file a reply to the wife's counterclaim conforming to the evidence already presented, the trial court having been in a position to know what transpired at a pretrial conference and whether defendant was surprised by plaintiff's evidence.

4. **Divorce and Alimony § 13— granting of absolute divorce — denial of counterclaim for alimony**

The evidence supported the trial court's findings that the husband was justified in leaving the wife because of the wife's drinking problem and that the husband had not offered indignities to the wife which would have made the wife's life unbearable, and the trial court properly dismissed the wife's counterclaim for alimony *pendente lite*, counsel fees and possession of the home and properly granted the husband an absolute divorce on the ground of one year's separation.

5. **Appeal and Error § 24— exceptions not set forth in record on appeal**

Exceptions not set forth in the record on appeal will not be considered by the appellate court.

APPEAL by defendant from *Osborne, District Judge*, at the 28 June 1971 Session of District Court held in WILKES County.

The plaintiff, Robert D. Johnson, brought this civil action for divorce from the defendant, Mary E. Johnson. The complaint alleged, as grounds for the divorce, one year's separation of the parties.

The defendant filed an answer and a counterclaim denominated as such, alleging that plaintiff had offered indignities to the defendant and deserted her and thereafter failed to provide adequate support and maintenance for her. The defendant asked that the complaint be dismissed, and that she be awarded alimony pendente lite, counsel fees, and a writ of possession of a residence owned by the parties as tenants by the entirety.

Plaintiff did not file a reply.

The case was tried by the judge sitting without a jury. At the trial, the plaintiff introduced evidence that defendant was habitually intoxicated and that defendant's intoxication was the reason plaintiff left home. This evidence was introduced as a defense to defendant's counterclaim. The defendant objected to the introduction of plaintiff's evidence on the grounds that no reply had been filed and defendant was therefore taken by surprise.

The trial judge allowed the plaintiff to file a reply to the counterclaim conforming to the evidence already presented.

The defendant made a motion for continuance after all of plaintiff's evidence had been introduced. The motion was denied.

The defendant testified that she did not have a drinking problem and that she had not given plaintiff any reason to leave home.

The judge's findings of fact and conclusions of law were in favor of the plaintiff. Judgment was entered granting plaintiff an absolute divorce on the grounds of one year's separation and dismissing defendant's counterclaim.

From the judgment, the defendant appeals.

Whicker, Vannoy & Moore by J. Gary Vannoy for plaintiff appellee.

McElwee & Hall by John E. Hall for defendant appellant.

CAMPBELL, Judge.

The defendant first assigns as error the admission of evidence as to the drinking problem of defendant as a defense against the defendant's counterclaim and the denial of defendant's motion for a continuance after this evidence was admitted.

Defendant contends that plaintiff was required to file a reply to her counterclaim and that in the absence of a reply it was error for the trial court to admit evidence of a defense to the counterclaim. She further contends that it was error for the trial court to deny defendant's motion for a continuance after the plaintiff's evidence was admitted.

Stated concisely, the question is whether it was error to admit plaintiff's evidence, allow him to file a reply conforming the pleadings to the evidence and deny defendant's motion for a continuance.

Although the North Carolina Rules differ somewhat from the Federal Rules of Civil Procedure, the Federal Rules are one of the sources of the North Carolina Rules; and decisions under them are pertinent for guidance and enlightenment as we develop the philosophy of the new rules. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). The canon of interpretation of the Federal Rules is one of liberality, and it has been held in numerous decisions that the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits. *Fakouri v. Cadais,* 147 F. 2d 667 (1945); *Mitchell v. White Consolidated,* 177 F. 2d 500 (1949).

The North Carolina Rules provide that a reply must be filed to any counterclaim denominated as such, G.S. 1A-1, Rule 7(a), and averments to which a responsive pleading is required are deemed to be admitted when not denied. G.S. 1A-1, Rule 8(d).

The North Carolina Supreme Court has, however, held that the Superior Courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute or unless vested rights are interfered with. *Gilchrist v. Kitchen,* 86 N.C. 20 (1882); *Cantwell v. Herring,* 127 N.C. 81, 37 S.E. 140 (1900); *Wheeler v. Wheeler,* 239 N.C. 646, 80 S.E. 2d 755 (1954). These cases were decided under the former Code of Civil Procedure. "But independent of

the Code, we hold that the right to amend the pleadings of a cause and allow answers or other pleadings to be filed at any time, is an inherent power of the superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with." *Gilchrist v. Kitchen, supra.* The *Gilchrist* case attributes this power to the superior court, but the rules of procedure are now the same in both district and superior courts (G.S. 1A-1, Rule 1) and the inherent powers of these courts are the same as far as procedural matters are concerned.

We do not hold that the filing of a reply is an amendment to the pleadings, but it should be noted that Rule 15 permits amendment of pleadings to conform to the evidence even where the evidence is admitted over objection. While this Rule does not control in the case before us, it does reflect the general policy of proceeding to the merits of an action.

[1] In the case before us we hold that the trial court was within its discretion in admitting plaintiff's evidence and allowing plaintiff to file a reply.

[2, 3] The defendant argues that it was error for the trial court to deny her motion for a continuance. The granting of a continuance is within the discretion of the trial court and its exercise will not be reviewed in the absence of manifest abuse of discretion. *O'Brien v. O'Brien,* 266 N.C. 502, 146 S.E. 2d 500 (1966). In this case the trial court was in a position to know what had transpired at the pre-trial conference which had been held and whether defendant was surprised by plaintiff's evidence. The defendant failed to convince the court that admission of plaintiff's evidence prejudiced her in maintaining her counterclaim on the merits. No abuse of discretion appearing, the judge's ruling will not be disturbed.

[4] Defendant also contends that the trial court's findings of fact are not supported by the evidence and that the judgment is not supported by the findings of fact.

We have examined the record carefully. It is our opinion that the evidence fully supports the trial judge's findings of fact. The findings of fact are sufficient to support the judgment. G.S. 1A-1, Rule 52.

The defendant raises two final questions on this appeal: 1. Did the trial court err by failing to make conclusions of

law? 2. Did the trial court's refusal to grant defendant a continuance until the plaintiff's reply was filed deny the defendant the right to trial by jury?

[5] These exceptions have not been set forth in the record on appeal and will not be considered by this Court. Rules 21 and 19(c), Rules of Practice in the Court of Appeals of North Carolina.

It should be noted that the trial court did make conclusions of law. They were omitted from the original record on appeal, but have been included in an addendum to the record.

On the jury trial question, it should be noted that defendant did not request a jury trial in her answer and counterclaim or at the time she moved for a continuance. The defendant has, in fact, argued that her reason for requesting the continuance was to meet alleged surprise, not to demand a jury trial.

We have carefully reviewed the record in this case and find

No error.

Judges BRITT and GRAHAM concur.

ORANGE COUNTY, A MUNICIPAL CORPORATION v. FORREST T. HEATH AND WIFE, NANCY B. HEATH

No. 7215SC93

(Filed 29 March 1972)

1. **Municipal Corporations § 12; State § 4— governmental immunity**

Except where waived under authority of statute, the common law rule of governmental immunity is still the law in this State.

2. **Municipal Corporations § 30— enactment and enforcement of zoning regulations — police power**

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State.

3. **Municipal Corporations § 12; Injunctions § 16— damages for wrongful injunction — governmental immunity**

A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined by the municipal corporation was not abrogated by the enactment of Rule of Civil Procedure 65(c), providing that no security for pay-

ment of damages for wrongfully obtaining an injunction shall be required of the State or its political subdivisions, but that "damages may be awarded against such party in accord with this rule."

4. **Eminent Domain § 2; Injunctions § 4; Municipal Corporations § 30— wrongful injunction — void zoning ordinance — "taking" of property**

Action of county commissioners in obtaining an order restraining defendants from using their property for a mobile home park in violation of a zoning ordinance thereafter determined to be void because it was adopted without public notice and hearing *is held* not to constitute an unlawful interference with defendants' use of their property or arbitrary and unreasonable conduct amounting to a "taking" of the property for which defendants are entitled to compensation.

5. **Municipal Corporations § 30— power to rezone**

A municipal legislative body has authority to rezone property when reasonably necessary to do so in the interests of public health, safety, morals or welfare, the only limitation being that it may not be exercised arbitrarily or capriciously.

APPEAL by defendants from *Hobgood, Judge,* 20 September 1971 Civil Session of ORANGE Superior Court.

Plaintiff instituted this action for the purpose of having defendants restrained and enjoined from developing a parcel of land in Chapel Hill Township as a mobile home park, contending that such use was in violation of a county zoning ordinance. On 21 July 1970 a temporary restraining order was entered and following a hearing the temporary order was continued until the final hearing on the merits. At the 18 November 1970 Session of Orange Superior Court, after a hearing on the merits, the temporary order was dissolved and plaintiff appealed. On 12 May 1971 the Supreme Court affirmed the order dissolving the restraining order, the court's opinion being reported in 278 N.C. 688, 180 S.E. 2d 810. Plaintiff filed no written undertakings.

On 18 August 1971, pursuant to G.S. 1A-1, Rule 65, defendants filed a motion in the cause reciting the facts above stated, alleging that they had suffered $20,000 damages by reason of the restraining order, and asking the court to ascertain and determine the amount of damages they are entitled to recover of plaintiff. Following a hearing on the motion, the court concluded as a matter of law that plaintiff being a municipal corporation with governmental immunity and the obtaining of the restraining order being in the exercise of plaintiff's governmental functions, plaintiff is not liable to defendants for dam-

ages. From an order dismissing their motion, defendants appealed.

Graham & Cheshire by Lucius M. Cheshire for plaintiff appellee.

Winston, Coleman & Bernholz by Alonzo Brown Coleman, Jr., for defendants appellants.

BRITT, Judge.

[1, 2] It appears to be well settled law in this State that except where waived under authority of statute, the common law rule of governmental immunity is still the law in North Carolina; and that in enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. *Town of Hillsborough v. Smith,* 10 N.C. App. 70, 178 S.E. 2d 18 (1970) and cases therein cited, cert. den. 2 February 1971, 277 N.C. 727, 178 S.E. 2d 831.

[3] But defendants contend that by the enactment of G.S. 1A-1, Rule 65(c) the General Assembly abrogated the common law rule aforesaid where a municipality obtains a restraining order or injunction. Rule 65(c) provides in pertinent part as follows:

> "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, *but damages may be awarded against such party in accord with this rule.*" (Emphasis added.)

The question presented by this contention is: Was substantive law changed by a procedural statute? We hold that it was not. There can be no doubt that G.S. 1A-1, Rule 65(c) is a procedural statute. The Rules of Civil Procedure were enacted by Chapter 954 of the 1967 Session Laws. The act is entitled "AN ACT TO AMEND THE LAWS RELATING TO CIVIL PROCEDURE." Section 1, in pertinent part states: "The Rules of Civil Procedure are as follows:"

Article IV, § 13(2) of the Constitution of North Carolina provides in part as follows: "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. *No rule of procedure or practice shall abridge substantive rights* or abrogate or limit the right of trial by jury." (Emphasis ours.)

In *Town of Hillsborough v. Smith, supra,* this court, quoting from a case from a sister jurisdiction, said: " 'As we understand the rule relating to the immunities attaching to sovereignty, such attributes are never to be considered as waived or surrendered by any inference or implication. The surrender of an attribute of sovereignty being so much at variance with the commonly accepted tenets of government, so much at variance with sound public policy and public welfare, the Courts will never say that it has been abrogated, abridged, or surrendered except in deference to plain, positive legislative declarations to that effect.' " Furthermore, it is well settled in this jurisdiction that a statute in derogation of the common law is to be construed strictly. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925 (1955); *Bell v. Page,* 2 N.C. App. 132, 162 S.E. 2d 693 (1968).

We think our negative answer to the question posed is fully supported by the basic law of our State.

[4] Defendants also contend that there has been an unlawful interference with the use and enjoyment of their property to such an extent as to amount to a "taking" of the property. We find no merit in this contention. In 16 Am. Jur. 2d, Constitutional Law, § 301, p. 590, we find: "The fact that police laws and regulations prevent the enjoyment of certain individual rights in property without providing compensation therefor does not necessarily render them unconstitutional as violating the due process clause or as appropriating private property for public use without compensation . . . . If he (the owner) suffers injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

In *State v. Lawing*, 164 N.C. 492, 80 S.E. 69 (1913), the court held that restricting, by exercise of police power, the use of private property to protect the community, is in no sense a taking of such property for public use. See also *McKinney v. Deneen*, 231 N.C. 540, 58 S.E. 2d 107 (1950). In *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885 (1970), the court held that the police power of the State, which may be delegated to munincipal corporations, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, morals, or the general welfare; and, when necessary to safeguard such public interest it may be exercised without payment of compensation to the owner, even though the property is thereby rendered substantially worthless.

[4, 5] Defendants contend that in this case there was arbitrary and unreasonable conduct on the part of the Orange County Commissioners. Absent a showing of ulterior motive or capriciousness, the burden of proof resting on the one asserting such capriciousness, this contention fails. We hold that defendants have failed to carry their burden of proof. Absent such a showing it is presumed that the Orange County Commissioners were acting in the proper exercise of the police power. *Raleigh v. Morand*, 247 N.C. 363, 100 S.E. 2d 870 (1957). A municipal legislative body has authority to rezone property when reasonably necessary to do so in the interests of the public health, safety, morals or welfare, the only limitation upon this authority ordinarily being that it may not be exercised arbitrarily or capriously. *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). The fact standing alone that the ordinance supporting the injunction was void due to a statutory procedural requirement of notice, is not sufficient to infer arbitrariness and capriciousness which would convert the exercise of police power into a taking for which the owner is entitled to compensation. The effect of permitting such an inference could subject a municipal corporation to liability in every instance where a zoning ordinance is ultimately determined to be incorrectly enacted.

For the reasons stated, the order appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

HENRY L. CROUCH, JR. v. HELEN JEAN CROUCH

No. 7214DC59

(Filed 29 March 1972)

1. **Divorce and Alimony § 23; Parent and Child § 7— duty to support child — termination at age 18**

Since the effective date of the statute abrogating the common law definition of "minor" and providing that a minor is any person who has not reached the age of 18 years, G.S. 48A-1 and G.S. 48A-2, the legal obligation of a father to support his child terminates when the child reaches the age of 18; consequently, where plaintiff's daughter had reached the age of 18, the trial court erred in increasing, for the purpose of covering college expenses, the amount of payments plaintiff had agreed to make for the support of his daughter until she "reaches age 21, becomes married or otherwise emancipated." G.S. 50-13.4 *et seq.*

2. **Appeal and Error § 2— questions not adjudicated in trial court**

Questions not adjudicated in the court below will not be considered on appeal.

3. **Divorce and Alimony § 23— motion for increase in child support payments — counsel fees — dependent spouse**

The trial court erred in requiring plaintiff father to pay counsel fees of defendant mother for a hearing upon defendant's motion for an increase in the amount of child support payments made by plaintiff, where there was no showing or finding that at the time of the hearing defendant was a dependent spouse as defined in G.S. 50-16.1.

APPEAL by plaintiff from *Lee, District Judge,* July 1971 Civil Session, DURHAM District Court.

On 24 March 1966 a consent judgment was entered in this cause, (then pending in Durham Superior Court but transferred to district court,) whereby plaintiff agreed to pay $250.00 per month for the benefit of his daughter, Jeanne Christianne Crouch, until she reached age 21, married, or otherwise became emancipated. On 12 July 1971, defendant filed a motion in the cause alleging that the daughter, who was born on 29 September 1953, had finished high school and desired to further her education by attending college, that a substantial increase in her support payments was necessary for that purpose, and asked that the judgment be modified to require plaintiff to make larger payments to cover college education expenses. Following a hearing on the motion on 19 July 1971, an order was entered on 9 August 1971 modifying the judgment to provide for monthly payments of $500 beginning with the month

of August 1971; the order also provided for a $500 fee for defendant's attorney. Plaintiff excepted to the order and appealed.

Everett, Everett & Creech by Robinson O. Everett and Arthur Vann for plaintiff appellant.

Haywood, Denny & Miller by George W. Miller, Jr., for defendant appellee.

BRITT, Judge.

The record establishes that plaintiff's daughter became 18 years of age on 29 September 1971. The primary effect of the order appealed from is to increase the payments plaintiff must make for the support of his daughter from $250 per month to $500 per month until she "reaches age 21, becomes married or otherwise emancipated." We hold that the court erred in entering the order.

The motion in the cause in the instant case was made pursuant to G.S. 50-13.4 et seq. all of which statutes refer to the support of "minor child" or "minor children." Prior to the enactment of Chapter 48A of the General Statutes, the common law definition of "minor" or "minor child" prevailed in this State; in *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31 (1947), the court said: "Ordinarily a child, in the eyes of the law, is in a condition to provide for his own maintenance when he has reached the age of twenty-one years, that is, has attained the status of majority. That age was arbitrarily fixed at common law for the termination of the child's minority, and the attainment of his majority, and the rule has remained in force throughout the United States. 27 Am. Jur., 748, Infants, 5."

[1] Chapter 48A of the General Statutes was enacted by the 1971 General Assembly and became effective on 5 July 1971. G.S. 48A-1 provides: "The common law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated." G.S. 48A-2 provides: "A minor is any person who has not reached the age of 18 years." Before the enactment of G.S. Chapter 48A, it was evident that the meaning of "minor child" within the purview of the custody and support statutes, G.S. 50-13.4 et seq., contemplated the common law age of majority, 21. *Speck v. Speck,* 5 N.C. App. 296, 168 S.E. 2d 672 (1969). When G.S. 48A-1 which repeals the common law

definition of minor is construed with G.S. 48A-2, the effect is that wherever the term "minor," "minor child" or "minor children" is used in a statute, the statute now refers to age 18. The statutes concerning child support, G.S. 50-13.4 et seq., all use the term "minor," "minor child" or "minor children," never referring to age 21. Therefore, in substituting the new meaning of "minor" into the statutes, the legal obligation to support one's child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood as was true in the *Wells* and *Speck* cases, *supra,* and as contemplated by G.S. 50-13.8.

Our holding is consistent with decisions in other jurisdictions that have enacted statutes making 18 the age of majority. In *Young v. Young,* Ky., 413 S.W. 2d 887 (1967), the court was construing Kentucky Revised Statute 2.015 providing as follows: "Persons of the age of eighteen years are of the age of majority for all purposes in this Commonwealth except for the purchase of alcoholic beverages and for purposes of care and treatment of handicapped children, for which twenty-one years is the age of majority." The court held that in light of this statute the legal obligation of a father to support his children terminates upon their reaching their eighteenth birthday. The court went on to say that there may exist a moral obligation for a father to assist his children in acquiring a college education but this is not legally enforceable.

In *Blackard v. Blackard,* Ky., 426 S.W. 2d 471 (1968), the Court of Appeals of Kentucky held that an order to pay support payments to an infant "until further orders of the court" terminates when the infant reaches 18 years of age. See also *Childers v. Childers,* 229 Ark. 11, 313 S.W. 2d 75 (1958) and *Carmody v. Carmody,* Fla., 230 So. 2d 40 (1970).

[2] Next, plaintiff contends that he should be relieved of all payments of child support, asserting that the consent judgment required him to support his daughter until she reached the age of 21, married, "or otherwise became emancipated," and that the effect of G.S. 48A-2 was to emancipate his daughter at age 18. This question is not properly before us as questions not adjudicated in the court below are not presented on appeal. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1 (1966); *Roberts v. Bottling Co.,* 256 N.C. 434, 124 S.E. 2d 105 (1962). The gist of defendant's motion in the cause was that plaintiff

be required to provide adequate and sufficient funds to enable his daughter to attend college. In his reply plaintiff asked that the motion be denied, that he not be required to pay defendant's counsel fees, and that the costs be taxed against defendant. He did not ask that he be relieved of making all payments; in fact, in paragraph 6 of his reply, plaintiff alleged: "Under the totality of the circumstances, the plaintiff ought not be required to support his daughter beyond the $250 per month he is now providing."

A careful review of the pleadings and proceedings relating to the motion in the cause indicates that the first time plaintiff suggested that he should be relieved of all payments of support was on 11 August 1971 when plaintiff moved that the court rescind the 9 August 1971 order and adopt and enter an order proposed by plaintiff; the proposed order referred to G.S. 48A-1 and 48A-2 and would declare that the daughter would be "otherwise emancipated" on 29 September 1971. Evidently plaintiff's motion of 11 August 1971 was an afterthought which we do not think should be considered on this appeal.

[3] Finally, plaintiff contends that the court erred in requiring him to pay $500 fee for defendant's counsel. This contention has merit. Authority for allowing counsel fees in actions for custody and support of minor children appears to be provided by G.S. 50-13.6 in the following language: "In an action or proceeding for the custody or support, or both, of a minor child the court may in its discretion allow reasonable attorney's fees to a dependent spouse, as defined in G.S. 50-16.1, who has insufficient means to defray the expenses of the suit."

There was no showing or finding that at the time of the hearing on the motion in the cause defendant was a dependent spouse as defined in G.S. 50-16.1. Defendant argues that our holding in *Andrews v. Andrews,* 12 N.C. App. 410, 183 S.E. 2d 843 (1971) should be followed in this case but we find the cases distinguishable. In *Andrews,* and quoting from *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967), we said: "Having thus forced her (the former wife) to apply to the court to secure for his children the support *to which they are entitled,* defendant cannot justly complain at being required to assist in the payment of plaintiff's necessary counsel fees." (Emphasis added.) In *Andrews,* as in *Teague,* an increase in child support

by the trial court was affirmed; in the case at bar we are reversing the order providing for an increase. Our holding in *Blair v. Blair,* 8 N.C. App. 61, 173 S.E. 2d 513 (1970) is also clearly distinguishable. It is evident that defendant's able counsel earned the fee approved and ordered paid by the trial court, but under applicable statutes and decisions we are unable to affirm the award.

For the reasons stated the order appealed from is

Reversed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD NEWKIRK

No. 7211SC195

(Filed 29 March 1972)

1. **Grand Jury § 3; Indictment and Warrant § 15— challenge to composition — waiver**

Objections by a defendant to the composition of the grand jury are waived if not raised before entering his plea to the charge against him.

2. **Jury § 7— challenges to the array — when made**

Objections to the panel drawn to serve as petit jurors must be raised by a challenge to the array or a motion to quash when defendant is first called upon to answer or plead to the charge.

3. **Jury § 7; Grand Jury § 3; Indictment and Warrant § 15— motion to quash — challenge to array — consideration after plea — discretion of court**

After the plea is entered, the presiding judge, in his discretion and as a matter of grace, may permit the accused to make a motion challenging the composition of the grand jury and the panel of petit jurors.

4. **Grand Jury § 3; Jury § 7— systematic exclusion of Negroes — failure of proof**

Defendant's evidence failed to establish a *prima facie* case of systematic exclusion of members of the Negro race from either the grand jury which indicted him or the petit jury which convicted him, where defendant's evidence related to the racial composition of only one grand jury and one list of petit jurors and does not show a course of conduct over a period of time resulting in apparent systematic exclusion of Negroes from grand and petit juries in the county.

5. Criminal Law § 138; Narcotics § 5— possession of marijuana — punishment statute changed pending defendant's appeal

Defendant whose appeal from conviction of possession of more than one gram of marijuana was pending on the effective date of the statute reducing that crime from a felony to a misdemeanor and reducing the maximum sentence for a first offense of possession of any quantity of marijuana to six months is not entitled to the benefit of the new statute.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by defendant from *Copeland, Judge,* 18 October 1971 Session of Superior Court held in JOHNSTON County.

The defendant, James Edward Newkirk, was charged in a bill of indictment, proper in form, with the felonious possession of 7.49 grams of the narcotic drug, marijuana. Upon the defendant's plea of not guilty, the State offered evidence tending to show that on 21 May 1971 the defendant was arrested by agents of the Federal Bureau of Investigation for the crime of bank robbery. When Agent Raymond Madden, Jr., searched the defendant at the Selma Police Station, he found five small manila envelopes containing marijuana in the defendant's right front pocket.

The jury found the defendant guilty as charged in the bill of indictment, and from a judgment imposing a prison sentence of not less than three nor more than five years the defendant appealed.

Attorney General Robert Morgan, by Associate Attorney Edwin M. Speas, Jr., for the State.

Robert A. Spence for defendant-appellant.

BROCK, Judge.

The assignments of error brought forward and argued in defendant's brief all relate to the court's denial of the defendant's objections to the panel and the array, and motion to quash the bill of indictment. The record reveals that after the defendant had pleaded not guilty and after twelve jurors had been selected to try the case, but before the jury was impaneled, the defendant, a Negro, made a motion to challenge the panel and the array and to quash the bill of indictment on the grounds that members of the Negro race had been systematically excluded from the grand jury which indicted him and from the list of persons summoned to serve as petit jurors at his trial.

[1-3] Under the criminal procedure of this State, objections by a defendant to the composition of the grand jury are waived if not raised before entering his plea to the charge against him. *Parker v. State,* 2 N.C. App. 27, 162 S.E. 2d 526. Likewise, objections to the panel drawn to serve as petit jurors must be raised by a challenge to the array or a motion to quash when defendant is first called upon to answer or plead to the charge. *State v. Rorie,* 258 N.C. 162, 128 S.E. 2d 229. After the plea is entered, but before the petit jury is sworn and impaneled to try the case, the presiding judge, in his discretion and as a matter of grace, may permit the accused to make the motion. *Parker v. State, supra.* In the present case, the trial judge in his discretion allowed defendant to make his motions and offer evidence thereon in order to determine whether defendant's rights had been violated.

[4] In support of his motions, the defendant offered evidence tending to show that of the 46 persons summoned for jury duty at this session of court, only three were Negro out of the 37 who answered for duty, and that only one Negro was on the grand jury that returned the bill of indictment. The racial makeup of the total population of Johnston County in 1970 was 48,590 white, 13,096 Negro and 51 other. There are no Negroes on the jury commission in Johnston County.

In *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970), Justice Huskins, speaking for the North Carolina Supreme Court, said:

> "Both state and federal courts have long approved the following propositions:
>
> 1. If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the conviction cannot stand. [citations omitted.]
>
> 2. If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendent to establish it. [citations omitted.] But once he establishes a *prima facie* case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. [citations omitted.]
>
> 3. A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on

the venire from which petit jurors are drawn. [citations omitted.]

4. A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged intentional exclusion of Negroes because of their race from serving on the grand or petit jury in his case. [citations omitted.] * * * "

In *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970), in discussing the establishment of a *prima facie* case of racial discrimination, Justice Huskins said: "What must be shown is a systematic course of conduct resulting in apparent systematic discrimination against persons of the defendant's race."

In the present case, the defendant's evidence related to the racial composition of only one grand jury and one list of petit jurors. The evidence does not show a course of conduct over a period of time resulting in an apparent systematic exclusion of the members of the Negro race from the grand juries or list of petit jurors in Johnston County. *State v. Brinson, supra; State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272 (1967). Compare *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109 (1964).

Defendant's evidence fails to establish a *prima facie* case of systematic exclusion of the members of the Negro race from either the grand jury which indicted the defendant or the petit jury which convicted him, and the trial court properly overruled the motions.

In our opinion defendant had a fair trial free from prejudicial error.

[5] This is another case in which the violation of the law arose prior to 1 January 1972. For the reasons stated in *State v. Lenoux Godwin* (No. 7212SC239) filed this date, it is our opinion that the sentence of three to five years imposed in this case is within the limits allowed by the applicable law.

No error.

Judge VAUGHN concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK concurring in part and dissenting in part.

For the same reasons set out in *State v. McIntyre,* 13 N.C. App. 479, 186 S.E. 2d 207 (1972), it is my opinion that the defendant has been convicted only of a misdemeanor. I vote to modify the judgment so as to reduce his sentence of imprisonment of not less than three nor more than five years to imprisonment for six months in the custody of the Commissioner of Corrections.

MIDEASTERN CONSTRUCTION COMPANY AND WILLIAM G. PRICHARD v. LESLIE W. HAMLETT AND RICHARD HAMLETT

No. 7210SC214

(Filed 29 March 1972)

1. **Appeal and Error § 30— exclusion of evidence — assignments of error**

An assignment of error that the trial court erred in the exclusion "of evidence of contractual arrangements made with plaintiff, and the matters and things done in their fulfillment," with numerous exceptions numbered seriatim at the end of the assignment, followed by a list of pages of the record, does not comply with Court of Appeals Rules 19(c) and 21.

2. **Appeal and Error § 49— exclusion of evidence — failure of record to show witness' answer**

The exclusion of testimony cannot be held prejudicial where the record fails to show what the witness would have testified had he been permitted to answer.

3. **Brokers and Factors § 6— commission for acquisition of property — insufficiency of evidence**

In an action against two individuals to recover a broker's fee which one defendant allegedly agreed to pay plaintiff for the acquisition of property conveyed to a corporation, plaintiff's evidence was insufficient to support recovery against the second defendant upon theories of *quantum meruit,* partnership between defendants, ratification and acceptance of benefits under the first defendant's contract, agency, liability of a promoter for obligations incurred in behalf of a corporation prior to its incorporation, or implied contract.

4. **Brokers and Factors § 6— right to commission for acquisition of property**

Plaintiff's evidence was sufficient to support recovery against an individual defendant of a broker's fee for the acquisition of property conveyed to a corporation, where it tended to show that plaintiff was the procuring cause of the acquisition of the property and that defendant had agreed to pay plaintiff a specified commission for obtaining the property.

APPEAL by plaintiff William G. Prichard from *Braswell, Judge,* 13 September 1971 Civil Session, Superior Court, WAKE County.

By this action Mideastern Construction Company seeks to recover $480.70, for services rendered defendants as alleged in the complaint in connection with the acquisition of certain property in Wake County, and William G. Prichard seeks to recover the sum of $12,600 allegedly due him by defendants as a real estate broker's fee resulting from the acquisition of the same property. At the conclusion of plaintiffs' evidence, defendants consented to the rendition of judgment against them in favor of Mideastern Construction Company in the amount prayed for with interest thereon from 10 November 1967. Also at the conclusion of plaintiffs' evidence, defendants moved for directed verdicts in their favor as to William G. Prichard. The motions were allowed, and plaintiff Prichard appeals.

Emanuel and Thompson, by Robert L. Emanuel, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert M. Clay, for defendant appellees.

MORRIS, Judge.

[1] Of the 48 exceptions included in plaintiffs' nine assignments of error, 46 are to the exclusion of evidence, for the most part as to Richard Hamlett. Assignment of error No. 1, which is as follows: "The Trial Court erred in the exclusion as to Richard Hamlett of evidence of the contractual arrangements and agreements made with plaintiff, and the matters and things done in their fulfillment, both prior to and subsequent to communications between plaintiff and Richard Hamlett.", includes 27 exceptions. The exceptions are numbered seriatim at the end of the assignment of error. Following the list of exceptions is a list of pages of the record. Each assignment of error including exceptions to rulings on evidence is done in identical fashion. This obviously does not comply with Rule 21 or Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina, nor with requirements of this Court and the Supreme Court. *In re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59 (1966); *Nye v. Development Co.,* 10 N.C. App. 676, 179 S.E. 2d 795 (1971), cert. denied 278 N.C. 702 (1971). In

order to determine what might have been erroneous in the court's ruling on any one exception, we have had to spend a greater amount of time than warranted in a voyage of discovery through the record. This voyage results in the conclusion that no prejudicial error appears.

[2] With respect to 12 of the exceptions, the record does not disclose what the witness's answer would have been. There is, therefore, nothing for the Court to consider. *Barringer v. Weathington,* 11 N.C. App. 618, 182 S.E. 2d 239 (1971).

By his assignment of error No. 8, appellant contends that the court erred in denying his motions to reverse and vacate the earlier rulings excluding evidence as to Richard Hamlett. This assignment of error is without merit.

[3] Appellant's remaining assignment of error is directed to the court's allowing defendants' motions for directed verdict. Appellant concedes that there is no evidence of any agreement between appellant and Richard Hamlett with respect to the payment of commissions for obtaining the land in question. He contends, however, that the evidence would support the submission to the jury of a variety of issues any one of which would establish liability. Appellant argues that the evidence would support an issue on the theory of quantum meruit; on the theory of a partnership between Leslie Hamlett and Richard Hamlett; on the theory that Richard Hamlett assumed, ratified, confirmed and accepted the benefits of the contract entered into between appellant and Leslie Hamlett; on the theory that Leslie Hamlett was acting as agent for his principal, Richard Hamlett; on the theory that Richard Hamlett, as a promoter for Capitol City Development Corporation, is liable for the debts and obligations incurred in its behalf prior to its incorporation; or on the theory of an implied contract. Our study of the record leads us to the conclusion that, viewing the evidence in the light most favorable to the plaintiff, there is insufficient evidence to support the submission of an issue to the jury on any of these theories as to Richard Hamlett. There is no evidence that Richard Hamlett ever authorized anyone to act for him, or that he ever even knew of an agreement between Leslie and appellant.

However, we think appellant's position with respect to Leslie Hamlett is well taken. Appellant testified that in the

early fall of 1967 Leslie Hamlett approached him and asked if he knew of any property which could be developed for apartment projects; that "Raleigh was a very good area to be in and he wished to get started in the area." Appellant took him to the offices of Mr. Richard Bell and Mr. Hal McNeilly, and the four of them rode to Durham to look over some property there. They talked about the Parker property near Raleigh, which was known to Mr. Bell and Mr. McNeilly, and Leslie Hamlett expressed a desire to look at it. An appointment was made, and the same four went to look at it. Appellant testified "As we approached the property and started to turn off the Highway 70 into the property, his first words were 'buy it'." They went back to Richard Bell's office where Leslie Hamlett "said that he would very much like to purchase the property." At that time, a discussion was had as to the price to offer for the property. Also at this time "Mr. Leslie Hamlett suggested a broker's fee for obtaining this property and also a land development fee for land planning of this property, which would be necessary to get a mortgage loan. . . . The land brokerage fee was to be $12,600. The estimated value of the land being purchased was $126,000. The land planning fee was agreed on at $7,000, to be paid to Richard Bell & Associates." Subsequently, Leslie Hamlett asked that the three men accompany him to Roanoke, Virginia, to see some projects of Richard Hamlett and observe how he operated. They did go to Roanoke and visited projects there. During the ensuing week or 10 days, Mr. Leslie Hamlett made numerous telephone calls to Raleigh to determine the progress being made in the purchase of the land. In October Mr. Richard Hamlett came to Raleigh where he met with appellant, Mr. Leslie Hamlett, Richard Bell, Hal McNeilly, Ted Reynolds, and Bob Farmer to discuss the purchase of the property and how to go about making an offer in writing. Subsequent to that meeting, another meeting was had with Mr. Reynolds. This was at night and at the insistence of Leslie Hamlett and was held in Mr. Bell's office. As a result of that meeting, a "night" letter was sent to the owners of the property. The next meeting was at Mr. Reynolds' office on the following day where appellant met with Mr. Reynolds, Mr. Leslie Hamlett, and Mr. Richard Hamlett, and an offer to purchase was drafted. The next meeting was with Mr. Ed Preston, attorney for the sellers. Present were appellant, Richard Hamlett, Leslie Hamlett, and Mr. Preston. Changes were made in the contract. In response to the question by Mr. Preston as

to whether there was a fee to the seller, appellant "answered that there was no fee to the seller that the buyer was taking care of the real estate broker's fee." An option was prepared for a purchase price of $170,000 plus $10,000 for timber "if it proved out to be as much as they said it was." During the option period Leslie Hamlett returned to Raleigh several times and talked with appellant. He discussed with appellant appraisals and apartment surveys to be used in connection with application for a loan. Mr. Leslie Hamlett was in the business of mortgage brokerage, and presented an application for a loan on this property to North Carolina National Bank which was not consummated. The property was acquired and conveyed to Capitol City Corporation, a corporation chartered on or around 10 October 1967, of which Richard Hamlett was president and Leslie Hamlett an officer and director. The deed was dated 10 November 1967. Mr. Richard Hamlett testified, by deposition, that Leslie Hamlett occasionally obtained financing for some of his (Richard's) 19 corporations; and that in this transaction, Leslie Hamlett was interested in acquiring a loan through North Carolina National Bank. "The fact of the matter is that is the reason I got into it. He come to me and says North Carolina National says they will finance ten buildings over there. Will you come down and build them? You buy the land and set it up, use your financial statement, and so forth, if I arrange the financing? I say, well, yes, I would, and so this was his primary interest to secure financing. He was seeking this as an opportunity to make a commission for obtaining financing, and it was understood that I would go ahead and own the corporation and build on it."

[4] From the evidence the jury could find, though it would not be compelled to do so, that there was an agreement between Leslie Hamlett and appellant, and that appellant was the procuring cause of the acquisition of the property. See *Realty Agency, Inc. v. Duckworth and Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486 (1968), and *Marshall v. White,* 245 F. Supp. 514 (W.D.N.C. 1965).

Affirmed as to Richard Hamlett.

New trial as to Leslie Hamlett.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD WHITTED

No. 7214SC60

(Filed 29 March 1972)

1. **Assault and Battery § 5— felonious assault — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury.

2. **Criminal Law § 161— necessity for exceptions**

Any error asserted on appeal must be supported by an exception duly taken and shown in the record. Court of Appeals Rules 19 and 21.

3. **Assault and Battery § 15; Criminal Law § 114— serious injury — instructions — invasion of province of jury**

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial court invaded the province of the jury in instructing the jury that "you will find that there was serious injury, if you believe the evidence as it all tends to show here, no question about the serious injury."

APPEAL by defendant from *Hobgood, Judge,* 19 June 1971 Session of Superior Court, DURHAM County.

Defendant was charged under an indictment, proper in form, with assault with a deadly weapon, to wit: a pistol, with the intent to kill and inflicting serious injury. Defendant entered a plea of not guilty, and the jury returned a verdict of guilty. From a judgment imposing a prison sentence, defendant gave notice of appeal.

Attorney General Morgan by Associate Attorney Kane for the State.

Witherspoon and Clayton, by Jerry B. Clayton, for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the failure of the court to sustain his motion for nonsuit made at the end of the State's evidence and renewed at the end of all the evidence. There was plenary evidence upon which to submit this case to the jury, and the court properly overruled defendant's motions.

[2] The second and third assignments of error are directed to the judge's charge to the jury, but no exception to the jury instructions appears in the record on appeal. The Rules of Practice of the Court of Appeals and of the Supreme Court of North Carolina (19 and 21) require any error asserted on appeal to be supported by an exception duly taken and shown in the record. Exceptions appearing for the first time in the purported assignments of error present no question for appellate review. *State v. Jacobs,* 278 N.C. 693, 180 S.E. 2d 832 (1971).

However, we think defendant, by his purported assignment of error No. 3, has set out a portion of the court's charge which constitutes reversible error. We have, therefore, chosen to discuss it despite defendant's failure to comply with the rules.

The evidence for the State tends to show: That the defendant shot the prosecuting witness (Smith) with a pistol at the S. & S. Drive-In in Durham on 6 February 1971; that Smith was struck in the abdomen on the left side and then blacked out; that Smith regained consciousness at Duke Hospital where he remained for 13 days; that due to damage to his intestines, Smith had to use a colostomy for two months; that Smith lost 35 pounds after he was shot; and that Smith testified, "I have not been able to resume my duties in and around my business because I still have a bad leg. Presently, the nerves in my leg are injured, and I don't know whether or not I will ever have use of it again."

The defendant presented evidence from the assistant medical record librarian at the Duke University Medical Center which tends to show: That Smith was admitted to the emergency room on 6 February 1971; that he was given tetanus toxoid and operative procedure was performed ("exploratory laparotomy with closure of ileal and distal sigmoid perforations, resection of descending colon perforation, and diverting descending colon colostomy."); that Smith was admitted again later to close the colostomy and was discharged 21 May 1971; and that Smith "is to return as necessary for medical treatment relating to this wound."

[3] The trial court later instructed:

> "I charge you for you to find the defendant guilty of assault with a deadly weapon inflicting serious injury, and

> *you will find that there was serious injury,* if you believe the evidence as it all tends to show here, *no question about the serious injury,* the State must prove three things beyond a reasonable doubt: First, that the defendant acted intentionally—that is not in self-defense; Second, that the defendant shot the prosecuting witness with a 38 caliber pistol; and third, that the 38 caliber pistol was a deadly weapon." (Emphasis supplied.)

The defendant was charged under the indictment with assault with a firearm with intent to kill and *inflicting serious injury* in violation of G.S. 14-32(a), and the jury returned a verdict of guilty of this offense. The essential elements of the offense are: (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) *inflicting serious injury,* (5) not resulting in death. *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638 (1968). There must be a charge and evidence thereon of the element of inflicting serious injury in order to sustain a conviction. *State v. Hefner,* 199 N.C. 778, 155 S.E. 879 (1930). In this case the trial court failed to instruct the jury that they must find beyond a reasonable doubt that serious injury was inflicted. Instead, he instructed the jury that, as a matter of law, "there was serious injury." We cannot conceive of a jury's failing to find serious injury from the facts of this case. Nevertheless, to take from the jury their duty to find this element from the facts was erroneous and prejudicial to the defendant. The North Carolina Supreme Court, through Higgins, J., has said that:

> "The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. *Whether such serious injury has been inflicted must be determined according to the particular facts of each case.*" (Emphasis supplied.) *State v. Jones,* 258 N.C. 89, 91, 128 S.E. 2d 1 (1962).

The appellate courts of this State have subsequently reiterated that whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instructions. *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Shankle,* 7 N.C. App. 564, 172 S.E. 2d 904 (1970); *State v.*

Parker, 7 N.C. App. 191, 171 S.E. 2d 665 (1970). This case is distinguishable from *State v. Marshall*, 5 N.C. App. 476, 168 S.E. 2d 487 (1969), where this Court found no error in the trial court's instructions to the jury concerning serious injury. There the trial court instructed the jury that serious injury "means physical or bodily injury and this I feel needs no further definition," but correctly left the question of whether the particular injury was serious for the jury to determine. Mere inaccuracies in the definition of serious injury, under certain circumstances, may not be prejudicial error. *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952); *State v. Hefner, supra.* The trial court's error in this case was, however, more serious because it invaded the province of the jury.

The following well-established principles are stated in *State v. Swaringen*, 249 N.C. 38, 105 S.E. 2d 99 (1958):

> "Defendants' pleas of not guilty put in issue each essential element of the crimes charged. *S. v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537; *S. v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549; *S. v. Brown*, 225 N.C. 22, 33 S.E. 2d 121; *S. v. Yow*, 227 N.C. 585, 42 S.E. 2d 661.
>
> The State had the burden of establishing beyond a reasonable doubt each element of the crime. Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. G.S. 1-180.
>
> The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. *S. v. Cuthrell*, 235 N.C. 173, 69 S.E. 2d 233; *S. v. Love*, 229 N.C. 99; 47 S.E. 2d 712; *S. v. Snead*, 228 N.C. 37, 44 S.E. 2d 359; *S. v. Minton*, 228 N.C. 15, 44 S.E. 2d 346; *Ward v. Mfg. Co.*, 123 N.C. 248.
>
> The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. *S. v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173; *Miller v. R.R.*, 240 N.C. 617, 83 S.E. 2d 533; *S. v. Shinn*, 234 N.C. 397, 67 S.E. 2d 270; *S. v. Simpson*, 233 N.C. 438, 64 S.E. 2d 568.
>
> Nor does the manner in which counsel examines the witnesses or argues the case to the jury justify the court in

assuming the existence of an essential fact. *S. v. Ellison,* 226 N.C. 628, 39 S.E. 2d 824. There must be a judicial admission before the existence of an essential element of a crime can be stated as a fact. *S. v. Hairr, supra* [244 N.C. 506, 94 S.E. 2d 472]." 249 N.C., at 39-40.

The error in the quoted portions of the charge is sufficiently prejudicial to require a

New trial.

Chief Judge MALLARD and Judge PARKER concur.

R. EDGAR WOODARD v. JULIAN E. MARSHALL AND SMITHFIELD LUMBER COMPANY, INC.

No. 7211DC15

(Filed 29 March 1972)

1. **Rules of Civil Procedure § 50— motion for directed verdict — waiver by offering evidence**

By offering evidence, defendants waived their motions for directed verdicts made at the close of plaintiff's evidence.

2. **Trespass § 8; Trespass to Try Title § 1— permanent damages to freehold — possession of land**

The possession of real property is not a sufficient interest upon which to base a recovery for permanent damages to the freehold.

3. **Trespass to Try Title § 2— wrongful removal of timber — proof of title and trespass**

In an action to recover damages for the unlawful cutting and removal of timber, defendants' denial of plaintiff's allegations of title and trespass placed the burden on plaintiff to establish such allegations.

4. **Trespass to Try Title § 2— wrongful removal of timber — proof of title**

In order to recover damages for the wrongful cutting and removal of timber, plaintiff must show title by one of the methods set forth in *Mobley v. Griffin*, 104 N.C. 112, that he is the owner of the land from which the timber was cut. G.S. 1-539.1.

5. **Trespass to Try Title § 4— wrongful removal of timber — proof of title**

In an action to recover damages for the wrongful cutting and removal of timber, plaintiff's evidence was insufficient to establish title by one of the approved methods, where it tended to show only that plaintiff's father conveyed the land to plaintiff in 1935 and that the timber in controversy was cut from land embraced within the description in plaintiff's deed.

APPEAL by defendants from *Morgan, District Judge*, June 1971 Session of District Court held in JOHNSTON County.

Plaintiff instituted this action to recover the actual value and penalty (G.S. 1-539.1) for timber unlawfully cut from plaintiff's property. The jury returned a verdict in favor of plaintiff for the sum of $593.32, and, pursuant to G.S. 1-539.1, judgment was entered awarding to plaintiff damages against defendant in the sum of $1186.64. Defendant appealed.

Further facts necessary to an understanding of this appeal are set out in the opinion.

George B. Mast, by Allen R. Tew, for defendants.

No counsel contra.

BROCK, Judge.

In undertaking to prove title to the premises from which the timber was alleged to have been unlawfully cut, plaintiff testified that he received a deed from his father for the premises in 1935. This deed to plaintiff was recorded on 5 November 1935. Plaintiff also offered the testimony of a surveyor which tended to show that the timber in controversy was cut from land embraced within the description contained in plaintiff's deed.

The remainder of plaintiff's evidence was directed to the questions of who was responsible for cutting the timber and the amount and value of the timber cut.

At the close of plaintiff's evidence, defendants moved for directed verdicts under G.S. 1A-1, Rule 50(a), upon the grounds that plaintiff had failed to offer sufficient evidence to establish, *prima facie,* plaintiff's title to the premises from which the timber was cut. These motions were overruled and defendants offered evidence. Again, at the close of all the evidence defendants moved for directed verdicts under G.S. 1A-1, Rule 50(b) (1), upon the grounds that plaintiff had failed to offer sufficient evidence to establish, *prima facie,* plaintiff's title to the premises from which the timber was cut. These motions were denied, and the case was submitted to the jury which returned a verdict in favor of plaintiff as set forth above. After verdict, pursuant to Rule 50(b) (1), defendants moved for judgments notwithstanding the verdict of the jury. These latter motions were also denied.

[1] By offering evidence, defendants waived their motions for directed verdicts made at the close of plaintiff's evidence. However, by proceeding after verdict under Rule 50(b) (1) with motions for judgments notwithstanding the verdict, they have preserved for appellate review their exceptions to the denial of their motions for directed verdicts made at the close of all the evidence.

[2] Plaintiff's offer of his deed dated in 1935, together with his evidence identifying the land described therein, constituted *prima facie* evidence of plaintiff's *possession* of the described lands within the time required by law to maintain an action for the recovery or possession of real property. G.S. 1-39 and G.S. 1-42. However, as in the present case, where the plaintiff

claims damages for unlawful cutting of timber, he is claiming permanent damages to the freehold, or damages to the ownership interest, and his right to recover depends upon his establishing his *title* to the described lands. The *possession* of real property is not a sufficient interest upon which to base a recovery for permanent damages to the freehold—the ownership interest. *Daniels v. R.R.*, 158 N.C. 418, 74 S.E. 331.

[3, 4] Defendants' denial of plaintiff's allegations of title and trespass placed the burden on plaintiff of establishing each of these allegations. *Bowers v. Mitchell,* 258 N.C. 80, 128 S.E. 2d 6. In order to sustain an action for permanent damages to the freehold, or to the ownership interest, such as an action for unlawful cutting of timber, plaintiff must allege and show that he is the owner of the land from which the timber was cut. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593. In order to recover penalties under G.S. 1-539.1, plaintiff must establish that he is the *owner* of the land from which the timber was cut. In an action for permanent damages to the freehold, or to the ownership interest, plaintiff must rely upon the strength of his own title. "This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142." *Scott v. Lewis,* 246 N.C. 298, 302, 98 S.E. 2d 294, 297. The methods set forth in *Mobley* are as follows:

1. He may offer a connected chain of title or a grant direct from the State to himself.

2. Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought.

3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title to himself and those under whom he claims, for seven years before the action was brought.

4. He may show, as against the State, possession under known and visible boundaries for thirty years, or as

against individuals for twenty years before the action was brought.

5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought.

6. He may connect the defendant with a common source of title and show in himself a better title from that source.

[5] The deed to plaintiff from his father in 1935 does not fulfill any of the six approved methods of proving title, and defendants' evidence did not aid plaintiff's proof of title in any way. Therefore, without a *prima facie* showing of title in plaintiff by one of the approved methods, plaintiff was not entitled to maintain this action.

After verdict, defendants moved in the trial court for judgment notwithstanding the verdict, which was the same as moving that judgment be entered in accordance with their motions for directed verdicts made at the close of all the evidence. We hold that the trial judge erred in failing to direct verdicts for defendants at the close of all the evidence and in failing to grant their motions for judgments notwithstanding the verdict. However, rather than direct that judgments be entered at this stage in accordance with defendants' motions for directed verdict, we remand this cause for further proceedings. It is ordered that the judgment appealed from is vacated. It is further ordered that this cause is remanded to the District Court of Johnston County for determination in the discretion of the trial judge, after notice to all parties, whether in the interest of justice a new trial should be ordered. If the trial judge determines that a new trial should be ordered, he shall enter an order setting aside the verdict in this case and directing a new trial; otherwise he shall enter judgments notwithstanding the verdict in accordance with defendants' motions for directed verdicts made at the close of all the evidence.

Judgment vacated and cause remanded with directions.

Judges HEDRICK and VAUGHN concur.

GLADYS W. JACKSON v. VESTER W. JACKSON

No. 7214DC23

(Filed 29 March 1972)

1. **Appeal and Error § 41— record on appeal — order of proceedings**

Appeal is subject to dismissal for failure to comply with the requirement of Court of Appeals Rule 19(a) that the proceedings be set forth in the record on appeal in the order of time in which they occurred.

2. **Divorce and Alimony § 21— failure to make child support payments — contempt**

Evidence that defendant husband has a net income of $110 per week does not support a finding that defendant presently possesses the means to comply with a court order requiring him to make child support payments which are now more than $5,000 in arrears, and the order committing defendant to imprisonment for contempt must be set aside.

3. **Divorce and Alimony § 23— child support payments — result of reconciliation**

The husband was not required to make child support payments pursuant to a court order if the wife and children resumed living with the husband; however, the original cause is still pending and upon a subsequent separation and necessity for support payments for the children, the courts are open for whatever relief may be justified by the situation then existing.

APPEAL from Order of *Moore, District Judge,* 16 June 1971 Session of District Court held in DURHAM County.

A hearing was held 16 June 1971 following which Judge Moore entered an order finding the defendant in wilful contempt of a support order entered 2 January 1969 and directing that the defendant be placed in the common jail of Durham County until such time as he should purge himself of this order of contempt. From this order the defendant appeals.

M. Hugh Thompson for plaintiff appellee.

Weatherspoon and Clayton by Jerry B. Clayton for defendant appellant.

CAMPBELL, Judge.

[1] The record in this case is arranged to confuse the Court rather than to assist and enlighten the Court. No effort or attempt was made to follow our Rule 19(a) as to the manner

and method of presenting a record to this Court. Our Rule clearly provides that the proceedings in the case should be set forth in the order of time in which they occurred. Instead of doing this, the record in this case commences with a Motion and Order for Extension of Time entered 29 February 1968; then follows the Answer filed 28 March 1968; then an Amended Complaint filed 23 July 1968; then Order Extending Time To File Answer dated 26 July 1968; then a Notice to show cause directed to the defendant dated 27 November 1968; then the Complaint filed 2 February 1968.

The Rules of Practice are mandatory and a failure to comply with them subjects the appeal to dismissal by this Court *ex mero motu. State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971).

We have, nevertheless, reviewed the record.

On 2 February 1968 this action was instituted by the wife for alimony without a divorce and for support of two minor children born of the marriage and counsel fees. On 2 January 1969 Judge Lee, in the Durham County District Court, entered a judgment to the effect that it was in the best interest of the parties that they separate and live apart, and to this end the furniture and other personal belongings were divided between the parties, and the husband was ordered to pay $45.00 per week into the Office of the Clerk of Superior Court to be turned over to the wife for the support of the two children and mortgage payments on the home, together with a payment for attorney's fees for the wife's attorney. On 19 March 1969 a show cause order was issued for that the husband was in arrears, but the disposition thereof is not shown. On 7 October 1969 another show cause order was issued for the same purpose but again the disposition thereof is not shown. On 19 May 1971 a show cause order was issued to the husband for that he was in arrears, and it is as a result of this order that the hearing in the instant case ensued.

Pursuant to the last show cause order a hearing was held on 16 June, 1971. The office of the Clerk of Superior Court reported that under the terms of the support order of 2 January 1969, the defendant was in arrears $5,523.03 as of 10 June 1971, the last payment having been made on 17 December 1969. The wife testified that pursuant to the order of 2 January

1969 the husband left the home but came back, even though she did not ask him to do so; that he then, in October 1969, left and went to Virginia where he had a job in Danville, but he returned to the home twice a week; that later she went to Danville, Virginia, where the husband had a job. She took the two children with her to Danville, Virginia, where they apparently lived in an apartment together. In February 1971 the wife signed a lease with her husband for an apartment in Danville, Virginia, and they were apparently living together at that time in Danville, Virginia, with the two children. Sometime thereafter and prior to the hearing in June 1971 the wife returned to North Carolina, and she testified, "I do not know what the defendant is making now." The record does not show when the husband and wife separated the last time, but it evidently was after February 1971. The defendant-husband attempted to bring out at the hearing when the separation occurred, but the Court refused to go into this and stated at the hearing, "The Defendant was directed by the Court to make and do certain things, and of course, the matter before us now is a matter between him and the Court. Has he done what the Court directed him to do?"

The record is silent as to what the testimony would have been if permitted by the Court. The record does show that the husband still maintained an apartment in Danville, Virginia, and was making $110.00 a week take-home pay. There is no evidence as to any other assets owned by the husband.

Based upon this evidence the Court entered an order from which this appeal was taken. The order in pertinent part provides:

> "That testimony on the part of the plaintiff showed and the Court finds as a fact that the defendant was ordered to pay into the Office of the Clerk of the Superior Court the sum of $45.00 each week to be used for the benefit of the two children of his marriage and to apply on a mortgage on the house which was occupied by the parties hereto.
>
> The Court finds as a fact that the defendant is in arrears in the amount of $5,523.03. The Court finds as a fact that the defendant has been continuously employed except for two short periods of time over the ensuing years.

The Court finds as a fact that the defendant has been in good health; that he is well able to perform his duties and has performed the duties of his employer over that period of time. The Court finds as a fact that he earns $110.00 approximately net income every week. The Court finds as a fact that he is financially and physically able to comply with the orders dated January 2, 1969, signed by Judge Thomas H. Lee.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant is in wilful contempt of the orders of the Court and that he has not paid the $45.00 each and every week as ordered and that he is in arrears in the amount of $5,523.03.

IT IS THEREFORE, DIRECTED that he be placed in the custody of the Sheriff of Durham County, and placed in the common jail of Durham County until such time as he can purge himself of this order of contempt."

[2] The evidence in the instant case does not support the Court's finding, "that he is financially and physically able to comply with the orders dated January 2, 1969." The mere fact that he earns "$110.00 approximately net income every week" does not indicate that the defendant *presently possesses* the means to comply. There is no evidence as to what, if any, other assets the husband possesses from which a sum in excess of $5,000 could be paid. Therefore, the finding that the defendant-husband's failure to make the payments of subsistence was deliberate and wilful is not supported by the record, and the order committing him to imprisonment for contempt must be set aside. *Cox v. Cox,* 10 N.C. App. 476, 179 S.E. 2d 194 (1971).

[3] It is apparent from this record that the trial court was under a misapprehension as to the law. If, after the order of 2 January 1969, there was a reconciliation and the wife and two children resumed the family group and lived together with the defendant-husband, the necessity for the support payments for the two children ceased. If thereafter there was a subsequent separation and need for support payments for the two children, the courts are open for whatever relief may be justified by the situation then existing. The original cause was at all times pending, and upon a proper motion and evidence to sustain

same, an order could be entered granting whatever relief might be justified by the situation then existing. *Hester v. Hester,* 239 N.C. 97, 79 S.E. 2d 248 (1953).

The order herein appealed from committing the defendant-husband to imprisonment for contempt is set aside, and this cause is remanded for such orders as may be proper.

Remanded.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. EMMETT JACKSON

No. 7216SC250

(Filed 29 March 1972)

1. **Criminal Law § 25— plea of nolo contendere**

A plea of nolo contendere, like a plea of guilty, leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense.

2. **Escape § 1— second escape — indictment**

Bill of indictment was insufficient to charge the felony of second escape where it failed to allege a "previous conviction of escape from the State Prison System." G.S. 148-45.

3. **Escape § 1— escape while serving felony — indictment**

Bill of indictment was insufficient to charge the felony of escape while serving a felony sentence, notwithstanding the indictment used the word "felony" to describe one of the offenses for which defendant was serving sentence when he escaped, where it also alleged that sentences for both offenses were imposed in district courts, since district courts are without jurisdiction to impose sentence in felony cases; however, the indictment was sufficient to charge misdemeanor escape.

Judge CAMPBELL dissenting.

APPEAL by defendant from *Blount, Special Judge,* 29 November 1971 Session of Superior Court held in SCOTLAND County.

Defendant was brought to trial under a bill of indictment charging that:

> " . . . [O]n the 21st day of June, 1971 . . . while he the said Emmett Jackson was then and there lawfully confined in the North Carolina State Prison System in the lawful custody of North Carolina Department of Correction, J. E. Osborne, Superintendent, Camp #5046, Wagram, North Carolina, and while then and there serving a sentence for the crime of
>
> Breaking, Entering and Larceny
> Escape , which is a
>
> Misdemeanor
> Felony , under the laws of the State of
> December 1970
> North Carolina, imposed at the May 1971
> District Sampson
> session District Court, Scotland County, then and there unlawfully, wilfully, and feloniously did attempt to escape and escaped from the said North Carolina Department of Correction, J. E. Osborne, Superintendent, Camp #5046, Wagram, N. C. . . . "

Defendant tendered a plea of nolo contendere. The trial court examined defendant extensively, under oath, as to the voluntariness of his plea. Based upon answers given by defendant, the plea was adjudged to have been freely, understandingly and voluntarily made and it was ordered entered upon the record. The questions of the court and the answers of defendant appear in the record.

Judgment was entered imposing a prison sentence of not less than 18 nor more than 24 months, the sentence to begin at the expiration of sentences now being served.

Attorney General Morgan by Associate Attorney Speas for the State.

Walter J. Cashwell, Jr., for defendant appellant.

GRAHAM, Judge.

No assignments of error are brought forward and argued in defendant's brief and his court appointed counsel states that he has reviewed the record and can find no error. There is

plenary evidence to support the court's conclusion that defendant's plea of nolo contendere was freely, understandingly and voluntarily made.

[1] "A plea of *nolo contendere,* like a plea of guilty, leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense." *State v. Stokes,* 274 N.C. 409, 412, 163 S.E. 2d 770, 773.

We find the bill of indictment insufficient to charge the offense of felonious escape. Under G.S. 148-45, "[a]ny prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years." Also, "[a]ny prisoner serving a sentence imposed upon conviction of a felony who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than two years."

[2] To charge a felony for a second offense of escape it is necessary for the bill of indictment to refer to a "previous conviction of escape from the State Prison System" which is one of the necessary elements under G.S. 148-45. *State v. Revis,* 267 N.C. 255, 147 S.E. 2d 892. The bill of indictment here, which is quite similar to the one considered insufficient to charge a felony in *Revis,* fails to contain this essential element and therefore will not support a judgment imposing sentence for a second offense of escape.

[3] The bill is also insufficient to charge an escape while serving a sentence for a felony conviction. An indictment charging that a defendant escaped while serving a sentence for a felony imposed *in the superior court* in a named county is sufficient without naming the felony. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252. Here, the indictment uses the word "felony" to describe one of the offenses for which defendant was serving sentence when he escaped. However, the indictment also alleges that sentences for both of the offenses were imposed in district courts. District courts are without jurisdiction to impose sentences in felony cases, G.S. 7A-272, and we must

assume that any sentence imposed in a district court was for an offense that was of a grade less than felony.

The record suggests that the sentences defendant was serving at the time he escaped were for misdemeanor offenses and that the State intended to charge defendant with a second offense of escape.

While the bill of indictment is insufficient to charge a felonious escape, it will support a charge of misdemeanor escape. See *State v. Revis, supra.* Misdemeanor escape is punishable by imprisonment for not less than three months nor more than one year. The case will be remanded for proper judgment upon a plea of nolo contendere to a charge of misdemeanor escape.

Error and remanded.

Judge BRITT concurs.

Judge CAMPBELL dissents.

Judge CAMPBELL dissenting:

In my opinion the bill of indictment in this case which is set forth in the opinion is insufficient for any purpose. It apparently requires reading like a sheet of music with certain notes above a line and certain notes below a line. I have never been able to read music, which I have always regretted, but nevertheless find true. A bill of indictment should not have to be read as a sheet of music or by one with peculiar attributes and understanding. A bill of indictment should set forth in a clear and accurate manner the offense which is charged and in such way that any ordinary, reasonable person can understand it. The bill of indictment in this case does not meet this requirement; and since this deficiency appears on the face of the record, I think it should be quashed and the judgment appealed from abated.

JAMES CLIFTON PEELER, JR. v. EUGENE CRUSE AND PROPST CONSTRUCTION COMPANY

No. 7219SC3

(Filed 29 March 1972)

1. **Negligence § 12— last clear chance**

The doctrine of last clear chance is applicable when both plaintiff and defendant have been negligent and the defendant has time, after the respective negligences have created the hazards, to avoid the injury.

2. **Automobiles § 81; Negligence § 35— riding on motor grader blade — contributory negligence**

Plaintiff was contributorily negligent as a matter of law in voluntarily standing on the two-inch blade of a motor grader while the grader was in operation.

3. **Automobiles § 89; Negligence § 39— riding on blade of motor grader — last clear chance**

The doctrine of last clear chance did not apply where the undisputed facts show that plaintiff stood on the scraping blade of a motor grader being operated in reverse, that plaintiff was holding onto a metal bar with both hands, that before the grader reached its destination it slowed down from a speed of four to five miles an hour to a speed of one to two miles per hour, that plaintiff took his right hand off the bar because he thought the grader was going to stop, and that as the grader started to regain its speed, plaintiff's left hand slipped and he fell from the blade and underneath the wheel.

APPEAL by plaintiff from summary judgment entered for defendant by *May, Special Judge,* 17 May 1971 Session of Superior Court held in ROWAN County.

On 22 October 1969 plaintiff sustained serious injuries when he fell from a motor grader which was being operated by the individual defendant in the course of his employment for the corporate defendant. At that time plaintiff was employed by the State Highway Commission and was inspecting grading work being done by the corporate defendant on a highway project in Rowan County. After inspecting a portion of the project, plaintiff and several others got on the motor grader to ride back to the point where they had started the inspection. Plaintiff stood on the scraping blade of the machine and held onto a metal bar with both hands. The blade, which was about two feet high and two inches thick, was located between the front axle and the two rear axles of the machine. The machine was being operated in reverse and one of its front

wheels was three or four feet behind the point on the blade where plaintiff was standing. Plaintiff admitted at his pretrial examination that he had known that if he fell he would be run over by that wheel.

When the motor grader had been operated 450 to 500 feet, and before it reached the place of its destination, it slowed from a speed of four to five miles an hour to a speed of one to two miles an hour. When the machine slowed plaintiff took his right hand off the bar because he thought it was going to stop and he needed to drop his right hand for balance. The machine started to regain its speed and plaintiff's left hand slipped and he fell from the blade and underneath the wheel. Plaintiff stated: "We were riding along, and all of a sudden it started to slow down. When it did, I went forward just a little, and as I went forward—all of a sudden there was a jerk, and it threw me backward." Plaintiff had ridden on the blade of the motor grader before and had seen the machine "jerk" before.

In answer filed by defendant, negligence was denied and plaintiff's contributory negligence was asserted as a proximate cause of his injuries. Plaintiff filed a reply in which he alleged, in the alternative, that defendants had the last clear chance to avoid injury to plaintiff and failed to exercise reasonable care in order to do so.

Defendants moved for summary judgment and offered the pleadings and the transcript of plaintiff's pretrial deposition in support of their motion. The court allowed the motion, finding that plaintiff was guilty of contributory negligence as a matter of law; that his contributory negligence was a proximate cause of his injury; and that the doctrine of last clear chance was inapplicable.

Robert M. Davis for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by Fred C. Meekins for defendant appellee.

GRAHAM, Judge.

While defendants do not concede their negligence and plaintiff does not concede his contributory negligence, the only question plaintiff argues in this Court is whether the trial judge erred in finding that the issue of last clear chance does not arise on the undisputed facts in this case.

[1] The doctrine of last clear chance presupposes negligence and contributory negligence. *Arvin v. McClintock,* 253 N.C. 679, 118 S.E. 2d 129. It is applicable when both plaintiff and defendant have been negligent and the defendant has time, after the respective negligences have created the hazards, to avoid the injury. 6 Strong, N.C. Index 2d, Negligence, § 12.

[2] We think it clear that in standing on the two-inch blade of the motor grader plaintiff voluntarily placed himself in a position of imminent danger. This constituted contributory negligence as a matter of law. *Huffman v. Huffman,* 271 N.C. 465, 156 S.E. 2d 684; *Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577; *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426.

[3] Whether there is evidence to support a finding that defendants had the last clear chance to avoid injury to plaintiff and negligently failed to avail themselves of this opportunity presents a closer question. However, we find the facts in this case indistinguishable from those considered by the Supreme Court in the case of *Presnell v. Payne,* 272 N.C. 11, 157 S.E. 2d 601, and affirm the judgment on the basis of the majority opinion in that case. In *Presnell* one of the defendants attempted to start a station wagon by pushing it with a truck. Plaintiff's intestate took a seat on the right front fender of the truck for the purpose of preventing damage to the station wagon by the front bumper of the truck overriding the rear bumper of the station wagon. The station wagon started and moved forward as defendant applied brakes for the purpose of stopping or slowing down the truck. Plaintiff's intestate lost his balance, fell from the fender, and was fatally injured. The dissenting opinion interpreted the evidence as showing that defendant first put on brakes abruptly, thereby causing plaintiff's intestate to fall forward from the fender of the truck, and thereafter eased or released his brakes to such extent that the truck struck plaintiff's intestate after he had fallen. The Supreme Court, with two justices dissenting, held that the trial court correctly refused to submit the issue of last clear chance because evidence to support the issue was lacking.

Plaintiff contends that the cases are distinguishable in that in *Presnell* plaintiff's intestate should have anticipated that defendant would stop the truck as soon as the station wagon started; whereas, the plaintiff here had no reason to anticipate that the individual defendant would stop the motor grader

before reaching the point of destination. We do not regard this distinction, if in fact it is a distinction, as sufficient to remove this case from the control of the precedent set in *Presnell.* Actually, although plaintiff contends that the motor grader "jerked," and that this caused him to fall, his testimony clearly indicates that the "jerk" was nothing more than a slowing of the machine by no more than three or four miles an hour, and then an acceleration back to its original speed. Moreover, plaintiff knew the machine was subject to "jerk" because he had seen it do so in the past. When plaintiff got on the narrow blade, he assumed all of the natural risks incident to riding in such a dangerous position, including the risk that the machine would not be operated at a constant speed at all times and the risk that it might "jerk" as he had observed it do on other occasions.

Under the authority of *Presnell v. Payne, supra,* the judgment is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. WILLIAM J. FOUNTAIN, JR.

No. 714SC650

(Filed 29 March 1972)

1. **Criminal Law § 91— motion for continuance — newspaper publicity of mistrial**

No abuse of discretion has been shown in the denial of defendant's motion for a continuance made on the ground that defendant could not at that time obtain a fair trial because of newspaper reports concerning his mistrial which had occurred during the preceding week, where the newspaper reports contained only brief, factual accounts of what had occurred at defendant's first trial, the record does not indicate that any member of the jury had read or was aware of the newspaper reports in question, and nothing in the record suggests that any juror objectionable to the defendant was permitted to sit on the jury which convicted him or that defendant exhausted his peremptory challenges before he passed the jury.

2. **Criminal Law § 91— denial of continuance — abuse of discretion — constitutional right — new trial**

Whether an appeal from the refusal to grant a continuance is based upon abuse of judicial discretion or denial of constitutional

rights, defendant must show both error and prejudice in order to be entitled to a new trial.

3. Criminal Law § 162— failure to rule on objection

The trial court did not err in failing to rule on defendant's objection to testimony which a State's witness started to give, where defendant's objection effectively stopped the witness from relating any incompetent evidence and the solicitor promptly rephrased the question to the witness, thus rendering a ruling by the court unnecessary.

4. Robbery § 4— armed robbery — variance

There was no fatal variance between an indictment alleging a robbery by use of a .45 caliber pistol whereby the life of a service station attendant was threatened and endangered and evidence tending to show that, although defendant gained possession of the service station's money box without the use of a firearm prior to any contact with the attendant, the robbery was still in progress when the attendant observed the defendant with the "money box under his arm with a .45 pistol swinging in front of him," and that defendant then removed money from the person of the attendant by use of the .45 pistol.

5. Robbery § 2— ownership and value of property taken

To allege and prove the crime of armed robbery, it is not necessary that ownership of the property be laid in any particular person so long as the allegation and proof are sufficient to negative the idea of the accused's taking his own property, and the kind and value of the property taken is not material so long as it is described by allegation and proof sufficient to show that it is the subject of robbery.

APPEAL by defendant from *James, Judge,* 12 April 1971 Session of Superior Court held in ONSLOW County.

In Case No. 71 Cr 1452 defendant was indicted for armed robbery, pleaded not guilty, was found guilty as charged, and from judgment imposing a prison sentence, appealed.

Attorney General Robert Morgan by Assistant Attorney General Russell G. Walker, Jr., for the State.

Edward G. Bailey for defendant appellant.

PARKER, Judge.

The error formerly appearing on the face of the record, to which attention was directed in our opinion reported in *State v. Fountain,* 13 N.C. App. 337, 185 S.E. 2d 446 has now been corrected.

[1, 2] Upon the call of the case for trial, defendant's counsel moved for a continuance on the ground that defendant could not at that time obtain a fair trial because of newspaper reports, published during the preceding week, concerning his mistrial which had occurred during the preceding week. Denial of this motion is the basis of defendant's first assignment of error. Appellant contends this ruling of the trial judge resulted in a denial of his constitutional right to a fair and impartial trial in that the newspaper publicity created "an atmosphere of prejudice against him." We do not agree. Copies of the newspapers, filed by appellant as exhibits on this appeal, reveal that they contained no more than brief, factual accounts of what had occurred at defendant's first trial. The reports were neither sensational in tone nor were they given particular prominence in the paper. More importantly, the record does not indicate that any member of the jury which convicted defendant had read or was even aware of the existence of the newspaper reports in question, and nothing in the record suggests that any juror objectionable to the defendant was permitted to sit on the jury which convicted him or that defendant exhausted his peremptory challenges before he passed the jury. Appellant concedes that ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and that his ruling thereon is not subject to review absent an abuse of discretion, but contends that when the motion is based on a constitutional right, it presents a question of law reviewable upon appeal. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526. However, "[w]hether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617. Here, defendant has shown neither.

[3] During the direct examination of one of the State's witnesses, a detective with the Onslow County Sheriff's Department, the assistant solicitor asked the witness if he had checked the serial number on a .45 caliber pistol which had been found in defendant's automobile. In response, the witness started to tell what was contained in reports he had received from Naval Intelligence officers, whereupon defendant's counsel objected and the assistant solicitor rephrased the question as follows:

Question: "Have you had this traced?"

Answer: "They cannot be traced on the original source."

Appellant's second assignment of error is that the trial judge erred in failing to make an immediate ruling sustaining his objection. This contention is without merit. Defendant's objection effectively stopped the witness from relating any incompetent evidence and the assistant solicitor's prompt action in rephrasing the question rendered a ruling by the court unnecessary. Even had error been committed, appellant suffered no prejudice. His second assignment of error is overruled.

[4] Appellant's final assignment of error is that his motion for nonsuit should have been allowed because there was a fatal variance between the allegations of the indictment and the evidence offered by the State. The indictment charged that defendant, on 8 February 1971 in Onslow County, "having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a .45 caliber pistol whereby the life of Bernice Bledsole was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away U. S. Currency of the value of $80.00 from the presence, person, place of business, and residence of Service Distributing Co., a corporation, 608 Wilmington Hwy, Jacksonville, N. C. . . . " At the trial, Bernice Bledsole, the attendant on duty at the service station of Service Distributing Company, on the night of 8 February 1971, testified:

> "I first saw the defendant when he came up the ditch bank, walked by the curbing and into the service station and then into the men's rest room. The next time I saw him he came walking by the steel beam supporting the canopy area and he had the manager's money box under his arm with a .45 pistol swinging in front of him."

Bledsole also testified there was about $80.00 to $100.00 in coins in the manager's money box. Appellant contends that this evidence showed that the taking of the cash box occurred prior to any contact between defendant and Bledsole and that such taking transpired without the use of a firearm. He contends that this was a fatal variance between the allegations of

the indictment and the proof. In making this contention, the appellant ignores Bledsole's further testimony which showed that the robbery was still very much in progress when he observed defendant with "the manager's money box under his arm with a .45 pistol swinging in front of him." Bledsole testified that defendant then came up to the booth where Bledsole was sitting, held the .45 pistol to Bledsole's head, took $34.00 cash from Bledsole's shirt pocket, told Bledsole to lie down on the floor face down, and then departed from the service station taking with him both the manager's cash box and the cash from Bledsole's pocket.

[5] There was ample evidence to support the charge contained in the indictment and there was no fatal variance between allegation and proof. Such variance as existed as to the value and ownership of the property taken was not material. To allege and prove the crime of armed robbery, it is not necessary that ownership of the property be laid in any particular person, *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525, at least so long as the allegation and proof are sufficient to negative the idea of the accused's taking his own property, *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34, and the kind and value of the property taken is not material so long as it is described by allegation and proof sufficient to show that it is the subject of robbery. *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14.

In the trial and judgment appealed from, we find

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. AMOS ROOSEVELT RICHARDSON

No. 7216SC115

(Filed 29 March 1972)

1. Homicide § 28— instructions — self-defense — burden of proof

In this homicide prosecution, the trial court sufficiently instructed the jury on the intensity of proof required of a defendant in order to establish the defense of self-defense when it instructed the jury that "defendant has the burden of proving, not beyond a reasonable doubt, but to your satisfaction, the absence of malice or that the killing was in self-defense."

2. Homicide § 30— second-degree murder — submission of manslaughter

In this prosecution for second-degree murder, the trial court did not err in submitting to the jury the lesser included offense of manslaughter, the testimony of defendant having required that such offense be submitted to the jury.

APPEAL by defendant from *McKinnon, Judge,* 10 August 1971 Session of Superior Court held in ROBESON County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the crime of murder. Upon calling the case for trial, the solicitor announced that the State would seek no greater verdict than murder in the second degree.

The evidence for the State tended to show that Howard Freeman (Freeman) and Roosevelt Willis (Willis) operated a "club" and a filling station on Highway #20 in Robeson County. They sold gas, candy, sandwiches and soft drinks. They also had pool tables and a "piccolo." On Saturday night, 20 February 1971, they were having a dance there which began about 10:00 p.m. The price of admission was one dollar a couple, or fifty cents per person. In that part of the building where the dance was held, there was room for about fifty couples. They had engaged a band to play for the dance. Prior to the arrival of the band, no admission was charged; but when the band arrived, Freeman and Willis asked everybody to go out, buy a ticket for the dance, and re-enter the building. Defendant and the others went outside, but after the defendant was outside, he said, "Why do I have to pay?" Freeman told him everybody had to pay. Defendant said, "I'm not going to pay a cent. I'm going on in." Willis, who was at the door with his daughter, taking up tickets, told defendant he was not going in unless he paid. The defendant went back out in the yard, got a bumper jack, came back and either struck or attempted to strike Willis with the jack. They came together and fell to the ground with Willis on top. Freeman took the jack and Willis got up and let the defendant go. Willis then went back to the door and took the money box from his daughter. Defendant left the premises in his car and returned about thirty-five minutes later. Defendant got out of his car, approached Willis who was still at the door, pulled a .25 automatic pistol out of his pocket and shot him. Willis fell inside the door with blood coming from his mouth. Defendant came on into the building, fired his pistol three or four more times, and then backed out the door and

left. Willis died there on the floor before being placed in a vehicle and taken to the hospital.

Defendant's evidence tended to show that he was 51 years old and was a mechanic. He was to deliver a car he had repaired to a Mrs. Hamilton at 11:00 p.m. that night at Willis's "cafe." When he arrived, there were a lot of people there, and he told a young man who came up to him that he wanted to see one Lonnie Grice and also wanted some gas. This young man hit him on the side of the head with a piece of iron and he fell. The man beat him in the face and on his body, and defendant testified that he lost a pint of blood from the beating. When he got up off the ground the second time, Willis was eight or ten feet from him and put a gun in his face; whereupon defendant got his pistol, shot it and ran.

The jury found the defendant guilty of voluntary manslaughter, and from a judgment of imprisonment, the defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Assistant Attorney General Hensey for the State.

L. J. Britt & Son by Luther J. Britt, Jr., and McLean, Stacy, Henry & McLean by William S. McLean for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant contends that the trial judge committed error in failing to properly instruct the jury as to the intensity of proof required of a defendant in order to establish the defense of self-defense. The defendant argues that the judge did not properly charge on what was meant by the term "to the satisfaction of the jury." The judge charged:

> "Even, if the State proves the elements of murder in second degree, the crime may be reduced to manslaughter if the act is done without malice, or may be excused altogether if the killing was in self-defense. The defendant has the burden of proving, not beyond a reasonable doubt, but to your satisfaction, the absence of malice or that the killing was in self-defense."

In the case of *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969), the Supreme Court said:

" . . . (W)hen the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—*but simply to the satisfaction of the jury.* Even proof by the greater weight of the evidence—a bare preponderance of the proof—may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied. (citation omitted.)

If there be evidence sufficient to establish an affirmative defense or to rebut the presumptions which arise against the defendant when a killing results from his intentional use of a deadly weapon, '[T]he accepted formula *and the one that should be used if risk of error is to be avoided,* is that the defendant has the burden of proving his defense (or mitigation) "to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury." ' Stansbury, N. C. Evidence § 214 (2d Ed. 1963). (Emphasis added.)"

Although the trial judge would have been well advised to have used the above-quoted language from the *Freeman* case, we are of the opinion and so hold that when the charge is read as a whole, no prejudicial error appears therein with respect to the intensity of proof required of a defendant in order to establish the defense of self-defense.

[2] The defendant also contends that the trial judge committed error in submitting to the jury the lesser included offense of manslaughter; that under the evidence, the question of his guilt of manslaughter did not arise.

"Manslaughter is the unlawful killing of a human being, without malice, express or implied, without premeditation or deliberation, and without the intention to kill or inflict serious injury." 4 Strong, N. C. Index 2d, Homicide, § 6.

While the evidence of the State supported the charge on murder, the testimony of the defendant required the trial judge to submit the question of manslaughter to the jury.

Defendant's other exceptions to the charge have been considered, and no prejudicial error is made to appear.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LOHMAN RAY MAYS, JR.

No. 7219SC187

(Filed 29 March 1972)

1. **Criminal Law § 91— denial of continuance**

In this homicide prosecution, the trial court did not err in the denial of defendant's motion for continuance made on the ground that his counsel needed time to investigate information given him on the day of trial that deceased carried a pistol under the front seat of his car, where (1) the trial judge authorized defendant's counsel to interview any of the State's witnesses, (2) defendant had an opportunity to cross-examine a witness who was a passenger in deceased's car when deceased was killed to elicit any evidence that deceased carried a gun in his car, and (3) evidence that deceased kept a gun under the front seat of his car would not have established a right of self-defense in the defendant.

2. **Homicide § 30— failure to charge on manslaughter**

In this prosecution for second degree murder, the evidence did not require the court to instruct the jury on the lesser included offense of manslaughter.

APPEAL by defendant from *Fountain, Judge,* at the October 11, 1971 Session of CABARRUS Superior Court.

The defendant was arrested on a charge of first-degree murder. A preliminary hearing was held on 9 September 1971 at which defendant was represented by court-appointed counsel.

An indictment was returned in October charging the defendant with first-degree murder. When the case came on for trial on 13 October 1971, the Solicitor for the State advised defendant that he would not require him to plead to the capital charge but only to second-degree murder. Before entering a plea the defendant moved the court for a continuance. In support of the motion, defendant's attorney informed the court

that he had not had sufficient time to prepare for the trial and that he had information which, if investigated, might tend to raise a defense for the defendant. The motion was denied.

The defendant entered a plea of not guilty to the charge of second-degree murder.

At the trial the State introduced evidence which may be summarized as follows: On February 22, 1969, at approximately midnight, one David Barringer and two friends went to the What-A-Burger drive-in restaurant in Kannapolis, North Carolina. They placed an order and were waiting for it to be served. The three men were talking among themselves and laughing. A man identified as the defendant got out of an automobile parked beside Barringer's automobile and approached the Barringer automobile on the driver's side. He warned the occupants of the Barringer automobile to "watch their language" and "keep the noise down." He threatened them with a beating if they did not comply. David Barringer said, "We don't want any trouble." The defendant started back to his car. He then turned and fired one shot which struck David Barringer in the neck. The defendant returned to his automobile and left the drive-in. It was stipulated that David Barringer's death on February 22, 1969, was the sole, direct and proximate result of a gunshot wound.

The defendant presented no evidence.

The jury returned a verdict of guilty of murder in the second degree. Judgment was entered imposing a prison sentence.

From the verdict and judgment, defendant appeals.

Attorney General Robert Morgan by Associate Attorney (Miss) Christine A. Witcover for the State.

Wesley B. Grant for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the trial court's denial of his request for a continuance and the failure of the trial court to instruct the jury on the lesser included offense of manslaughter.

[1] The defendant contends that on the day of trial his attorney was made aware of certain facts which might produce a defense for defendant and that under these circumstances a continuance should have been granted to allow more time in which to prepare for trial. In support of his motion, defendant's attorney informed the judge that he had heard that David Barringer carried a pistol under the front seat of his automobile. The defendant's attorney contends that he was informed of this information on the day of trial. He argues that he should have been granted a continuance to allow him to investigate this information and that failure to grant the continuance was a denial of defendant's rights.

Ordinarily, whether a continuance shall be granted is a matter of discretion resting with the trial judge and his decision is not subject to review except for gross abuse. But when the motion is based on a right secured by the Federal and State Constitutions the question is one of law and the decision of the trial court is reviewable. *State v. Atkinson,* 7 N.C. App. 355, 172 S.E. 2d 249 (1970). An indigent charged with a felony is entitled to representation by counsel as a matter of right. *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). And the right to counsel includes the right of counsel to consult with witnesses and to prepare a defense. *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322 (1943).

It is apparent in this case that the defendant's attorney, who has represented him at all stages of the proceedings, was appointed prior to the preliminary hearing held on September 9, 1971. The trial in this case was not conducted until October 13, 1971, more than a month after the preliminary hearing. When defendant's motion for continuance was denied, the trial judge authorized the defendant to interview any of the prosecution's witnesses that he desired to interview. Further, the defendant had an opportunity on cross-examination of the State's witness Starnes, who was a passenger in the deceased's automobile, to elicit evidence of any weapon that Barringer may have carried in his automobile. Defendant did not attempt to bring this information out on cross-examination.

Even if defendant had established that Barringer kept a gun in the front seat of his car, this evidence would not establish a right of self-defense in the defendant. Self-defense requires, among other things, that the one invoking the defense be

without fault in initiating the affray. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1969). It must also be shown that the killing was necessary or appeared to be necessary to prevent death or great bodily harm to defendant. *State v. Edwards,* 8 N.C. App. 296, 174 S.E. 2d 28 (1970). The record in this case indicates that the defendant was clearly at fault in initiating the affray. There is no evidence that defendant was in any real or apparent danger from Barringer. The denial of defendant's motion was proper.

[2] The defendant also argues that the trial judge erred when he failed to instruct the jury on the lesser included offense of manslaughter. The trial judge is required to instruct the jury on the lesser included offense of manslaughter only where there is evidence which would sustain such a verdict. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). It is not error to omit a charge on manslaughter where there is no evidence of manslaughter. The evidence in this case does not present any offense of manslaughter and the trial court's omission of a charge on manslaughter was proper.

No error.

Judges BRITT and GRAHAM concur.

CLYDE C. CARTER, ARTHUR FINK, ROBERT C. HARRISS AND F. E. STROWD, AS REPRESENTATIVES FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. THE TOWN OF CHAPEL HILL, INTER-CHURCH COUNCIL FOR SOCIAL SERVICES, INC., AND DANIEL A. OKUN

No. 7215SC87

(Filed 29 March 1972)

1. **Appeal and Error § 41— record on appeal — order of proceedings**

Appeal is subject to dismissal where the proceedings are not set forth in the record on appeal in the order of time in which they occurred as required by Court of Appeals Rule 19(a).

2. **Administrative Law § 4; Municipal Corporations § 30— special use permit — hearing — rules of evidence**

It was not error for a municipal board of aldermen to admit unsworn testimony and otherwise depart from the rules of evidence in a hearing upon an application for a special use permit, G.S. 143-318 being inapplicable to a municipal legislative body.

Carter v. Town of Chapel Hill

APPEAL by petitioners from *Cooper, Judge,* in Chambers at Whiteville, 28 October 1971.

These petitioners bring this appeal from a ruling by the Superior Court on a writ of certiorari sustaining a decision of the Chapel Hill Board of Aldermen granting a special use permit to the respondents.

Manning, Allen and Hudson by John L. Manning for petitioner appellants.

Haywood, Denny & Miller by Emery B. Denny, Jr., for defendant appellees, Town of Chapel Hill.

Barber, Holmes & Barber by Edward S. Holmes for defendant appellees, Inter-Church Council for Social Services, Inc., and Daniel A. Okun.

CAMPBELL, Judge.

[1] The record on appeal in this case fails completely to conform with Rule 19(a) of the Rules of Practice in the Court of Appeals of North Carolina which requires that the proceedings be set forth in the order of time in which they occurred. Failure to comply with the Rules of Practice subjects the appeal to dismissal *ex mero motu. State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971).

We have, nevertheless, reviewed the record in order that we might render a decision on the merits in this case.

In brief summary, the facts in this case may be summarized as follows:

Respondent Daniel A. Okun is the owner of a 5.5-acre tract of land in Chapel Hill, North Carolina. The land is situated in an area zoned R-5 (Residential) pursuant to the Ordinance Providing for the Zoning of Chapel Hill and Surrounding Area (ordinance). Okun filed an application with the Town of Chapel Hill for the issuance of a special use permit to construct a unified housing development consisting of forty units. The petitioners are residents of "Westwood" and "Forest Hills," two nearby developments.

After proper advertisement a public hearing was held on February 1, 1971 at which time the application was referred to

the Planning Board for its recommendations. Testimony in favor of and in opposition to issuance of the permit was heard.

The Planning Board recommended to the Board of Aldermen that the permit be issued. After discussion at its regular meeting on 8 February 1971, the Board granted the special use permit based on the following findings of fact:

> "1. That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan submitted and approved,
>
> 2. That the use meets all required conditions and specifications,
>
> 3. That the use will not substantially injure the value of adjoining or abutting property and,
>
> 4. That the location and character of the use if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Chapel Hill and its Environs; and that in accordance with these findings the project be approved and the special use permit be granted with the following stipulations:" (Stipulations omitted.)

The appellant petitioned the Superior Court of Orange County for a writ of certiorari to review the decision of the Chapel Hill Board of Aldermen. The writ was issued, and the Court entered judgment sustaining the decision of the Board of Aldermen.

On appeal, the petitioner's first argument is that the Chapel Hill ordinance does not contain appropriate standards to guide the Board of Aldermen and is therefore invalid.

We have already upheld the Chapel Hill Zoning Ordinance against similar arguments. See *Kenan v. Chapel Hill* filed in this Court on 29 March 1972.

We will not therefore discuss this argument except to say that it is overruled.

[2] Appellants next argue that it was error for the Board of Aldermen to admit unsworn testimony and otherwise depart

from the rules of evidence employed in the courts of this State. Appellants rely on G.S. 143-318.

The statute requires that the rules of evidence be followed in all "proceedings." G.S. 143-318. "Proceedings" are defined as "any proceeding, by whatever name called, before an administrative agency of the State, wherein the legal rights, duties, or privileges of specific parties are required by law or by constitutional right to be determined after an opportunity for agency hearing." G.S. 143-317(3).

In G.S. 143-317(1) "Administrative agency" is defined as "any State authority, board, bureau, commission, committee, department, or officer authorized by law to make administrative decisions, except those agencies in the *legislative* and judicial departments of government." (Emphasis added.)

It is not necessary for us to decide, and we do not decide, whether the provisions of G.S. 143-317 and 318 are applicable to political subdivisions of the State, including cities and towns. Assuming solely for the purpose of argument that said statutes do apply to cities and towns, Chapel Hill's Board of Aldermen is its municipal legislative body and, therefore, falls within the exception set forth above and the proceedings involved in this action are not affected by G.S. 143-318. We hold that it was not error for the Board of Aldermen to deviate from the rules of evidence.

We have reviewed this record carefully and find that the proceedings were conducted in fair and orderly manner and that all parties were accorded due process of law. There was evidence to support each finding of fact and the findings supported the conclusion.

The ruling of the lower court is

Affirmed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. GEORGE PARKS

No. 7223SC188

(Filed 29 March 1972)

1. **Criminal Law § 84; Searches and Seizures § 1— search without warrant — articles in plain view**

No warrant was required for the seizure of two pistols from the car in which defendant was sitting when he shot deceased, where an officer opened the car door and saw the pistols lying in plain view on the driver's seat under the steering wheel.

2. **Criminal Law § 84; Searches and Seizures § 1— search without warrant — articles in plain view**

Neither the Fourth Amendment nor G.S. 15-27 prohibits a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view.

3. **Criminal Law § 105— motion for nonsuit — waiver by introducing evidence — renewal**

Where defendant introduces evidence, the motion for nonsuit at the close of the State's evidence is waived, and a renewed motion must be made at the close of all the evidence.

4. **Homicide § 21— second degree murder — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that the victim and defendant exchanged words and scuffled at a store, that defendant went to his car, and that the victim approached defendant's car and defendant shot him with a pistol.

5. **Homicide § 30— submission of second degree murder — verdict of manslaughter — harmless error**

Error, if any, in the submission of the question of guilt of second degree murder was rendered harmless by a verdict of guilty of manslaughter.

6. **Criminal Law § 102— argument of solicitor — prejudicial error**

The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial.

APPEAL by defendant from *Crissman, Judge,* October 1971 Criminal Session, WILKES Superior Court.

Defendant was indicted for first degree murder, was tried for second degree murder and found guilty by a jury of manslaughter. The evidence presented at trial tended to show: The victim, Thomas Lee Triplett, in the company of his brother-

in-law, Cammie Dean Harris, went to a grocery store at about 11:15 p.m. on 12 June 1971. While at the store the victim and defendant exchanged words and "scuffled." Defendant went to his car, after which the victim approached the car in which defendant was seated. By his own testimony defendant indicated he shot the victim with a .32 caliber pistol. Defendant relied on evidence of self-defense, asserting the victim approached him with a hatchet but no hatchet was ever found. From judgment that defendant be imprisoned for a term of 8 to 12 years, defendant appeals.

Attorney General Robert Morgan by Associate Attorney Charles A. Lloyd for the State.

Franklin Smith for defendant appellant.

BRITT, Judge.

Defendant assigns as error the denial of his motion to suppress the State's evidence consisting of two guns found in an automobile near the scene of the shooting, contending an illegal "search and seizure." We find no merit in this contention.

[1] Pertinent testimony of Deputy Sheriff McCann with respect to this assignment of error is summarized thusly: He was on duty on the night of 12 June 1971 and around midnight received a call over the radio relative to a shooting. He immediately went to Gentry's store and on arrival saw that Tommy Lee Triplett had been shot. The victim was lying on the ground; defendant was lying on the ground beside the victim with Tommy Redding holding defendant down. They were near the driver's side of a 1960 Ford that defendant had been driving. While the victim and defendant were being placed in an ambulance, Officer McCann opened the car door and saw two guns lying on the driver's seat under the steering wheel; "the guns were laying there in visible sight." One of the guns was a .32 revolver and the other a .38 revolver. The .32 had been recently fired and contained five unspent cartridges with an empty round in the chamber. A pathologist testified that the victim died as the result of bullet wounds to vital internal organs.

[2] Neither the Fourth Amendment nor G.S. 15-27 is applicable where no search is made; the law does not prohibit a seizure without a warrant by an officer in the discharge of his official

duties where the article seized is in plain view. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968). The limits of reasonableness which are placed upon searches are equally applicable to seizures, and whether a search or seizure is reasonable is to be determined on the facts of the individual case. *State v. Howard, supra.* We think the reasoning and authorities set forth in *State v. Howard, supra,* and in *State v. Fry,* 13 N.C. App. 39, 185 S.E. 2d 256 (1971) are applicable to this case and no useful purpose would be served by a repetition of the reasoning and authorities set forth in those opinions.

[3, 4] Defendant assigns as error the denial of his motion for nonsuit interposed at the close of all the evidence. The record reveals that there was no exception taken at that time and the exception under this assignment of error in defendant's brief is that taken at the denial of his motion at the close of the State's evidence. Where defendant introduces evidence, the motion for nonsuit at the close of the State's evidence is waived, and a renewed motion must be made at the close of all the evidence. *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897 (1967). In such instance the assignment of error should be based on the second exception. *State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100 (1968). In any criminal case upon motion for nonsuit all the evidence admitted must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn therefrom, and so much of the defendant's evidence as is favorable to the State must also be considered. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). A review of the evidence in this case, taking the defendant's and State's evidence together, leaves no question but that the evidence was sufficient to withstand a nonsuit motion even if it had been properly presented on appeal.

[5] Defendant's contention that the court erred in denying his motion to dismiss the charge of second degree murder and submit the case to the jury only on the issue of manslaughter is untenable since if error was committed, it was not prejudicial to defendant inasmuch as the jury answered favorably to defendant on this point by returning a verdict of manslaughter. *State v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633 (1951).

[6] Defendant presents four assignments of error concerning the argument of the solicitor to the jury. The control of the

argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960). We find nothing in the solicitor's argument in this case that has been held to be condemned conduct sufficient to be prejudicial. See 2 Strong, N.C. Index 2d, Criminal Law, § 102, p. 64 et seq.

We have reviewed the other assignments of error brought forward and argued in defendant's brief but find them without merit. They are all overruled.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. DAVID LOUIS NETCLIFF

No. 7212SC58

(Filed 29 March 1972)

1. **Homicide § 21— second degree murder — sufficiency of evidence**

   The State's evidence was sufficient to support defendant's conviction of second degree murder.

2. **Criminal Law §§ 77, 89; Homicide § 17— defendant's statements to witness — corroboration of witness — motive**

   In this homicide prosecution, testimony by a police officer that a previous witness told him that defendant said he shot "the dudes" because they were white was properly admitted for the purpose of corroborating testimony by the previous witness, the statement constituting an admission by defendant and being highly relevant on the question of defendant's motive in firing a pistol at deceased and his companion.

3. **Criminal Law § 114— instructions — application of law as given by court — expression of opinion**

   The trial court did not express an opinion in instructing the jury on the importance of applying the law as given to them by the court rather than as they think it is or should be.

APPEAL by defendant from *Bailey, Judge,* 30 August 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was tried under a bill of indictment charging him with the first degree murder of Frank H. Baca.

Defendant did not testify or offer other evidence. Evidence for the State tended to show the following:

On 31 July 1970, the deceased Baca, David Novak and Robert Simms were service men stationed at Fort Bragg. About 9:45 or 10:00 p.m. on that date, the three men left the Clown Lounge on Bragg Boulevard and started walking toward Fort Bragg. They saw three Negroes in a parking lot. One of the Negroes asked if they wanted to buy some "grass." Novak kept walking toward Fort Bragg but Simms and Baca took a couple of steps toward the Negroes; whereupon, one of the Negroes said "Don't move or I'll blow your head off." Simms testified that he saw that the man had a pistol and heard it fire twice. When the pistol fired the first time it was pointed toward Baca. The second shot struck Simms in the arm. Shortly thereafter Simms noticed a small wound in Baca's chest and saw some blood coming from the wound.

James McCoy testified that at about 10:00 p.m. on the evening of 31 July 1970, he, Kenneth Simmons, and defendant Netcliff left the Afro Lounge and started walking toward another lounge. He stated:

> "When we got in the area of the Tire Mart Kenneth Simmons walked on down to the parking lot and I walked behind him. David Netcliff didn't go too far down there. I didn't hear him say anything. I did hear some loud voices and saw some white dudes standing up there. Two of the dudes were sort of walking away. Netcliff was talking to the third one. Both of them were talking very loud and I heard one say "Cops" or something like that. I didn't hear any other word than "cop."
>
> At that time, I didn't see nothing in David Netcliff's hand. He had his back toward me. I heard some shots and after the first shot the person standing nearest David Netcliff grabbed his chest. He staggered a little bit and went toward the Wagon Wheel. The other two people were running. I heard a second shot and it was after the second shot the other people started running. Kenneth and I started running down the parking lot away from Bragg Boulevard. David Netcliff started running.

After we stopped, we asked him why did he shoot the dude. He said because they were white. At that time, he took the pistol out of his pocket and put it in his belt."

Kenneth Simmons also testified for the State. He stated that he saw defendant take his hand from his pocket; "[t]hen there was a flash and another flash. . . . At that time, I heard a pistol fire." The witness stated that when he heard the pistol fire, the individual standing close to defendant grabbed himself in the chest and staggered away.

A stipulation was entered that if Dr. George E. Gammel were present he would testify that he observed an autopsy performed on deceased the day following the shooting, "and he would further testify that Frank H. Baca died as a result of a perforating bullet wound to the chest which bullet wound perforated the heart and left lung causing massive hemorrhage and death."

The jury returned a verdict of guilty of murder in the second degree and judgment was entered imposing a prison sentence for a term of not less than 25 nor more than 30 years.

Attorney General Morgan by Staff Attorney Evans for the State.

Sol G. Cherry, Public Defender, Twelfth Judicial District, for defendant appellant.

GRAHAM, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. In our opinion substantial evidence was presented in support of every essential element of the offense for which defendant was convicted. This assignment of error is overruled.

Defendant contends that the court erred in permitting an investigating officer to testify as to a statement made by the witness James McCoy. This testimony was admitted for the sole purpose of corroborating testimony already given by McCoy, in the event the jury found that it did corroborate McCoy's testimony. It was competent for this limited purpose. *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522. Proper instructions were given limiting the purpose of the testimony at the time the officer testified and again in the court's charge to the jury.

[2] Defendant contends that in relating McCoy's statement to the jury, the officer should not have been permitted to testify as to that portion of the statement to the effect defendant said he shot "the dudes" because they were white. It is noted that McCoy made this identical statement on the witness stand. Defendant did not object or move to strike the testimony at that time. Even if such a motion had been made, defendant would not have been entitled to have the testimony stricken. The statement constituted an admission by defendant and was highly relevant on the question of defendant's motive in firing the pistol at deceased and his companion.

[3] Defendant's final contention is that the court intimated an opinion on the evidence in the following portion of the charge:

> "Now, Ladies and Gentlemen, it is absolutely necessary that you understand and apply the law as I give it to you, not as you think it is, not as you might like it to be. This is important, for what I say the law is, is being taken down by the court reporter and if I get it wrong, that can be corrected by the Court of Appeals."

The court continued its charge by stating: "If you guess at it or if you do not concur with the law, there is no way of correcting your mistakes as to the law. Justice requires that everyone tried for the same crime be tried under the same law and have the same law applied to him. So I ask that you accept what I say the law is."

In this portion of the charge, the court was simply emphasizing to the jury the importance of applying the law as given to them by the court. We do not see how this could possibly be construed to constitute an expression of opinion on the evidence. Certainly it was important to the defendant, as well as to the State, that the jury pay close attention to the court's charge as to the law.

We have reviewed the entire record and conclude that defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. BOBBY EUGENE FRAZIER

No. 7215SC279

(Filed 29 March 1972)

1. **Criminal Law § 138— court's inquiry before imposing punishment — appellate review**

An appellate court in this State has no authority to review the adequacy of an inquiry made by a trial judge before imposing punishment.

2. **Criminal Law § 138— punishment — appellate review**

As long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office.

APPEAL by defendant from *Bickett, Judge,* 21 June 1971 Session of Superior Court held in ALAMANCE County.

Defendant pleaded guilty to two charges of unlawfully selling marijuana. The court thereupon examined him under oath relating to the voluntariness of his pleas. His answers indicate that his pleas were freely, understandingly and voluntarily made and that he understood that upon his pleas of guilty he could be imprisoned for as much as ten years.

Based upon defendant's answers, which appear in the record, the court adjudged the pleas of guilty to have been made freely, understandingly and voluntarily and ordered that they be entered on the record.

The State offered evidence tending to show that on two occasions defendant sold marijuana to undercover police officers, receiving $40.00 on each occasion.

Defendant offered evidence tending to show that he was employed by Burlington Industries as a cloth inspector and that he was a good and dedicated worker who worked every day and "all the extra time he could work." A co-worker testified that he had never known defendant to commit any criminal offense and that when he read about these offenses in the paper he could "hardly believe it was him." Defendant stated that he had never used marijuana or any drugs until he went into the service and was stationed overseas. He denied that he was "still dealing in it" and stated that he had learned his lesson. The

court asked: "Where did you get the 18 ounces at the time?" (The State's evidence indicated the amount sold on each occasion was less than one ounce and there is nothing in the record to indicate defendant was ever in possession of as much as 18 ounces.) Defendant replied that he purchased the marijuana he sold to the officers from a boy in Chapel Hill whose name he did not know. Defendant stated, however, that he could point the individual out if he saw him. The court stated: "You don't remember any of the fifty people who brought it to you?" Defendant stated that he got it from only one person, the boy from Chapel Hill. Other questions concerning where the marijuana came from were also asked by the court.

The court imposed active prison sentences for the maximum time allowed by law and ordered that the sentences be served consecutively.

Attorney General Morgan by Associate Attorney Poole for the State.

Allen, Allen & Sternberg by Frederick J. Sternberg for defendant appellant.

GRAHAM, Judge.

Defendant does not contend that his pleas of guilty were not voluntarily, understandingly and freely made. Indeed, he has at all times openly and candidly admitted his guilt. He does contend, however, that the trial court abused its discretion in sentencing him to two consecutive sentences of five years, or a total of ten years imprisonment. He argues that the court made no inquiry into such matters as age, character, education, environment, habit, mentality, propensity and the record of defendant. These are appropriate matters for a trial judge to consider in determining punishment. *State v. Hullender,* 8 N.C. App. 41, 173 S.E. 2d 581. Defendant further argues that, rather than inquiring into any of the above factors, the court conducted its own investigative inquiry to determine the complicity of others and directed questions to the defendant which appear "antagonistic, judgmental and prejudiced."

[1] We know of no authority which permits an appellate court in this State to review the adequacy of an inquiry made by a trial judge before imposing punishment. A trial judge must

necessarily have broad discretion to question a defendant before passing sentence.

[2] The sentences imposed, which are within the limits provided by law, are beyond our review. " . . . [S]o long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371." *State v. Spencer,* 7 N.C. App. 282, 285, 172 S.E. 2d 280, 282.

Defendant calls attention to the case of *State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833, in which the Supreme Court, quoting from the case of *State v. Lee,* 166 N.C. 250, 80 S.E. 977, stated:

> " 'While we will not hold, therefore, that as a matter of law the punishment was in excess of the powers of the judge, we are frank to say that it does not commend itself to us as being at all commensurate with the offense, even if the defendant was properly found guilty upon the facts. There was neither aggravation nor circumstances which tended to show that the punishment should approximate the highest limit allowed by the law in such cases. It was evidently intended that where there was no aggravation that the punishment should approximate the lower limit allowed, and only when aggravation was shown should the highest degree of punishment authorized by the statute be inflicted.' "

In the *Hilton* case, the judgment was affirmed. In the *Lee* case, a new trial was ordered on other grounds. In *State v. Hilton, supra* at 458, 156 S.E. 2d at 834, the court stated: "While we do not hold that as a matter of law the punishment was in excess of the powers of the judge, we must note that the sentences were imposed under circumstances which would seem to warrant prompt review by the Board of Paroles." We make a similar observation with respect to the sentences imposed in the instant case.

No error.

Judges CAMPBELL and BRITT concur.

CHARLES ELTON UPTON v. MARY ROBERTS UPTON

No. 7216DC84

(Filed 29 March 1972)

Appeal and Error § 16; Divorce and Alimony § 21— support order — appeal pending — contempt proceedings

The trial court was without jurisdiction to enforce a support order by contempt proceedings while plaintiff's appeal from that order was pending in the Court of Appeals, since an appeal removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court; however, if the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the district court, including any violation that occurred while the order was pending on appeal. G.S. 1-294.

APPEAL by plaintiff from *Gardner, District Judge,* 20 September 1971 Session of District Court held in ROBESON County.

This appeal is from an order entered after a show cause hearing on 16 September 1971 to determine if plaintiff was in contempt of prior court orders. Defendant's verified motion, filed 3 September 1971, alleged that plaintiff "has failed to comply with the orders of this court for the support of the two children of the parties, and is in default of the payments required by the orders of this court to be made by him for support of the two children of the parties for the period of April 26, 1971 through the date of this motion. . . . "

The court concluded that plaintiff had wilfully failed to make payments previously ordered, adjudged him in contempt, and ordered him confined in jail until he purges himself of contempt by paying into court the amount of his arrearage ($1705.00) and a fee of $150.00 for defendant's counsel.

Ottway Burton for plaintiff appellant.

McLean, Stacy, Henry & McLean by William S. McLean for defendant appellee.

GRAHAM, Judge.

Plaintiff contends the trial court was without jurisdiction to enter the contempt order because at the time it was entered, the order which plaintiff allegedly violated was pending on appeal in this Court. We agree.

An initial support order was entered in this cause on 28 August 1967. In that order plaintiff was ordered, among other things, to pay to defendant $60.00 a week for the support of their children and to make monthly mortgage payments in the sum of $170.00 on the home occupied by defendant and the children.

On 16 March 1971, plaintiff was found in default under this judgment and was ordered to pay the sum of $800.00 into the office of the clerk of superior court or to deliver possession of his pickup truck to a commissioner on or before 29 March 1971. The commissioner was appointed by the court to sell the truck and apply the net proceeds toward plaintiff's arrearage.

On 29 March 1971, plaintiff filed a motion seeking a reduction in the amounts required to be paid under the order of 28 August 1967.

A hearing was held on 22 April 1971 and on 26 April 1971 the court entered two orders: In one order plaintiff was adjudged in contempt and sentenced to ten days in jail for failing to make payments or deliver possession of the pickup truck to the commissioner in compliance with the order of 16 March 1971. In the second order, the court found that plaintiff was financially unable to meet the requirements of the order of 28 August 1967 and ordered that weekly payments of $60.00, and the monthly mortgage payment of $170.00, be reduced to a total monthly payment of $300.00 until 1 May 1972 at which time the payments required under the 1967 order would be reinstated unless otherwise ordered. Plaintiff appealed both orders and his appeals were pending in this Court on the date the order now appealed from was entered. An opinion affirming both orders was filed on 20 October 1971. *Upton v. Upton,* 12 N.C. App. 579, 183 S.E. 2d 866.

Defendant's motion that resulted in the contempt order now under appeal alleged that plaintiff "is in default of the payments required by the orders of this court to be made by him . . . for the period of April 26, 1971 through the date of this motion. . . . " The support payments plaintiff was obligated to make during this period were those which had been ordered in one of the orders entered on 26 April 1971 and appealed to this Court. While this order was pending on appeal, the trial judge was without jurisdiction to enforce it by a con-

tempt order. An appeal removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court. G.S. 1-294; *Joyner v. Joyner,* 256 N.C. 588, 124 S.E. 2d 724, and cases cited.

Defendant contends the district court had jurisdiction to proceed with the contempt hearing because the question involved was not affected by the appeal. A trial court may proceed upon any matter not affected by the judgment appealed from. G.S. 1-294. However, the plaintiff was found guilty of violating the very order then being questioned on appeal. The order's validity was being challenged on various grounds, including the ground that the court abused its discretion in allowing only a nominal reduction in support payments when the evidence showed plaintiff had no income or money and that he had substantial debts including tax assessments of approximately $7,000.00.

It is noted that while the appeal stayed contempt proceedings until the validity of the order was determined, taking the appeal did not authorize a violation of the order. "One who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court." *Joyner v. Joyner, supra* at 591, 124 S.E. 2d at 727.

Since the order has been affirmed and remanded to the District Court of Robeson County, that court is now at liberty to investigate plaintiff's willful violation of the order, including any violation that occurred while the order was pending on appeal. Should such inquiry be made, the issue of whether plaintiff possessed the means to comply with the order during the period when he was in default should be determined by specific findings of fact. *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391; *Cox v. Cox,* 10 N.C. App. 476, 179 S.E. 2d 194. The order presently before us appears insufficient in this respect.

Vacated.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. SAMUEL DEES

No. 7211SC127

(Filed 29 March 1972)

1. **Criminal Law §§ 99, 170— question by court — defendant previously fingerprinted**

Where defendant had testified on cross-examination as to various crimes for which he had been convicted, and defendant asked for permission to make a statement and asserted that he had been fingerprinted and thought that a State's witness should also have been fingerprinted, it was not prejudicial error for the court to ask defendant, "You had been fingerprinted before haven't you?"

2. **Larceny § 3— felony or misdemeanor — market value**

The "market value" of a stolen item is used in determining whether the crime of larceny is felonious of nonfelonious.

3. **Larceny § 8— amount received from sale of stolen property — market value**

In a prosecution for felonious larceny of mechanic's tools, evidence that defendant sold the stolen tools for $50.00 had no relevance to the market value of the tools and did not require the court to submit to the jury an issue of nonfelonious larceny.

4. **Larceny § 7— ownership of stolen property — possession**

There was no fatal variance between a larceny indictment placing ownership of stolen tools in a corporation and evidence that, although the tools were personally owned by individual mechanics working for the corporation, they were left overnight on the corporation's premises and were in the possession of the corporation at the time of the theft.

APPEAL by defendant from *Clark, Judge,* 23 August 1971 Session of Superior Court held in HARNETT County.

On 29 June 1971, after closing hours, Strickland Motor Company, located in Dunn, N. C., was broken into and a quantity of mechanic's tools were removed therefrom. Defendant was arrested and indicted for felonious breaking or entering and felonious larceny. The State offered the testimony of Sylvester Thompson who stated that he helped defendant remove the tools from an alley behind the Motor Company. Other evidence of the State tended to show that defendant sold the tools to Eugene Chance for fifty ($50.00) dollars and that although the tools were personally owned by the individual mechanics working at Strickland Motor Company, possession and custody of the tools was retained by the Motor Company. Defendant

testified that the State's witness, Sylvester Thompson, had solicited defendant's aid in removing and selling the tools. The jury found defendant not guilty on the first count of the indictment charging felonious breaking or entering and guilty on the second count charging felonious larceny. From the imposition of an active prison sentence, defendant appeals.

Attorney General Robert Morgan by Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Patrick H. Pope for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first contention is that the trial court erred in asking certain questions of the defendant. The exact language complained of reads as follows:

> WITNESS: Your Honor, may I say one word?
>
> COURT: I don't know what you want to say, I will let you start. Go ahead.
>
> WITNESS: Your Honor, I think they should have fingerprinted him too. They fingerprinted me. If they got any fingerprinting on me it was off the box but I have been to Strickland Motor Company looking a job and they did not fingerprint him I don't think so. I won't say yes and I won't say no.
>
> COURT: You had been fingerprinted before haven't you?
>
> WITNESS: Yes, sir, several times.
>
> COURT: You don't know whether they did or did not fingerprint Sylvester do you?
>
> WITNESS: He didn't say nothing about it.

It is not error, as a matter of law, for a trial judge to ask questions of a defendant or witness during the course of that person's testimony. Such questioning becomes error only when it tends to impeach the credibility of the witness in the eyes of the jury, thereby prejudicing defendant. "The judge may not make a statement or ask a defendant or a witness questions tending to impeach him or to cast doubt on his credibility or

which intimate that a fact has or has not been established. However, remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant, and the question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made." *State v. Byrd,* 10 N.C. App 56, 177 S.E. 2d 738. The circumstances surrounding the asking of the questions here were, first, the defendant requested to make a statement and then went on to mention the fact that he had been fingerprinted. Prior to the judge's statement and questioning, and in response to a proper question by the solicitor, defendant had recited the various crimes of which he had been convicted. The implication was strong that at some time during his extralegal career he had been fingerprinted. The Supreme Court in *State v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677, stated: "It may be conceded that not every ill-advised or inadvertent comment or question of a presiding judge tending to impeach a witness is of sufficient harmful effect to constitute prejudicial error." We hold that the judge's question was not prejudicial error.

[2, 3] Defendant also contends that the trial court erred in failing to instruct the jury on the lesser included offense of nonfelonious larceny and in failing to submit this to the jury as a possible verdict. "The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." 3 Strong, N. C. Index 2d, Criminal Law, § 115, p. 21; see also, *State v. Summers,* 263 N.C. 517, 139 S.E. 2d 627; *State v. Jenkins,* 8 N.C. App. 532, 174 S.E. 2d 690. The "market value" of the stolen item is generally used in determining whether the crime is felonious or nonfelonious. "Thus, in the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market—its 'market value' or its 'reasonable selling price,' at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny. . . . It has been ruled that the actual value of the thing wrongfully appropriated, rather than the intention of the taker with respect to value, determines the grade of

larceny." 50 Am. Jur. 2d, Larceny, § 45, pp. 209-211. The only evidence offered as to the "market value" of the tools was given by Paul Strickland, owner of Strickland Motor Company, who testified that they were worth, "in the neighborhood of four to seven hundred dollars." There was evidence that defendant sold the tools for $50.00 but the price received for stolen tools has no relevance to the "market value" of those tools. Consequently, the only competent evidence as to the "market value" of the tools was that they were worth more than $200.00. The trial judge did not err in failing to instruct on and submit to the jury the question of nonfelonious larceny.

[4] Defendant's final contention is that the trial judge erred in failing to enter a judgment of dismissal because of a fatal variance between the indictment and proof as to the ownership of the property allegedly stolen. The indictment charges defendant with feloniously stealing certain property of Strickland Motor Company, a corporation. Testimony of one of the State's witnesses, Mr. Paul Strickland, Jr., owner of Strickland Motors, indicated that he did not actually own the tools, which were owned by the individual mechanics, but that they were used in his business and left overnight on the premises. Thus, the tools were in the lawful possession of Strickland Motor Company at the time of the theft. There is, therefore, no fatal variance. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. EDWARD JUNIOR DUNCAN, DORSEY LEE DUNCAN AND CLIFTON EDWARD PRICE

No. 7210SC237

(Filed 29 March 1972)

1. Robbery § 1— armed robbery — attempt to take property

The offense of armed robbery is complete if there is an attempt to take personal property by use of a firearm or other dangerous weapon.

2. Robbery § 4— attempted armed robbery — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury in this prosecution of three defendants for attempted armed robbery

where it tended to show that defendants grabbed the prosecuting witness, threw him down, told him they wanted his money, tried to go in his pocket and then started cutting him.

3. **Robbery § 5— attempted armed robbery — instructions on common law robbery — absence of a taking**

The evidence in a prosecution for attempted armed robbery did not support an instruction on common law robbery where there was no evidence that property was actually taken.

4. **Robbery § 5— common law robbery — attempted common law robbery — instructions**

The trial court's instructions on common law robbery and attempted common law robbery were conflicting and confusing, the court having used those terms interchangeably in the charge.

5. **Robbery § 5— attempted armed robbery — failure to instruct on assault**

In a prosecution for attempted armed robbery, the trial court erred in failing to submit to the jury the lesser included offense of assault.

APPEAL by defendants from *Brewer, Judge,* 26 October 1971 Regular Criminal Session, Superior Court, WAKE County.

Defendants were tried under indictments charging attempted armed robbery in violation of G.S. 14-87. They appeal from judgments entered on the jury verdict as to each of guilty of common law robbery.

Attorney General Morgan, by Assistant Attorney General Icenhour, for the State.

Robert Howard for Edward Junior Duncan, defendant appellant.

McDaniel and Fogel, by L. Bruce McDaniel, for Clifton Edward Price, defendant appellant.

Bailey, Dixon, Wooten & McDonald, by John N. Fountain, for Dorsey Lee Duncan, defendant appellant.

MORRIS, Judge.

Defendants contend that their motion for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence should have been allowed. We do not agree.

G.S. 14-87 provides:

"Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

[1] Under this statute "the offense is complete if there is an *attempt* to take personal property by use of firearms or other dangerous weapon." *State v. Rogers,* 273 N.C. 208, 211, 159 S.E. 2d 525 (1968); *State v. Jenkins,* 8 N.C. App. 532, 174 S.E. 2d 690 (1970).

[2] The prosecuting witness testified: "As to what happened, they came in and grabbed me, tried to get my money but I had my money in my shoes and couldn't get that, then they jumped on me and started cutting me. I had $10.50 in my shoes and they couldn't get it. I had 10¢ in my pocket. I know they wanted my money because they said they wanted it, and then started cutting me. . . " and further: "No, sir, they did not say anything to me. They just walked up to me and one grabbed me and one throwed me down and one tried to go into my pocket." He later testified that it was the "little one" who "had his hand in my pocket."

Speaking for the Court in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964), Justice Higgins said:

"So great is the offense when life is endangered and threatened by the use of firearms or other dangerous weapons, that it is not of controlling consequence whether the assailant profit much or little, or nothing, from their felonious undertaking. The attempt to take property by the forbidden means, all other elements being present, completes the offense." At p. 682.

We think the evidence here, taken in the light most favorable to the State, is sufficient for submission to the jury on the offense charged. Conflicts, weight, and credibility are for the jury.

Defendants also except and assign as error certain portions and omissions in the charge of the court to the jury. We think the defendants' position is well taken.

[3-5] The court in his charge to the jury was obviously using the Pattern Jury Instructions developed by the North Carolina Conference of Superior Court Judges. The evidence in this case does not support an instruction on common law robbery, since there is no evidence in the record before us of a taking, an essential element of the crime of common law robbery. *State v. Parker, supra; State v. Rogers, supra.* It is obvious that the court intended to amend the pattern instruction on common law robbery so as to instruct on attempted common law robbery but clearly failed to do so, since he frequently used the phrases "common law robbery" and "attempted common law robbery" interchangeably. The charge was, therefore, ambiguous and confusing to the jury. Nor was the ambiguity and confusion clarified when the court finally instructed the jury, separately as to each defendant, that they could return one of three verdicts: guilty of robbery with a dangerous weapon other than a firearm, guilty of common law robbery, or not guilty. The jury began its deliberations at 11:15 o'clock a.m. and was not able to reach a verdict until the next day, the time of their returning their verdict not being noted in the record. The verdict returned was guilty of common law robbery as to each defendant. Under the charge of the court which was conflicting and confusing as to common law robbery and attempted common law robbery, we do not think it an unlikely inference that the jury assumed that the verdict returned was the same as guilty of attempted common law robbery. Additionally, the court failed to submit to the jury, upon proper instructions, an issue of guilty or not guilty of the lesser included offense of assault. The evidence clearly supported instructions on this offense, and we agree with defendants' contention that the failure of the court to instruct the jury on this lesser included offense constitutes prejudicial error. Defendants take the position that the submission to the jury of the offense of common law robbery and the failure to charge on assault entitle them to

have the verdict set aside and a *venire de novo*. Upon the evidence in this case, defendants are entitled to a new trial upon the issue of misdemeanor assault properly submitted to the jury.

New trial.

Chief Judge MALLARD and Judge PARKER concur.

ALICE JEANNIE HAWLEY CLOUSE v. CHAIRTOWN MOTORS, INC.

No. 7222SC136

(Filed 29 March 1972)

1. **Appeal and Error § 41— documents in record — dates filed**

Appeal is subject to dismissal for failure to comply with the requirement of Court of Appeals Rule 19 that each document included in the record on appeal plainly show the date on which it was filed and, if verified, the date of verification and the name of the person who verified it.

2. **Rules of Civil Procedure § 7— motions — rule number**

A motion must state the rule number or numbers under which the movant is proceeding. Rule 6 of the General Rules of Practice for the Superior and District Courts.

3. **Damages § 11; Fraud § 13— fraud in sale of automobile — punitive damages**

The trial court erred in granting defendant's motion to dismiss plaintiff's claim for punitive damages in an action based on alleged fraud in the sale of an automobile.

APPEAL by plaintiff from *Lupton, Judge,* 4 October 1971 Civil Session of Superior Court held in DAVIDSON County.

Action to recover actual and punitive damages for alleged fraud in the sale of an automobile by defendant to plaintiff. Among other things, plaintiff alleged: (1) that defendant falsely represented the automobile as being a demonstrator used only by factory representatives of Ford Motor Company, when, in fact, it had previously been owned by a car rental agency; (2) that the actual mileage the automobile had been operated was greater than that represented by defendant; and (3) that defendant falsely represented that the automobile had

never been wrecked. Plaintiff alleged that defendant's false representations were made with intent to deceive plaintiff and that plaintiff was deceived and oppressed by the alleged actions and false statements of defendant. Defendant filed answer and counterclaim. On 4 October 1971 Judge Lupton signed an order granting a motion to strike paragraph 12 in the first, second and third causes of action. Each of the paragraphs which were ordered to be stricken contained allegations that plaintiff was entitled to punitive damages in the amount of $10,000.00. From the entry of the order, plaintiff appealed.

John Randolph Ingram for plaintiff appellant.

Lambeth and Rogers by Charles F. Lambeth, Jr., for defendant appellee.

VAUGHN, Judge.

[1] Rule 19 of the Rules of Practice in this Court requires, among other things, that "every pleading, motion, affidavit, or other document included in the record on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it." The rule and the appeal is subject to dismissal.

[2] Rule 6 of the General Rules of Practice for the Superior and District Courts requires that any motion shall state the rule number or numbers under which the movant is proceeding. Defendant's "Motion to Strike" which the court allowed presumably was that "Motion" appearing in the record at page 14 with no indication as to when it was filed or as to under which rule movant was proceeding. Ordinarily Rule 12(f) requires that a "Motion to Strike" be made before responding to a pleading.

We will treat defendant's motion as a motion to dismiss under Rule 12(b) (6) and, in our discretion, consider the appeal on its merits so as to determine the correctness of the order entered.

The question of recovery of punitive damages in an action for fraud was discussed in considerable detail in *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785. In that case the Court said:

> " . . . [I]t has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury and within reasonable limits, though the right to such an award does not follow as a conclusion of law because the jury has found an issue of fraud against the defendant. There must be an element of aggravation accompanying the tortious conduct which causes the injury. Smart money may not be included in the assessment of damages as a matter of course simply because of an actionable wrong, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights."

The Court then concluded:

> " . . . [W]e think the rule is that the facts in each case must determine whether the fraudulent representations alleged were accompanied by such acts and conduct as to subject the wrongdoer to an assessment of additional damages, for the purpose of punishing him for what has been called his 'outrageous conduct.' "

[3] It is clear then that a claim for punitive damages in an action for fraud is a claim upon which relief may be granted. This being so, it was error to grant defendant's motion to dismiss plaintiff's claim for punitive damages. No insurmountable bar to recovery appears on the face of the complaint. The complaint contains a statement of the claim "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved" so as to meet the requirements of Rule 8(a). A claim should not be dismissed unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. What facts, if any, plaintiff may be able to prove are not known at this stage of the proceeding and the order entered constituted a premature attempt to dispose of the claim. See *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161, where Justice Sharp discusses the history and proper application of Rule 8(a).

The order from which plaintiff appealed is reversed.

Reversed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. THOMAS GARLAND HART

No. 7212SC135

(Filed 29 March 1972)

1. **Receiving Stolen Goods § 1— constructive receipt**

Constructive receipt is sufficient to constitute "receiving" within the meaning of G.S. 14-71.

2. **Receiving Stolen Goods § 5— constructive receipt — sufficiency of evidence**

The State's evidence was sufficient to show that defendant constructively received stolen goods where it tended to show that defendant directed a person at his home to take the goods to an apartment which defendant owned, and that he made a "down payment" on them.

3. **Receiving Stolen Goods § 5— guilty knowledge — incriminating circumstances**

Knowledge that goods were stolen may be inferred from incriminating circumstances, the test being whether defendant knew, or must have known, that the goods were stolen.

4. **Receiving Stolen Goods § 5— guilty knowledge — sufficiency of evidence**

The State's evidence was sufficient to support a finding by the jury that defendant knew the clothes in question were stolen at the time he received them where it tended to show that a person showed up at defendant's house at 3:00 a.m. with clothes which he told defendant were "out of" a certain store, and that the clothes were offered to defendant for 10% of their retail value.

APPEAL by defendant from *Hall, Judge,* 20 September 1971 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was brought to trial under a bill of indictment, proper in form, charging him with feloniously receiving stolen goods, knowing them to have been stolen. G.S. 14-71.

The State presented evidence which tended to show the following: On the night of 29 March 1971, Rufus Howard, Jr., and two other persons broke into Fleishman's department store in Fayetteville and removed clothing having an approximate retail value of $5,000. The clothing was taken to defendant's house in a taxi at about 3:00 a.m. and Howard told defendant that he and his companions had some clothes to sell. Defendant told a young man at the house to take them around "to my

apartment." In accordance with defendant's instructions the men took the clothing to an apartment about two blocks away. They then returned to defendant's house and advised him that they wanted $400 or $500 for the clothes. Defendant gave them $25 and stated he would have to go downtown "and see the man" before he made any deal.

Howard returned to defendant's house the next day and defendant told him that he was leaving right then to go down to the bank to get some money. According to Howard, defendant agreed to pay $500 for the clothes but never did do so. A few days after the clothes were put in the apartment, defendant ordered them removed because "a man was on the way." Howard took this to mean the police were coming and removed the clothes.

On cross-examination Howard stated that he did not remember whether he told defendant the clothes were stolen but he did recall telling him that they were out of Fleishman's. In answer to the question, "Did you tell him you had stolen them from the store?" Howard stated: "I didn't have to tell him. He probably already knew."

Defendant offered evidence and testified in his own defense. He stated that Howard came to his house at 3:00 o'clock in the morning and asked to borrow $25 on a watch in order to pay a taxicab driver. Defendant denied that Howard mentioned any clothes or that he ever saw any clothes. He did admit that he owned the apartment where the clothes were carried.

The jury returned a verdict of guilty and the court entered judgment thereon imposing an active prison sentence.

Attorney General Morgan by Assistant Attorney General Hafer for the State.

James G. Taylor, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

GRAHAM, Judge.

[1, 2] Defendant argues that the evidence was insufficient to show that he purchased the clothes or actually received them into his possession. Even if the evidence be interpreted as insufficient to show that defendant actually received possession of the goods in question, we think it clearly sufficient to show

that he constructively received the goods. Constructive receipt is sufficient to constitute "receiving" within the meaning of G.S. 14-71. 6 Strong, N.C. Index 2d, Receiving Stolen Goods, § 1, p. 607. The evidence here was that defendant directed a person at his home to take the goods to an apartment which defendant owned, and that he made a "down payment" on them. As stated in *State v. Stroud,* 95 N.C. 626, 631, "It would certainly make him a *receiver* in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen. . . . It is the same as if he had done it himself."

[3, 4] Defendant also contends the evidence was insufficient to show that he had knowledge the clothes were stolen. Guilty knowledge may be inferred from incriminating circumstances. *State v. Miller,* 212 N.C. 361, 193 S.E. 388. The test is whether defendant knew, or *must* have known, that the goods were stolen. *State v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814. When considered in the light most favorable to the State, the evidence tends to show that Howard showed up at defendant's house at 3:00 a.m. with clothes which he told defendant were "out of" a Fayetteville store. The clothes were offered to defendant for 10% of their retail value. This evidence is sufficient to support a finding by the jury that defendant knew the clothes were stolen at the time he received them.

No error.

Judges CAMPBELL and BRITT concur.

JAMES L. MORRIS v. R. S. DICKSON, POWELL, KISTLER & CRAWFORD AND ROBERT J. POWELL, JR.

No. 7212SC222

(Filed 29 March 1972)

Pleadings § 1; Rules of Civil Procedure § 3— extension of time to file complaint — sufficiency of application and order

An order extending the time within which to file a complaint was not rendered invalid by the fact that the application for the extension did not request permission to file complaint "within 20 days" and the order did not state the nature and purpose of the action. G.S. 1A-1, Rule 3.

Morris v. Dickson

APPEAL by plaintiff from *Hall, Judge,* 25 October 1971 Session, CUMBERLAND Superior Court.

Plaintiff brought this action for an accounting to ascertain his interest in defendants' partnership in which plaintiff had been a partner. The action was instituted by filing of complaint and issuance of summons at 11:13 a.m. on 3 September 1971. Defendants filed answer in which they alleged as a further defense that at 9:29 a.m. on 3 September 1971 they had instituted an action involving the same cause before the same court to recover a sum of money from the present plaintiff. Defendants therefore moved that this action be abated and dismissed because of their prior pending action. The motion was granted and from order allowing the motion, plaintiff appealed.

Spruill, Trotter & Lane by Michael S. Colo for plaintiff appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper by Alfred E. Cleveland for defendant appellees.

BRITT, Judge.

Plaintiff contends that defendants purported to institute their action by filing an application for and obtaining an order extending the time within which to file complaint, and having summons issued, but that the application and order did not comply with G.S. 1A-1, Rule 3, therefore, their action was a nullity.

The pertinent part of G.S. 1A-1, Rule 3, provides: "A civil action may also be commenced by the issuance of a summons when (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and (2) The court makes an order stating the nature and purpose of the action and granting the requested permission."

The record before us discloses that the application and order being challenged were set forth on a single page. The application stated the nature and purpose of the action but the order granting an extension of 18 days for filing complaint did not restate the nature and purpose of the action but declared that the application sufficiently complied with the statute. Plaintiff's primary contention in challenging the validity

of the order is that the application did not request permission to file complaint *within 20 days* and the order did not state the nature and purpose of the action. The contention is without merit.

Sutton v. Duke, 277 N.C. 94, 176 S.E. 2d 161 (1970) stands for the proposition that under the new rules of civil procedure North Carolina has adopted a "notice pleading" theory. Professor Sizemore in his discussion of the General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1, 6, cites *Commissioner of Int. Rev. v. Chase Manhattan Bank,* 259 F. 2d 231 (5th Cir. 1958) as holding that liberality is the canon of construction of the federal rules and then continues to state that this certainly applies to the North Carolina rules. See also G.S. 1A-1, Rule 8, Comment. In light of the fact that we now operate under a "notice" system with a liberal interpretation of the requirements of the rules it is difficult to perceive any way in which plaintiff herein was taken by surprise with respect to the nature and purpose of the previous action.

G.S. 1A-1, Rule 3, appears to incorporate the provision of former G.S. 1-121, therefore, a consideration of decisions under the former statute seems relevant. In *Roberts v. Bottling Co.,* 256 N.C. 434, 124 S.E. 2d 105 (1962) where defendant's motion to dismiss for failure of the plaintiff's application and order to state the nature and purpose of the action was denied, the court stated that the intent of the statute was to require plaintiff to alert the defendant by giving preliminary notice of the nature of the claim and the purpose of the suit, and that the ultimate factual averments would follow in a complaint to be filed later. In *Sharpe v. Pugh,* 270 N.C. 598, 155 S.E. 2d 108 (1967) the court in denying a similar motion to dismiss based on G.S. 1-121 stated that it could perceive no reasonable ground to believe that the defendant was taken by surprise.

If this reasoning prevailed under the former procedural statute which had a more strict interpretation than the new rules then surely the same reasoning would be applicable under the new rules. Considering the challenged application and order together, in light of the information required by G.S. 1A-1, Rule 3, we hold that there was substantial compliance with the rule and plaintiff's assignment of error is overruled. To do otherwise would be to revert to the old practice where procedure was subject to technicality, form and surprise.

We have carefully considered plaintiff's other contentions concerning the application of G.S. 1A-1, Rule 3, and likewise find them to be without merit.

Affirmed.

Judges CAMPBELL and GRAHAM concur.

ROSE & DAY, INC. v. JIM RAY CLEARY

No. 7223DC169

(Filed 29 March 1972)

1. **Rules of Civil Procedure § 39— jury trial — failure to demand — discretionary allowance**

Where defendant did not demand a jury trial as provided by G.S. 1A-1, Rule 38, the allowance of a jury trial under G.S. 1A-1, Rule 39(b), is within the discretion of the trial court.

2. **Trial § 14— reopening of case for additional evidence**

The trial court did not abuse its discretion in reopening the case and allowing plaintiff to introduce further evidence after both parties had rested.

3. **Appeal and Error § 28— exception to findings, conclusions and judgment — broadside**

An exception to the findings of fact, conclusions of law and the judgment, without exception to a particular finding, is a broadside exception which does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings.

APPEAL by defendant from *Osborne, District Judge,* 21 September 1971 Session, YADKIN District Court.

Evidence presented at trial tended to show: Defendant purchased an automobile from plaintiff and executed a conditional sale contract to secure payment in monthly installments for a period of 36 months. Upon default of payments by defendant, the automobile was repossessed; a notice of sale was prepared and posted at plaintiff's place of business and copy of the notice sent by mail to defendant. The car was sold at public sale for $2750.00, plaintiff being the purchaser. Plaintiff then brought this action seeking to recover the deficiency between

the remaining contract price and the proceeds received from the sale. The court sitting as a jury found as a fact that there was a deficiency due plaintiff in the amount of $851.20; that the public sale was commercially reasonable and therefore concluded as a matter of law that plaintiff was entitled to recover $851.20 with interest and reasonable attorney's fee. Judgment was entered accordingly from which defendant appeals.

Randleman, Randleman & Randleman by Richard N. Randleman for plaintiff appellee.

Allen, Henderson & Allen by William M. Allen, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his motion for a trial by jury. In his brief defendant admits that he did not demand a jury trial as provided by Rule 38 of the Rules of Civil Procedure and that his motion for trial by jury was based on Rule 39(b). Rule 39(b) provides as follows: "Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court *in its discretion* upon motion or of its own initiative may order a trial by jury of any or all issues." (Emphasis added.) Clearly the allowance of a jury trial under this section is within the discretion of the trial court and no abuse of discretion is made to appear in the present case. The assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the court abused its discretion in reopening the case at the close of all the evidence after plaintiff and defendant had rested and allowing plaintiff to introduce further evidence. There is no merit in this contention. The trial court in its discretion may allow a plaintiff or defendant to introduce further evidence after they have rested. *State v. Satterfield,* 207 N.C. 118, 176 S.E. 466 (1934); *Featherston v. Wilson,* 123 N.C. 623, 31 S.E. 843 (1898); *Smith v. Perkins,* 5 N.C. App. 120, 168 S.E. 2d 14 (1969). See also *Williams v. Averitt,* 10 N.C. 308 (1824) and *Kelly v. Goodbread,* 4 N.C. 468 (1816). Defendant has failed to show any abuse of discretion in the present case, therefore, the assignment of error is overruled.

Finally, defendant contends that the evidence did not support the findings of fact upon which to base the conclusions of law. The record reveals that defendant did not except to either of the findings of fact or conclusins of law but only to the signing of the judgment.

[3] It is well settled in this jurisdiction that an exception to the findings of fact and conclusions of law and the judgment of the court, without exception to a particular finding, is a broadside exception which does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings. 1 Strong, N. C. Index 2d, Appeal and Error, § 28, p. 157. Where there are no exceptions to the findings of fact, the findings are presumed to be supported by competent evidence and are binding on appeal. *Heating Co. v. Realty Co.*, 263 N.C. 641, 140 S.E. 2d 330 (1965). In the instant case, we hold that the findings of fact fully support the conclusions of law and the judgment.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. WAYNE HAWKINS

No. 7215SC277

(Filed 29 March 1972)

Arrest and Bail § 11— judgment absolute on bond

The trial court erred in entering judgment absolute against defendant's cash bond on the same day that defendant was called and failed to appear, since G.S. 15-113 provides that such judgment shall not be entered until "after thirty days or at the next term, whichever is later."

ON *certiorari* to review judgment of *Copeland, Special Judge,* entered at the 31 May 1971 Session of ORANGE Superior Court.

At the September 1970 Session of Orange Superior Court defendant was indicted for first degree burglary. On recommen-

dation of the solicitor, defendant was allowed bond in amount of $5,000 and a cash bond in said amount was posted for defendant. After continuances of the case on 4 November 1970, 10 December 1970, 14 January 1971, 23 February 1971 and 27 April 1971, defendant was called and failed to appear at the 31 May 1971 Session of the court. On 7 June 1971, at the same session and on the same day when defendant was called and failed to appear, Judge Copeland ordered that judgment absolute be entered against the cash bond. On 27 June 1971, the full amount of $5,000, less $5.00 costs, was turned over to the Orange County Treasurer by the clerk of superior court.

At the September 1971 Session of the court, defendant with his counsel appeared before Judge Hobgood and moved to modify or set aside the judgment absolute entered by Judge Copeland. Judge Hobgood ruled that he was without authority to modify or change an order or judgment of another superior court judge and denied the motion. Defendant appealed from Judge Hobgood's order and that appeal (No. 7215SC137) is before the Court of Appeals at this session. On 17 November 1971 we allowed defendant's petition for certiorari to review Judge Copeland's judgment.

Attorney General Robert Morgan by James E. Magner, Assistant Attorney General, for the State.

Murdock & Jarvis by Felix B. Clayton for defendant appellant.

BRITT, Judge.

Defendant assigns as error the entering of judgment absolute against the cash bond on the same day that defendant was called and failed to appear.

G.S. 15-113 provides in pertinent part as follows:

> " . . . where the defendant deposits cash in lieu of bond or recognizance, upon his failure to appear for trial in accordance with the requirements of such cash bond then judgment nisi on the cash bond shall be entered and the defendant shall be charged with legal notice thereof without issuance or service of a *scire facias* or other notice and after thirty days or at the next term, whichever is later, judgment absolute forfeiting and condemning the cash bond shall be entered if the defendant then fails to appear or

upon appearance fails to show legal excuse or other satisfactory explanation of his non appearance at the term when judgment nisi was entered."

The assignment of error is sustained. The quoted statute clearly provides that judgment absolute against a cash bond shall not be entered until "after thirty days or at the next term, whichever is later," following the date the defendant is called and fails to appear. Defendant herein was deprived of his right to appear and show legal excuse or other satisfactory explanation for his failure to appear when called on 7 June 1971.

For the reasons stated, the judgment absolute entered against the cash bond is

Reversed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. WAYNE HAWKINS

No. 7215SC137

(Filed 29 March 1972)

Arrest and Bail § 11; Courts § 9— order of bond forfeiture — review by another judge

A superior court judge erred in ruling that, as a matter of law, he could not review an order of bond forfeiture entered by another superior court judge, since G.S. 15-116 gives him authority to review such an order.

APPEAL by defendant from *Hobgood, Judge,* 6 September 1971 Session, Superior Court, ORANGE County.

Defendant was charged with first-degree burglary. Under order of court dated 27 August 1970, there was posted on the 31st day of August 1970, an appearance bond of $5,000 in cash, for the defendant's appearance on 8 September 1970. Defendant appeared and a true bill was returned. The case was calendared for trial and continued on 4 November, 10 December, 1970,

and 14 January, 23 February, 27 April, 1971. About 1 June 1971, defendant went to the courthouse and talked with the deputy clerk, who in turn consulted the solicitor in the courtroom, with respect to the status of his case. It was learned that his counsel had withdrawn from the case because of the inability of defendant to pay him. Defendant was told he would be given until late August or early September to obtain counsel. He contacted Mr. Vann in Durham and employed him to represent him. Mr. Vann instructed defendant to return to his office on 8 September 1971, the next term of criminal court after August. When he returned to Mr. Vann's office he was advised that his "case had been called and failed" and was not on the September docket. The case was calendared for trial at 31 May 1971 Session. On 7 June 1971 the solicitor called the case for trial, and defendant failed to appear. On the same day, Judge Copeland ordered that judgment absolute be entered against the cash bond, and on 27 June 1971, the full amount of the cash bond, less $5 costs, was turned over to the Orange County Treasurer by the Clerk of Superior Court.

Defendant, with his counsel, appeared in court on 9 September 1971 and moved that he be allowed to post another cash bond which motion was allowed. His motion to modify or set aside the judgment of Judge Copeland of 7 June 1971, was denied. The judgment of Judge Hobgood denying the motion found the facts substantially as recited herein and concluded that, as a matter of law, he was without authority to grant defendant's motion because "one Superior Court Judge cannot modify an Order or Judgment, or change an Order of (sic) Judgment, of another Superior Court Judge, even if the original order was based upon an erroneous application of legal principles." From the entry of this order, defendant appealed. Defendant also petitioned this Court for a writ of certiorari to review the order of Judge Copeland entered 7 June 1971 from which no appeal had been taken. That petition was allowed by this Court on 17 November 1971, and that phase of the matter is before the Court on certiorari at this Session.

Attorney General Morgan, by Associate Attorney Magner, for the State.

Murdock and Jarvis, by Felix B. Clayton, for defendant appellant.

MORRIS, Judge.

By opinion filed this day, this Court has held that Judge Copeland erred in entering judgment absolute, and the judgment against the cash bond was reversed. While this holding, for all practical purposes, renders moot the question raised by the appeal in this case, we think the question raised should be answered.

G.S. 15-116 provides:

> "The judges of the superior and district courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the State and the persons praying such relief, as well before as after final judgment entered and execution awarded."

Referring to this statute (then Bat. Rev., chap. 33, secs. 83, 84, 85), the Supreme Court, in State to the use of the *Board of Education v. Moody,* 74 N.C. 73 (1876), said:

> "The statute is so broad that there can be no doubt that the Judges of the Superior Courts have the power to remit or lessen forfeited recognizances, either before or after final judgment, upon the petition of the party aggrieved. . . . And this is a matter of judicial discretion in the Judges below, which we cannot review, except for some error in a matter of law or legal inference." 74 N.C., at 74-75.

Judge Hobgood's failure to exercise discretion and ruling that, as a matter of law, he could not review the order of forfeiture constitutes error in a matter of law and makes his judgment reviewable. Because Judge Hobgood, in failing to exercise the power of judicial discretion conferred by statute, committed error prejudicial to defendant, the judgment must be

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JERRY MICHAEL MARTIN

No. 7221SC102

(Filed 29 March 1972)

1. **Criminal Law § 132— motion to set aside verdict**

A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal.

2. **Assault and Battery § 14— assault with deadly weapon per se — motion to set aside verdict**

The trial court did not err in the denial of defendant's motion to set aside a verdict of guilty of assault with a deadly weapon *per se*, inflicting serious injury, made upon the ground that the evidence showed that defendant acted in self-defense when he stabbed the victim, where the record reveals that the evidence was conflicting and that the jury simply found the facts to be contrary to defendant's contentions.

3. **Assault and Battery § 15— instructions — accused who quits combat — self-defense**

In this prosecution for felonious assault, the evidence did not require the trial court to instruct the jury upon the right of an accused who quits the combat to invoke the right of self-defense upon renewal of the affray even though he may have been at fault in bringing about the original difficulty, where all the evidence shows that the difficulty started as a cuss-fight between the victim and defendant's brother on the front porch of the home of defendant's mother, that defendant came to the front door and stated, "Let me go get a knife," and that defendant picked up a butcher knife from the kitchen table and took it into the backyard, where he stabbed the victim.

APPEAL by defendant from *Kivett, Judge,* 30 August 1971 Session of Superior Court held in FORSYTH County.

Defendant pleaded not guilty to a bill of indictment which charged that he committed a felonious assault upon Howard Young "with a deadly weapon, to wit: a butcher knife, with intent to kill the said Howard Young inflicting serious bodily injury. . . ." The State's evidence tended to show that during the course of a family fight on the night of 15 July 1971, defendant, who was Young's stepson, twice stabbed Young with a butcher knife after Young had told defendant and his brother to leave and had fired a warning shot from his shotgun into the ground. One of the stab wounds penetrated Young's abdominal wall, cutting his liver and gall bladder. Defendant testi-

fied he acted in self-defense and in defense of his mother. The jury found defendant guilty of assault with a deadly weapon *per se,* inflicting serious injury. From judgment on the verdict imposing prison sentence of not less than three nor more than five years, defendant appealed.

Attorney General Robert Morgan by Associate Attorney General Charles A. Lloyd, and Associate Attorney General Edwin M. Speas, Jr., for the State.

Bailey & Thomas by Wesley Bailey for defendant appellant.

PARKER, Judge.

[1, 2] Appellant first assigns error to the trial court's denial of his motion to set aside the verdict. He contends that the verdict was against the greater weight of the evidence and that the evidence established that he acted in self-defense "as a matter of law." A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court and its refusal to grant the motion is not reviewable on appeal. *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *State v. Caper,* 215 N.C. 670, 2 S.E. 2d 864; 3 Strong, N. C. Index 2d, Criminal Law, § 132, p. 55. The record reveals that this is simply a case in which the jury, on conflicting evidence and after receiving proper instructions from the trial court, found the facts to be contrary to defendant's contentions.

[3] Appellant next assigns as error that the trial court failed to instruct the jury as to how the defendant, if he was at fault initially, "could regain the right of self-protection." This assignment of error is without merit. It is true that an accused who quits the combat may invoke the right of self-defense upon renewal of the affray even though he may have been at fault in bringing about the original difficulty, *State v. Miller,* 221 N.C. 356, 20 S.E. 2d 274, but no such question arises on the evidence here. A careful review of all of the evidence reveals that the difficulty started as a cuss-fight between Young and defendant's brother on the front porch of defendant's mother's home; defendant came to the front door and, according to Young's testimony, stated, "Let me go get a knife"; defendant turned around and went back through the house, picking up the butcher knife from the kitchen table and taking it with him into the backyard, where the stabbing occurred. There was no evidence

to support defendant's contention that there were two separate incidents involving the defendant, one on the front porch and one in the backyard. Even if so considered, the fact that defendant armed himself with a butcher knife after leaving the front porch hardly supports a conclusion that he then intended to withdraw from the combat. This assignment of error is overruled.

We have carefully examined appellant's remaining assignment of error, directed to the trial court's action in sustaining an objection to a question asked by defendant's counsel on cross-examination, and find no prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

ELIZABETH R. POSTON AND HUSBAND, BANKS E. POSTON v. H. S. RAGAN, JR., AND WIFE, LONITA S. RAGAN; H. T. RAGAN AND WIFE, ELIZABETH H. RAGAN

No. 7218SC6

(Filed 29 March 1972)

Appeal and Error § 7; Partition § 6— partitioning proceeding — failure to file exceptions — appeal from dismissal of co-respondents' appeal

Where respondents in a partitioning proceeding did not file timely exceptions to the commissioners' report or to the clerk's order affirming the report and did not give notice of appeal to the superior court, they may not appeal from an order entered in the superior court dismissing their co-respondents' appeal to superior court after the co-respondents abandoned their exceptions.

APPEAL by Respondents, H. S. Ragan, Jr., and wife, Lonita S. Ragan, from *Kivett, Judge,* at the 26 April 1971 Session of GUILFORD Superior Court.

This is a special proceeding, instituted 5 October 1965, for the partition of land owned by the parties as tenants in common. Commissioners were appointed on 20 June 1968 to effect the partition. After an extension of time, the commissioners' report was filed 6 May 1969.

Only H. T. Ragan (H. T.), and wife, filed timely exceptions to the commissioners' report. These exceptions were overruled by the clerk of superior court, and his order confirming the commissioners' report was entered 19 November 1969. H. T. and wife filed timely exceptions to the clerk's order and appealed to the superior court.

Appellants, H. S. Ragan, Jr. and wife, did not timely except to the commissioners' report or to the clerk's order and did not give notice of appeal. However, on 14 September 1970, after time for filing exceptions and giving notice of appeal had expired, appellants were granted leave to file exceptions and appeal in an order entered by Judge Collier without notice to the other parties. In accordance with this order, appellants filed exceptions and purportedly appealed to the superior court.

On 6 November 1970 the other parties moved to vacate Judge Collier's order, strike appellants' exceptions, and dismiss appellants' appeal to the superior court. This motion was allowed in its entirety by Judge Crissman in an order entered 27 November 1970. An appeal by appellants from this order was subsequently abandoned.

When the appeal of H. T. and wife came on for hearing before Judge Kivett, the appealing parties expressly abandoned all exceptions and Judge Kivett thereupon dismissed their appeal. Appellants appeal to this Court from Judge Kivett's order dismissing the appeal of their co-respondents to the superior court.

James Mattocks and C. Richard Tate, Jr., for petitioners appellees.

Frazier, Frazier & Mahler by C. Clifford Frazier, Jr., and Spencer W. White for respondent appellants, H. S. Ragan, Jr., and wife, Lonita S. Ragan.

Haworth, Riggs, Kuhn and Haworth by John Haworth for respondent appellees, H. T. Ragan and wife, Elizabeth H. Ragan.

CAMPBELL, Judge.

The question for decision is whether appellants may appeal from the order of Judge Kivett dismissing the appeal to superior court perfected by appellants' co-respondents. We hold that they cannot.

We find no cases directly on point in North Carolina, but the general rule is set forth in 4 C.J.S., Appeal and Error, § 348, p. 1168: ". . . A party is not entitled to the benefit of an exception not taken by himself, and therefore an exception taken by one party is not available to his adversary, or to a co-party."

We find a clear statement of the general prevailing rule in *Weed, et al v. Gainesville, J. & S. R. Co., et al,* 119 Ga. 576, 46 S.E. 885 (1904):

> ". . . where there are various and independent parties to the litigation, and one files exceptions, the others have no vested interest therein; that the exception may be withdrawn, and other parties to the record cannot complain of the dismissal or use the original exceptions as a basis for the assignment of error here."

The authorities cited above are sound. Appellants did not comply with G.S. 1-272, which specifies the manner of effecting an appeal from the clerk of superior court. Therefore, they had no exceptions pending before Judge Kivett. When their co-respondents abandoned the only exceptions that were before Judge Kivett, nothing remained to be heard.

Appellants cannot be aggrieved by an order dismissing someone else's appeal. An appeal to this Court can be taken only by a party aggrieved. G.S. 1-272.

Appealed dismissed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. LESTER SHAW NORTON

No. 7216SC147

(Filed 29 March 1972)

1. Assault and Battery § 14— assault with firearm on police officer — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of assault with a firearm on a police officer where it tended to show that a police officer answered a call with respect to a disturbance at a private residence, that defendant pointed a pistol at the chest of the officer while the officer was

within reaching distance of defendant, and that defendant stated that he would shoot everybody standing there if they did not make his wife come out of the residence.

2. **Assault and Battery § 17; Indictment and Warrant § 8— assault on police officers — one-count indictment — concurrent sentences**

Where a one-count bill of indictment for assault with a firearm on a police officer named three officers as victims of the assault, and three separate concurrent sentences were imposed for the assaults, the appellate court *ex mero motu* will strike the last two sentences from the judgment.

APPEAL by defendant from judgment of *Canaday, Judge,* August 1971 Session, SCOTLAND Superior Court.

The defendant was tried on a bill of indictment charging him with assault with a deadly weapon, namely, a pistol, on 11 April 1970, upon three police officers and threatening to kill them. The defendant entered a plea of not guilty and from a jury verdict finding him guilty as charged, judgment was entered. The judgment imposed a sentence of not less than three nor more than five years on the charge of an assault with a firearm on Officer Quick; a term of two years for the assault on Officer Bristow and a term of two years for the assault upon Officer Priest, with all sentences to run concurrently. From the imposition of this judgment the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

J. Robert Gordon for defendant appellant.

CAMPBELL, Judge.

[1] The only question presented by this appeal is whether the evidence on behalf of the State was sufficient to warrant its submission to the jury and upon which to base a verdict of guilty. The defendant was tried, convicted and sentenced for three violations of North Carolina General Statutes 14-34.2 which reads:

> "Any person who shall commit an assault with a firearm upon any law-enforcement officer or fireman while such officer or fireman is in the performance of his duties shall be guilty of a felony and shall be fined or imprisoned for a term not to exceed five years in the discretion of the court."

Upon this record the evidence is to be taken in the light most favorable to the State and the State must be given every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971).

The evidence in this case when considered under this rule tends to show:

On the afternoon of April 11, 1970, N. W. Quick was Assistant Chief of Police of Laurinburg. He was on duty when he received a call to go to the Breeden home at 2:45 p.m. When he arrived there he found two other members of the Laurinburg Police Department, Officers Bristow and Priest, present. The patrol car operated by Officer Bristow was in the driveway. Bristow was standing in front of his automobile and Officer Priest was in the yard in front of the defendant. The defendant had a pistol in his hand and was pointing it at the two officers. Chief Quick stopped his automobile in the street in front of the house and walked up in the yard towards the other officers and the defendant. Chief Quick inquired of the defendant as to what the trouble was and the defendant informed him that his wife was in the house and that he had already shot Woody Breeden and would shoot everybody standing there, including the Officers and Chief Quick if they did not make his wife come out. During this time the defendant pointed the pistol at the chest of Chief Quick. Chief Quick was in reaching distance of the defendant and not only could see the pistol clearly but could see the bullets in it. Sometime later the defendant was informed that his wife had gone out the back door of the house; thereupon, the defendant gave the pistol to Chief Quick.

In our opinion this evidence is sufficient to be submitted to the jury for the offense charged. The charge of the Court to the jury was not brought forward in the record, and it is therefore presumed to be free from error and that the jury was properly instructed as to the law arising upon the evidence. *State v. Murphy, supra.*

[2] It is noted that the bill of indictment contained only one count while including the names of three police officers and three sentences were imposed. This is improper, and this Court *ex mero motu* will strike the last two two-year concurrent sen-

tences from the judgment. The result is that the defendant stands convicted of an assault with firearms upon Assistant Chief of Police Quick for which a sentence of not less than three nor more than five years was imposed. As thus modified, the judgment in the trial court is affirmed.

Modified and affirmed.

Judges BRITT and GRAHAM concur.

LUCY BLOUNT WILLIAMS v. JUDSON H. BLOUNT, SR., JUDSON H. BLOUNT, JR., INDIVIDUALLY AND AS ATTORNEY-IN-FACT FOR JUDSON H. BLOUNT, SR., AND STATE BANK AND TRUST COMPANY

No. 7210SC14

(Filed 29 March 1972)

1. **Appeal and Error § 6— information to file complaint — adverse examination — appeal from order**

Appeal from an order allowing plaintiff to examine defendants for the purpose of securing information to draw a complaint is premature and subject to dismissal.

2. **Actions § 10; Rules of Civil Procedure § 3— service of summons — commencement of action under old rules — effect of new Rules of Civil Procedure**

Where plaintiff commenced an action in 1968 by issuance of summons in accordance with former G.S. 1-14, but has not yet filed a complaint, the subsequent enactment of the Rules of Civil Procedure, under which an action is commenced by filing a complaint, did not require that she recommence her action in accordance with the new Rules. G.S. 1A-1, Rule 3.

3. **Bill of Discovery § 2; Rules of Civil Procedure § 27— information to file complaint — order under former statute — effect of new Rules of Civil Procedure**

Where an order was entered in 1968 allowing plaintiff to examine defendants pursuant to former G.S. 1-568.10 for the purpose of securing information to file a complaint, plaintiff has a vested right to conduct such examination and need not move for an adverse examination under either G.S. 1A-1, Rule 26, relating to the taking of depositions after the commencement of an action, or G.S. 1A-1, Rule 27(b), relating to the taking of depositions in preparation for filing a complaint.

APPEAL by defendants from *Godwin, Special Judge,* 14 June 1971 Session of Superior Court held in WAKE County.

Plaintiff instituted this action on 12 July 1968 by causing summons to be issued against defendants. At the same time plaintiff, through her attorney, filed an application and affidavit seeking an order allowing adverse examination of defendants for the purpose of preparing a complaint pursuant to former G.S. 1-568.10. On plaintiff's motion, an order was entered extending the time to file complaint until after the adverse examination had been held. The purpose of the action, as stated in the application and affidavit for adverse examination is to have "declared null and void upon the books of State Bank and Trust Company a purported transfer of plaintiff's shares of stock in State Bank and Trust Company by the defendant, Judson H. Blount, Jr., Attorney in Fact for Judson H. Blount, Sr., and to recover possession of said shares of stock, or to recover of defendants, jointly and severally, damages for the wrongful conversion of plaintiff's stock in State Bank and Trust Company." Defendants moved to vacate the orders allowing the examination and after a hearing before the Clerk their motions were denied. Defendants then appealed to the superior court where the Clerk's order allowing the examination was affirmed. Defendants now appeal to this Court.

Manning, Fulton and Skinner by Howard E. Manning and John B. McMillan for plaintiff appellee.

James, Hite and Cavendish by M. E. Cavendish for defendant appellants Blount.

Sam B. Underwood, Jr., for defendant appellant Bank.

VAUGHN, Judge.

[1] Defendants are appealing from an order entered allowing plaintiff to examine defendants for the purpose of securing information to draw a complaint. Appeal from such an order is premature and subject to dismissal. *Tillis v. Cotton Mills,* 238 N.C. 124, 76 S.E. 2d 376; *Brown v. Clement Co.,* 203 N.C. 508, 166 S.E. 515; *Johnson v. Mills Company,* 196 N.C. 93, 144 S.E. 534. However, this Court can, and in this case will, in its discretion, consider the appeal on its merits. *Fox v. Yarborough,* 225 N.C. 606, 35 S.E. 2d 885; *Knight v. Little,* 217 N.C. 681, 9 S.E. 2d 377; *Bohannon v. Trust Co.,* 210 N.C. 679, 188 S.E. 390.

Defendants contend that plaintiff's application and affidavit fail to meet the requirements of former G.S. 1-568.10 under which plaintiff is moving. Such assignments of error as are brought forward and which are supported by proper exceptions fail to disclose prejudicial error in the order allowing the examination.

[2] Among other things, defendants contend that the enactment of the North Carolina Rules of Civil Procedure, and their implementation as of 1 January 1970, serves to negate any action taken prior to that date. Defendants specifically contend that plaintiff has not commenced an action since, under Rule 3, an action is commenced by filing a complaint, which plaintiff has not done. As the time this action was initiated in 1968 an action was commenced by the issuance of a summons in accordance with former G.S. 1-14. Plaintiff successfully commenced this action as of 12 July 1968 by causing summons to be issued against the defendants and the subsequent enactment of the North Carolina Rules of Civil Procedure does not require that she recommence her action.

[3] Defendants further contend that in order for plaintiff to secure the information requested in her original application and affidavit for adverse examination she must now move under either Rule 26, relating to the taking of depositions after the commencement of an action, or Rule 27(b), relating to the taking of depositions in preparation for filing a complaint. We find no merit in this contention. On 12 July 1968 plaintiff made application for an adverse examination pursuant to former G.S. 1-568.10. On the same date an order was entered allowing the examination. Upon entry of that order, plaintiff had a vested right to conduct the examination. The subsequent enactment of the Rules of Civil Procedure did not divest her of this right. See *Fishel & Taylor v. Church,* 13 N.C. App. 238, 185 S.E. 2d 322.

Affirmed.

Judges BROCK and HEDRICK concur.

RAYMOND C. FREEMAN, II v. JOHN GUY HAMILTON, SR.

No. 7210SC35

(Filed 29 March 1972)

1. **Automobiles § 49— passenger's statement at collision scene — fault**

In this action to recover for personal injuries sustained in a collision between plaintiff's motorcycle and defendant's car, the trial court did not err in permitting defendant's driver to testify that a motorcycle passenger injured in the accident told him at the collision scene that "It's not your fault."

2. **Automobiles § 45; Evidence § 22; Witnesses § 8— civil action — conviction of criminal offense based on same acts**

In this action to recover damages for personal injuries, the trial court properly refused to allow plaintiff to cross-examine the driver of defendant's car as to whether he had been convicted of an offense "growing out of this accident," since a defendant in a civil action may not be cross-examined regarding his conviction of an offense based on the very acts charged against him in a civil action unless such conviction is based on a plea of guilty.

3. **Rules of Civil Procedure § 51— request for special instructions — timeliness**

The trial court did not err in refusing to give the jury special instructions requested in writing by plaintiff after the jury had deliberated for three hours, since such request must be submitted to the judge before the charge is begun. G.S. 1A-1, Rule 51(b).

APPEAL by plaintiff from *Bone, Judge,* 15 July 1971 Session of Superior Court held in WAKE County.

Action to recover compensation for injuries arising out of a collision by plaintiff, while operating a motorcycle, with an automobile owned by defendant and operated by defendant's son. Issues of negligence, contributory negligence and damages were submitted. The jury answered the issues of negligence and contributory negligence in the affirmative. Plaintiff appealed.

Jacob W. Todd for plaintiff appellant.

Smith, Anderson, Blount and Mitchell by John H. Anderson for defendant appellee.

VAUGHN, Judge.

[1] The following is the subject of plaintiff's first assignment of error. Joan Tiska, a passenger on the motorcycle, was thrown

to the pavement. Defendant's driver, in the course of testifying as to the events immediately preceding and following the collision testified as follows:

> "After I looked and saw Mr. Freeman, I saw that somebody was taking care of him, I kneeled back down and I got on my knees. I looked at Joannie and told her she was going to be all right and she looked at me and said 'It's not your fault.' That's exactly what she said."

Plaintiff's objection and motion to strike were overruled. We hold that the court's failure to strike the testimony as to the foregoing spontaneous utterance of the injured passenger did not constitute prejudicial error.

[2] On direct examination the driver of defendant's automobile testified, without objection by plaintiff, that he had never been convicted of anything. On cross-examination of the witness, plaintiff's counsel asked the following: "Isn't it a fact that you were, in June of 1970, convicted of an offense on the fourth floor of this Courthouse, growing out of this accident?" Defendant's objection to the question was sustained and the court's ruling on the propriety of the question is assigned as error. It is settled that a defendant in a civil action may not be cross-examined regarding his conviction of an offense based on the very acts charged against him in the civil action, unless such conviction is based on a plea of guilty. See *Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36 and authorities therein cited. The question, as propounded by counsel, called for incompetent testimony. Plaintiff's counsel, had he elected to do so, could have rephrased his question and deleted any reference to a conviction based on the acts giving rise to the civil action then being tried. *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. This assignment of error is overruled.

[3] After the jury had deliberated approximately three hours, plaintiff's counsel submitted a written request that the court "charge the jury that a person having the right of way may assume that persons to whom the right of way applies will respect it until the contrary affirmatively appears." The court declined to give the requested instruction and this constitutes plaintiff's third assignment of error. Rule 51(b) of the North Carolina Rules of Civil Procedure provides that requests for special instructions must be submitted to the judge before the

judge's charge to the jury is begun. Plaintiff's request, therefore, came too late. Moreover, consideration of the entire charge discloses that the judge properly declared and explained the law arising on the evidence. This assignment of error is overruled.

Plaintiff's final assignment of error that "the Court erred in declining to set aside the verdict, for that it clearly appears that it was against the weight of the evidence" is without merit. Both plaintiff and defendant were ably represented at trial and on this appeal. Upon conflicting evidence the jury resolved the issues in a trial which we hold to have been free of prejudicial error.

No error.

Judges BROCK and HEDRICK concur.

LOUIS G. FLORES v. HARRY B. CALDWELL, JR.

No. 7218SC97

(Filed 29 March 1972)

1. **Aviation § 4; Negligence § 5— airplane painter — injury when propeller revolved — negligence**

In an action to recover for personal injuries sustained by plaintiff, a regular automobile painter hired to paint defendant's airplane, when the propeller of the airplane revolved suddenly as plaintiff moved it in order to spray paint behind it, plaintiff's evidence was sufficient for submission to the jury on the issue of defendant's negligence where it would support jury findings that (1) defendant was aware that the propeller, if turned, could backfire or kick even though the ignition were off, (2) plaintiff did not know and should not have known that the propeller might kick or backfire if turned, and defendant could not reasonably assume that plaintiff possessed such knowledge, (3) defendant could and should have foreseen that plaintiff, unless warned not to do so, would move the propeller to facilitate his task of painting the aircraft and would be exposed to injury, and (4) defendant failed to warn plaintiff that it was dangerous to move the propeller.

2. **Aviation § 4; Negligence § 5— airplane painter — injury when propeller revolved — contributory negligence**

In an action to recover for personal injuries sustained by plaintiff when the propeller of defendant's airplane revolved suddenly as plaintiff moved it in order to spray paint behind it, plaintiff's evidence

did not disclose that plaintiff was contributorily negligent as a matter of law in moving the propeller where the jury could legitimately find that plaintiff was unfamiliar with the danger arising from moving the propeller, and that his act of moving it in order to paint behind it was not an unreasonable act.

3. Pleadings § 32; Rules of Civil Procedure § 15— motion to amend complaint

The motion for leave to file an amended complaint is addressed to the discretion of the trial court.

APPEAL by plaintiff from *McConnell, Judge,* 23 August 1971 Civil Session of Superior Court held in GUILFORD County.

Civil action to recover for personal injuries sustained by plaintiff on 12 October 1969 when he was struck in the leg by the propeller of defendant's 1950 Beechcraft airplane. The accident occurred when the aircraft's propeller revolved suddenly as plaintiff moved it in order to spray paint behind it. Plaintiff, who was regularly employed as a painter for an automobile body shop, was painting the plane on a weekend under an agreement with defendant.

At the conclusion of plaintiff's evidence defendant moved for a directed verdict, asserting that the evidence was insufficient to show actionable negligence on the part of defendant and that plaintiff's own evidence established his contributory negligence as a matter of law. An order was entered allowing the motion but the grounds upon which the motion was allowed were not specified.

Robert A. Merritt for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

GRAHAM, Judge.

One of plaintiff's theories of recovery is that defendant failed to furnish him a safe place to work in that the airplane's ignition system was faulty and the airplane was defective in other respects.

No evidence was introduced in support of this theory. All of the evidence tended to show that the switch was off, the throttle was closed, and that reasonable steps had been taken to secure the aircraft. Defendant, who testified as an adverse

witness for plaintiff, attributed the action of the propeller to compression which had built up in certain cylinders. He stated that when the propeller was moved it "kicked, or backfired," "like an old Model T used to do in cranking it. . . . " Defendant further stated that the fact the propeller "kicked" did not mean the plane was defective. "It could still kick on compression just like—maybe you have seen a milk bottle top after it sits a day or so it will pop off, and this is just from compression building up. You still have the pressure built up on certain cylinders. In a six cylinder engine, it could be halfway compressed and you could have two or three cylinders under compression at one time."

Another theory asserted by plaintiff is that defendant knew that it was dangerous to move the propeller, even with the plane's switch and throttle off, and that defendant failed to give plaintiff any warning of this danger.

[1] Plaintiff testified that no warning was given. Defendant testified to the contrary. In deciding whether the evidence was sufficient to withstand defendant's motion for a directed verdict we must accept plaintiff's testimony as true. *Dawson v. Jennette,* 278 N.C. 438, 180 S.E. 2d 121; *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47. Therefore, the issue narrows to a question of whether, under the evidence presented, defendant was under a duty to warn plaintiff concerning the danger involved in moving the propeller.

An airplane propeller that revolves suddenly and unexpectedly unquestionably presents a hazard to a person standing near it. Defendant had employed plaintiff to paint the aircraft. If defendant knew, or, in the exercise of due care, should have known, that the propeller would likely "fire" or "kick" if moved, and if he should have reasonably foreseen that plaintiff would likely move the propeller during the course of his work, defendant should have warned plaintiff of the danger involved. "He who puts a thing in charge of another which he knows, or in the exercise of ordinary prudence he should have known, to be dangerous, or to possess characteristics which, in the ordinary course of events, are likely to produce injury, owes a duty to such person to give reasonable warning or notice of such danger." *Honeycutt v. Bryan,* 240 N.C. 238, 241, 81 S.E. 2d 653, 655; *Stroud v. Transportation Co.,* 215 N.C. 726, 3 S.E. 2d 297.

We find the evidence sufficient to support an inference that defendant was aware that the propeller, if turned, could "backfire" or "kick," even though the plane's ignition was off and the throttle was closed. Defendant had been a licensed pilot since 1954 and had "worked on planes" over the years. His testimony demonstrated a familiarity with the propensities of airplane engines and their propellers. Indeed, defendant's position is that he did warn plaintiff not to mess with the propeller. He stated: "I asked him not to mess with the propeller, that I would take care of masking it off. . . . That was indicating for him not to move it or bother it in any way, that I would handle that particular part of it."

Defendant strenuously contends that the danger of moving the propeller should have been obvious to plaintiff. Defendant testified: "I did not go into the danger of moving it. That is obvious." If plaintiff was aware, or should have been aware of the danger involved in moving the propeller, defendant had no duty to warn him of that danger. "When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows is without significance." *Jones v. Aircraft Co.*, 253 N.C. 482, 491, 117 S.E. 2d 496, 503. See also *Sellers v. Vereen*, 267 N.C. 307, 148 S.E. 2d 98; *Spell v. Contractors*, 261 N.C. 589, 135 S.E. 2d 544.

We are of the opinion that the evidence here, when considered in the light most favorable to plaintiff, does not establish, as a matter of law, that plaintiff knew, or should have known, that the aircraft propeller might kick or backfire if turned; nor does it show that defendant could reasonably assume that plaintiff possessed this knowledge. Defendant contends that the danger involved in moving the propeller of an airplane, even with the switch off, is common knowledge. While this fact may be well known to those who are knowledgeable about airplanes, we think it unreasonable to assume that it is also known by those who are not. Plaintiff was experienced in painting cars but his contact with airplanes had been minimal. He testified that he had no knowledge of the workings of airplane engines. He had attempted to paint an airplane on one previous occasion but had abandoned this job before finishing it. He stated that he advised defendant of this lack of experience. Defendant testified that plaintiff told him he had been in the paratroopers, "but he told me also that all he did was just

jump, it didn't have anything to do with the operation of the plane."

We are of the further opinion that plaintiff's evidence is sufficient to raise a jury question on the element of foreseeability. Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24; *Osborne v. Coal Co.,* 207 N.C. 545, 177 S.E. 796.

Plaintiff testified that it was necessary for him to move the propeller in order to spray paint behind it. Defendant would not concede that this was necessary but he did agree that it would be more convenient. Plaintiff indicated that on the day before the accident he had moved the propeller "a little bit" and sprayed behind it. On the day of the accident, he twice again moved the propeller slightly for the same purpose. The last occasion is when it "went off, fired off" and struck plaintiff on the ankle. Defendant was present on each occasion that plaintiff moved the propeller and, according to plaintiff, uttered no words of caution.

We think the jury could legitimately infer from this evidence that, in the exercise of ordinary prudence, defendant could and should have foreseen that plaintiff, unless warned not to do so, would move the propeller in order to facilitate his task of painting the aircraft, and that in doing so plaintiff would be exposed to injury.

[2] Finally, we consider whether the evidence so clearly establishes plaintiff's contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom. When opposing inferences are permissible from plaintiff's evidence, a motion for a directed verdict on the grounds of contributory negligence as a matter of law should be denied. *Bowen v. Gardner, supra.* The jury could infer from the evidence that plaintiff knew, or should have known, of the danger involved in moving the airplane propeller and that he nevertheless assumed this risk. On the other hand, we think the jury could legitimately find that plaintiff was unfamiliar with the danger arising from moving the propeller, and that his act of moving it in order to paint behind it was not an unreasonable act. Under these circumstances, the question of whether plaintiff was guilty of contributory negli-

gence, and if so, whether his negligence was a proximate cause of his injury, is a question for jury determination.

We conclude that the evidence, when considered in the light most favorable to plaintiff, is sufficient to withstand a motion by defendant for a directed verdict and the judgment must be reversed.

[3] We have also reviewed plaintiff's exceptions to several interlocutory orders allowing motions by defendant to strike portions of the complaint. The allegations stricken were immaterial and irrelevant to the lawsuit and were properly stricken. Plaintiff also complains that the court refused him permission to amend after the allegations were stricken. The motion for leave to file an amended complaint was addressed to the discretion of the trial court. *Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E. 2d 428; G.S. 1A-1, Rule 15(a). No abuse of discretion has been shown.

Reversed.

Judges CAMPBELL and BRITT concur.

FCX, INC., PLAINTIFF v. WILLIAM BAILEY AND REYNOLDS BAILEY, D/B/A NOVA TERRA COMPANY, ORIGINAL DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. SOUTHERN RAILWAY COMPANY, THIRD-PARTY DEFENDANT

No. 7210DC101

(Filed 29 March 1972)

1. **Contracts § 14— third-party beneficiary**

If a contract was not made for the benefit of a third party, he has no cause of action upon the contract to enforce it or sue for its breach.

2. **Contracts § 14— third-party beneficiary — insufficiency of complaint**

In an action instituted by plaintiff to recover the purchase price of sows sold and delivered to original defendants, a third-party complaint filed by the original defendants alleging (1) that the sows were purchased by plaintiff from the third-party defendant, (2) that the third-party defendant breached its agreement with plaintiff, and (3) that the third-party defendant was fully aware of the agreement between plaintiff and original defendants, *is held* insufficient to state a claim for relief for damages as third party beneficiaries for breach of the contract between plaintiff and the third-party defendant.

3. Rules of Civil Procedure § 10— pleadings — prior statements — incorporation by reference

While G.S. 1A-1, Rule 10(c), permits an incorporation by reference of statements made in other parts of a pleading, counsel should be careful to ascertain that the prior statement will properly express the intent of the immediate paragraph into which the prior statement is incorporated by reference.

APPEAL by original defendants, William Bailey and Reynolds Bailey, from *Preston, District Judge,* 23 August 1971 Session of District Court held in Wake County.

This action was instituted by FCX, Inc., to recover the purchase price of twenty-three sows sold and delivered to the original defendants, William Bailey and Reynolds Bailey (Bailey). Bailey admitted the delivery of the sows, but alleged a breach of agreement with respect to the condition of the sows; Bailey alleged the sows were not accepted and sought affirmative relief for damages against FCX. Bailey, as third-party plaintiff, alleged that FCX purchased the twenty-three sows from Southern Railway Company (Southern); that Southern was aware of the agreement between FCX and Bailey; that Southern breached its sales agreement with FCX; and that Bailey, as third-party beneficiary of the agreement between Southern and FCX, is entitled to recover damages against Southern. At Bailey's instance, Southern was made a third-party defendant.

Southern filed a motion to dismiss the third-party complaint by Bailey against Southern under G.S. 1A-1, Rule 12(b)(6), upon the grounds that the third-party complaint failed to state a claim upon which relief can be granted. The motion to dismiss was allowed by Judge Preston; Bailey, as third-party plaintiff, has appealed.

Spruill, Trotter & Lane, by John R. Jolly, Jr., for William Bailey and Reynolds Bailey—appellants.

Smith, Anderson, Blount & Mitchell, by John L. Jernigan, for Southern Railway Company—appellee.

BROCK, Judge.

Appellants (Bailey), as third-party plaintiffs, allege in substance that: (1) the sows involved in the FCX complaint were purchased by FCX from Southern, (2) Southern breached

its agreement with FCX, and (3) Southern was fully aware of the agreement between FCX and Bailey. Upon these allegations, Bailey concludes that they are entitled to recover from Southern as third-party beneficiaries of the agreement between Southern and FCX.

[1] "If the contract was not made for the benefit of the third party, he has no cause of action upon the contract to enforce it, or sue for its breach. [citations]. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. [citations]." *Products Corp. v. Sanders,* 264 N.C. 234, 141 S.E. 2d 329.

[2] G.S. 1A-1, Rule 8, requires that a pleading shall contain a plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of the transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. Nowhere in the third-party complaint is there a statement which gives notice of transactions or occurrences from which the courts can reasonably conclude that Bailey has a claim against Southern on any legal theory. Bailey's allegation of the mere conclusion that they are third-party beneficiaries is not sufficient.

[3] We note that in undertaking to allege a breach by Southern of its contract with FCX, Bailey incorporates by reference their allegations of breach by FCX of its contract with Bailey. G.S. 1A-1, Rule 10(c) permits an incorporation by reference of statements made in other parts of a pleading. However, counsel should be careful to ascertain that the prior statement will properly express the intent of the immediate paragraph into which the prior statement is incorporated by reference. In the present case, Bailey alleges specific breaches by FCX of its contract with Bailey; but, when these allegations are incorporated verbatim into the paragraph in which Bailey undertakes to allege a breach by Southern of its contract with FCX, it creates a problem of interpolation and guesswork as to what Bailey's allegations against Southern really are. Each of the allegations refers to delivery of sows to Bailey, representations to Bailey, or representations by FCX. In order for the allegations to have some meaning against Southern, it seems they would need to refer to delivery of sows to FCX, representations to FCX, or representations by Southern. G.S. 1A-1, Rule 8(f) provides:

"All pleadings shall be so construed as to do substantial justice." However, in giving a liberal construction the courts should not engage in judicial amending or rewriting of pleadings.

The order dismissing the third-party action is affirmed.

Judges HEDRICK and VAUGHN concur.

BESSIE H. CORNATZER, WIDOW v. FERN P. (MRS. G. N.) NICKS

No. 7221SC31

(Filed 29 March 1972)

1. **Trusts § 14— parol trust — absence of fraud**

In the absence of fraud or other ground for equitable relief, a grantor may not impose a parol trust for his benefit on land which he conveys by deed purporting to vest title in the grantee.

2. **Cancellation and Rescission of Instruments § 2; Fraud § 7— deed from parent to child — undue influence**

The mere relationship of parent and child does not raise a presumption of fraud or undue influence in the execution of a deed by the parent to the child.

3. **Trusts § 19— parol trust — fiduciary relationship — summary judgment**

In an action to impose a parol trust on land conveyed by plaintiff and her husband to their son and his wife, the defendant, plaintiff's deposition shows that she cannot support her allegation that a fiduciary relationship existed between plaintiff and her son at the time of the conveyance, and summary judgment was properly entered in favor of defendant, where plaintiff testified that she always handled her own affairs and did so at the time of the conveyance, that the conveyance was her idea in the first place, and that her son did not misrepresent anything to her and did not pressure her in any way.

APPEAL by plaintiff from *Lupton, Judge,* 3 May 1971 Session of Superior Court held in FORSYTH County.

This is a civil action to impose a trust on real property. In substance, plaintiff alleged: In 1960 she and her since-deceased husband owned a vacant lot. They were then in their late sixties and were too old to get a loan to build a house on their property. Accordingly they made an agreement with plaintiff's son, under which they agreed to convey legal title to

their lot to the son and his wife, the defendant in this action, who in turn agreed to obtain a loan on the property and use the proceeds to build a house on the lot for the benefit of plaintiff and her husband. This arrangement was consummated in 1961, the lot was conveyed, the loan obtained, the house built, and plaintiff and her husband moved into the house and since that time have paid all taxes, maintenance costs, and made all payments to the Savings and Loan Association. The son died in 1970 and plaintiff thereafter asked defendant to convey the property back to her, but defendant refused to do so. Plaintiff prayed judgment that defendant holds title as trustee for plaintiff.

Defendant answered, denied material allegations of the complaint, and pleaded the Statute of Frauds. Defendant then moved for summary judgment under Rule 56, supporting her motion by presenting a copy of the recorded warranty deed by which plaintiff and her husband had conveyed the property to defendant and her husband, by affidavit of defendant, and by the deposition of plaintiff taken on adverse examination. The trial court, finding no genuine issue as to any material fact existed and concluding that defendant was entitled to judgment as a matter of law, granted the motion and dismissed plaintiff's action. Plaintiff appealed.

Hatfield, Allman & Hall by Weston P. Hatfield and James W. Armentrout for plaintiff appellant.

Deal, Hutchins & Minor by William Kearns Davis for defendant appellee.

PARKER, Judge.

[1-3] The judgment must be affirmed. In the absence of fraud or other ground for equitable relief, a grantor may not impose a parol trust for his benefit on land which he conveys by deed purporting to vest title in the grantee. *Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548. Plaintiff's counsel recognizes this and seeks to distinguish *Willetts* by the contention that in the present case a confidential or fiduciary relationship existed between plaintiff and her son. An allegation to that effect was included in the complaint, but plaintiff's own deposition conclusively demonstrates that she cannot support it. The mere relationship of parent and child does not raise a presumption of

fraud or undue influence, *Walters v. Bridgers,* 251 N.C. 289, 111 S.E. 2d 176, and plaintiff's deposition discloses that in fact none existed here. She testified that she always handled all of her own affairs and did so in 1961, that the conveyance was her idea in the first place, and that her son did not misrepresent anything to her, did not use "any bit of undue influence," and did not pressure her in any way. Her testimony that her son would come over and take her where she wanted to go, fix anything she wanted him to, or mow the yard sometimes, bespeaks more a familial than a fiduciary relationship. *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615, relied on by appellant, is not applicable.

No genuine issue as to any material fact being shown and the undisputed facts disclosing that defendant is entitled to judgment in her favor as a matter of law, disposition by summary judgment was proper. *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823.

In passing, we note that defendant stated in her affidavit that she intended to let plaintiff live in the house as long as she wanted to, and plaintiff testified in her deposition that no one had asked her to move out of the house and she had been told she could stay there the rest of her life.

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. ROBERT LEE HOOVER

No. 7218SC57

(Filed 29 March 1972)

1. **Criminal Law § 3— attempt to commit crime**

An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission.

2. **Robbery § 4— attempted robbery — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of attempted common law robbery where it tended to show that defendant entered a savings and loan association branch office, that he handed a teller a note containing

the words, "This is a hold-up. Close door. Lock Doors," and other instructions, that a teller pushed a silent alarm button, that defendant recognized one of the tellers as a neighbor of his sister, that defendant stated he was kidding, took his note and left the building, that the police arrived and pursued defendant, and that when stopped by the police, defendant had a loaded pistol on the seat of his car, a paper bag concealed in the waistband of his trousers and the hold-up note in his coat pocket.

3. Robbery § 3— evidence found in defendant's car — intent

In this prosecution for attempted common-law robbery, evidence relating to firearms found in defendant's car and a paper bag found concealed on his person was properly admitted for the purpose of showing defendant's intent.

APPEAL by defendant from *McConnell, Judge,* 31 May 1971 Session of Superior Court held in GUILFORD County.

Defendant was indicted for attempted robbery and entered a plea of not guilty. The evidence tended to show the following. A few minutes before the regular closing hour, defendant entered a branch office of Home Federal Savings and Loan Association in Greensboro and asked to speak with the loan officer or manager. Upon being advised that the manager was not in, defendant pulled a note from his pocket and handed it to a teller. Handprinted on this note were the words, "This is a hold-up. Close door. Lock doors," and other instructions. The teller became frightened and handed the note to another teller. One of the tellers pushed a silent alarm button which was located under the counter. Another teller came out from the kitchen and was recognized by defendant as being a neighbor of his sister. Defendant stated that he was kidding, took his note and left the building. The tellers watched defendant enter a car at the rear of the building. Police arrived just as defendant pulled away. One of the tellers got in the police car which pursued defendant. At the time of his capture defendant was found to have a loaded pistol on the seat of his car, a paper bag concealed in the waistband of his trousers and the hold-up note in his coat pocket. Defendant testified that he was on the way to the liquor store and just thought he would pull a joke on the girls who worked for the savings and loan. He said that he thought some of his friends at a nearby service station would enjoy hearing about the story. From a verdict of guilty and judgment imposing an active prison sentence, defendant appealed.

Attorney General Robert Morgan by Associate Attorney William Lewis Sauls for the State.

Public Defender for the Eighteenth Judicial District Wallace C. Harrelson and Assistant Public Defender J. Dale Shepherd for defendant appellant.

VAUGHN, Judge.

[1, 2] Defendant contends that the trial court committed error in refusing to grant his motion for nonsuit made at the close of the State's evidence. Defendant was charged with attempted robbery. "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. [citations omitted]. 'An indictable attempt, therefore, consists of two important elements: (1) an intent to commit the crime, and (2) a direct ineffectual act done toward its commission.' " *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880. Furthermore, "Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355. The evidence is ample to support a jury finding that defendant intended to rob the savings and loan, that he placed the tellers in fear, and that he committed a direct act in furtherance of the crime but which fell short of accomplishing its actual commission. This assignment of error is overruled.

[3] Defendant further contends that the trial court erred in admitting evidence and testimony relating to weapons found in defendant's car and as to the paper bag found concealed on his person. Intent is one of the elements of the offense with which defendant was charged. Intent, by its very nature, is most often not susceptible to proof by direct evidence. "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proved by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649. For these reasons, among others, the evidence was properly admitted.

We have carefully considered all of defendant's assignments of error including those directed at the charge of the

court and find them to be without merit. In the entire trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. HENRY LEE HUNT

No. 7216SC275

(Filed 29 March 1972)

Burglary and Unlawful Breakings § 5— breaking and entering — intent to commit larceny — sufficiency of evidence

The State's evidence was sufficient to support findings by the jury that defendant was the person who broke into and entered a building, and that he intended to commit larceny therein, notwithstanding no property was taken, where it tended to show that police officers went to a place of business shortly after midnight in response to a burglar alarm, that a door of the building had been prized open, that officers heard footsteps in the back of the building and observed a door in the building being closed, that officers heard someone on the roof and observed that a skylight had been removed, that an officer outside the building observed defendant on the roof and observed him slide down a rain gutter from the top of the building, and that officers found defendant in a trash can receptacle behind an adjoining service station.

ON *certiorari* to review judgment entered by *Canaday, Judge,* at the 4 January 1971 Session, ROBESON Superior Court.

The defendant was tried on a bill of indictment in proper form charging felonious breaking and entering the building occupied by Lumberton Trading Company, Inc. with the intent to commit larceny. To the charge the defendant entered a plea of not guilty. The jury found him guilty as charged and Judge Canaday imposed a sentence of not less than eight nor more than ten years.

We granted certiorari to review the trial in lieu of an appeal.

Attorney General Robert Morgan by Assistant Atorney General R. S. Weathers for the State.

Neill A. Jennings, Jr., for defendant appellant.

CAMPBELL, Judge.

The only question presented is whether or not the evidence was sufficient to require submission to the jury. In this situation the evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. Only the evidence favorable to the State is considered and contradictions and discrepancies even in the State's evidence are matters for the jury and do not warrant nonsuit. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971).

Applying this rule the evidence on behalf of the State can be summarized as follows:

On the night of 26 September 1968, five police officers of Lumberton went to the place of business of Lumberton Trading Company in answer to a burglary alarm. They arrived shortly after midnight and observed the door on the south side of the building had been prized open. Two of the officers, together with a representative of the company, entered the building. While inside they heard running footsteps in the back of the building and observed a door, separating two sections of the building, being closed. On obtaining entry into the rear section of the building, they heard someone on the roof and observed that a skylight had been removed. Another police officer on the outside of the building observed the defendant on the roof of the building and observed him slide down a rain gutter from the top of the building. The defendant was about 30 feet away at the time. The rain gutter was of galvanized metal approximately 6 inches square and came down from the roof at a 45 degree angle. Officers proceeded to search the area and behind an adjoining service station there was a metal trash can receptacle. In this trash can receptacle behind two trash barrels the defendant was found lying on the ground.

We are of the opinion that this evidence was sufficient to submit to the jury and that the defendant was the person who forcibly entered the building by prizing open a door and was the person heard running in the building and on top of the building. With regard to the intent to commit larceny, the following excerpt from *State v. McBryde,* 97 N.C. 393, 1 S.E. 925 (1887) quoted with approval in *State v. Accor,* 277 N.C. 65, 175 S.E. 2d 583 (1970) is applicable.

" 'The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. Here there was no larceny or other felony actually committed, and the guilt, if any, consisted in the *intent* to commit a felony, which was not consummated.' "

We hold the evidence was sufficient for submission to the jury upon the allegations contained in the indictment, and that it was for the jury to determine, under all the circumstances, whether the defendant had the ulterior criminal intent at the time of breaking and entering to commit the felony charged in the indictment.

No error.

Judges BRITT and GRAHAM concur.

JANET LYNN TAYLOR McALISTER v. THOMAS RAY McALISTER

No. 7219DC103

(Filed 29 March 1972)

Divorce and Alimony § 18— subsistence pendente lite — hearing — denial of court reporter

Defendant has shown no prejudice by the denial of his motion for an official court reporter to record the hearing in district court on plaintiff's motion for subsistence and counsel fees *pendente lite.*

APPEAL by defendant from *Hammond, District Judge,* 27 August 1971 Session of District Court held in RANDOLPH County.

The plaintiff brought this civil action against her husband, the defendant, for alimony without a divorce, counsel fees,

custody of the minor children of plaintiff and subsistence for the minor children, possession of a residence owned by plaintiff and defendant as tenants by the entirety, and possession of an automobile owned by defendant. In this proceeding she moved for similar relief pendente lite and a hearing was held on this motion.

Prior to the introduction of any evidence at the hearing the defendant moved for an official court reporter to take the record and further moved for a continuance if a court reporter was not available. The trial judge denied both motions.

The matter was heard before the Judge on affidavit and the oral testimony of witnesses.

The trial court found in favor of the plaintiff and awarded child support, alimony pendente lite, counsel fees, possession of the residence, and possession of the automobile.

From the order of the trial court, the defendant appeals.

No counsel for plaintiff appellee.

Ottway Burton for defendant appellant.

CAMPBELL, Judge.

The only issue raised in this Court is whether it was error for the trial judge to deny defendant's motion to have the record taken by an official court reporter.

The defendant argues that it was error to deny his motion for a reporter and that the absence of a reporter impaired his right of appeal.

The North Carolina General Statutes require only that "[c]ourt-reporting personnel shall be utilized, *if available,* for the reporting of civil trials in the district court." G.S. 7A-198 (emphasis added). If a reporter is not available in any county, other means may be employed to take the testimony. *Ibid.* The defendant made no motion that any other means be employed when his motion for a court reporter was denied.

There are no cases on this point in North Carolina. Other jurisdictions have, however, held that it is not error for the trial judge to fail to appoint a stenographer to take down the testimony where no stenographer is available. *Lindsey v. Caston,*

118 S.W. 2d 843, Tex. Civ. App. (1938); *Universal Life Ins. Co. v. Larremore,* 32 S.W. 2d 964, Tex. Civ. App. (1930). If the case is one in which a court reporter's services can be dispensed with without prejudice, and no reporter can be found, it is not error to refuse a motion for the services of a reporter. 53 Am. Jur., Trial, § 30; *Frost v. Witter,* 132 Cal. 421, 64 P. 705 (1901).

A hearing of this nature may be conducted on affidavits only and without oral testimony. *Miller v. Miller,* 270 N.C. 140, 153 S.E. 2d 854 (1967). Nevertheless, oral testimony was introduced in the instant case. Even so the absence of stenographic notes is not always fatal. *State v. Sanders,* 280 N.C. 67, 185 S.E. 2d 137 (1971); *State v. Allen,* 4 N.C. App. 612, 167 S.E. 2d 505 (1969).

The defendant has not shown any prejudice by the denial of his motion. A new trial will be granted only for prejudicial error. 1 Strong, N.C. Index 2d, Appeal and Error, § 47.

In the trial of this case we find

No error.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. ELLIS SUTTON, JR.

No. 7212SC245

(Filed 29 March 1972)

Narcotics § 4— heroin found in motel — possession of manager

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of possession of heroin where it tended to show that officers found heroin in an unrented room and in a storage room of a motel managed by defendant, and that defendant told officers that he knew about the dope being in the motel but that it wasn't his, the evidence being sufficient for the jury to find that the heroin was subject to the dominion and control of defendant.

ON *certiorari* to review the order of *Bailey, Judge,* at the 18 May 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was tried on a bill of indictment charging that on 25 August 1970 he did have in his possession and under his control a quantity of narcotic drugs, to wit, heroin. From judgment imposing a five-year prison sentence, defendant gave notice of appeal. Defendant was unable to perfect his appeal within the time allowed and this Court granted his petition for certiorari.

Attorney General Robert Morgan by Associate Attorney Ronald M. Price for the State.

Rose, Thorp and Rand by Anthony E. Rand for defendant appellant.

VAUGHN, Judge.

Defendant's counsel cogently contends that the court erred in failing to allow his motion for nonsuit. The evidence tends to show the following. At the time of defendant's arrest he was the manager of the Crestview Motel in Fayetteville. On the date of the alleged offense law enforcement officers in their search of an unrented room and a storage room in the motel, discovered an assortment of narcotic drugs, including the drug heroin, along with measuring spoons, rubber bands and syringes. Part of the drugs were concealed in a bedpost. Part of the testimony of Agent Windham of the State Bureau of Investigation is as follows:

> "I asked Mr. Sutton about dope being in the motel and he said he knew it was in the motel, but it wasn't his. I asked him if that was the dope he was referring to when he said he knew dope was in the hotel and he said he knew it was there but it wasn't his. I asked him whose it was and he made no answer."

Defendant had previously been advised of his constitutional rights. He also told Agent Windham that the motel was used for prostitution and gambling and that he had seen people with "the needle" in their arms.

Defendant testified that he was the manager of the motel and had four people working for him who had access to the motel rooms. He contended that although he had seen people using the drugs in the motel, the drugs did not belong to him. Defendant admitted that "we gamble there" and that the rooms

were rented for prostitution. Defendant denied that the rooms were rented for people who wanted to "shoot-up" heroin but did admit that the same rooms would be rented to several different guests on the same night. Although the motel had only 30 rooms, defendant had made as many as 106 different rentals in one night. Defendant testified that he had run people out of the motel when he caught them using drugs and that he had cooperated with law enforcement officers in an effort to keep drugs out of the motel.

When all the evidence is considered in the light most favorable to the State and with every reasonable inference therefrom given to the State, we are of the opinion that the court properly overruled defendant's motion to nonsuit. Defendant's statements to the officers, along with the other circumstances revealed by the evidence, were sufficient to allow the jury to reasonably conclude that defendant was aware of the unlawful presence of the drugs which were seized. The drugs were cached in a storage room and an unrented motel room and thus subject to the dominion and control of defendant. That others may also have had access to the drugs does not exonerate defendant. The State is not required to prove sale and exclusive possession or control.

We find no merit in defendant's remaining assignments of error wherein he contends that the court failed to properly explain "constructive possession."

No error.

Judges BROCK and HEDRICK concur.

DORIS BURTON BECK v. HENRY CLAY BECK

No. 7222DC22

(Filed 29 March 1972)

1. Divorce and Alimony § 13— separation for one year — absence of mutual consent or court decree

In order to be entitled to a divorce a plaintiff need not show that a marital separation for the statutory period was by mutual agreement or under a decree of court.

2. Divorce and Alimony § 13— living separate and apart

A husband and wife are deemed to live separate and apart within the meaning of the divorce statute when: (1) they live separate and apart physically for an uninterrupted period of time at least as long as the time required by the divorce statute; and (2) their physical separation is accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation.

APPEAL from *Dearman, District Judge,* 18 June 1971 Session of District Court held in DAVIDSON County.

This action for absolute divorce was instituted on 15 July 1970.

Plaintiff alleged, and offered evidence at the trial which tended to show, that she has been a resident of North Carolina for 59 years, that she and defendant were married on 20 December 1923, and that they separated on 17 October 1965 and have lived separate and apart since that time. Defendant filed answer in which he did not deny the separation but alleged that it came about because plaintiff left the home without just cause or excuse. Plaintiff testified she left because "[m]y husband told me numerous times if I did not like the way he done, out there was the road." Defendant testified in substance that he never mistreated his wife and never agreed that she could leave.

Issues were answered in plaintiff's favor and a judgment of divorce was entered.

George W. Saintsing for plaintiff appellee.

William H. Steed for defendant appellant.

GRAHAM, Judge.

[1, 2] Defendant contends that in order to be entitled to a divorce a plaintiff must show that a marital separation for the statutory period was by mutual agreement or under a decree of court. This was true prior to 1937. In that year the divorce statute was amended so as to remove this requirement. *Byers v. Byers,* 222 N.C. 298, 22 S.E. 2d 902. During the past 35 years a husband and wife have been deemed to live separate and apart within the meaning of the divorce statute when: (1) they live separate and apart physically for an uninterrupted period of time at least as long as the time required by the divorce statute; and (2) their physical separation is accom-

panied by at least an intention on the part of one of them to cease their matrimonial cohabitation. See *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525; *Mallard v. Mallard,* 234 N.C. 654, 68 S.E. 2d 247 and cases cited.

Affirmed.

Judges CAMPBELL and BRITT concur.

FRANCIA H. MOORE v. SAUNDERS W. MOORE

No. 7215DC274

(Filed 29 March 1972)

Appeal and Error § 6— appeal from interlocutory order — dismissal

Appeal from an order relieving defendant from making alimony and child support payments pending determination of defendant's motion for modification of a previous order is an appeal from an interlocutory order which is dismissed as being premature. Court of Appeals Rule 4.

APPEAL by plaintiff from order of *McLelland, District Judge,* entered at the 5 November 1971 Civil Session of ALAMANCE District Court.

The record on appeal discloses: On or about 1 October 1971, pursuant to G.S. 50-13.7, defendant filed a motion in this cause asking for modification of a previous order for alimony and child support because of changed circumstances. Defendant alleged that in July or August of 1970, following the entry of the previous order, plaintiff remarried and removed the child from Alamance County to Venezuela, South America, and although defendant had fully and promptly paid substantial alimony and support payments, plaintiff had continuously refused to make arrangements with defendant for him to see his child. He asked the court to enter an order fixing and determining reasonable rights of visitation between the child and defendant and conditioning the support payments upon plaintiff's complying with such order.

Notice was given to plaintiff's attorneys in Alamance County and to plaintiff in Venezuela that defendant would ask the court to hear his motion on 5 November 1971. On 5 November 1971, plaintiff through her counsel moved that the hearing

be continued for a period of 120 days for the reason that plaintiff resides in South America and was unable to travel due to giving birth to a child during the month of October 1971. The court entered an order denying plaintiff's motion for a continuance of 120 days but continued the hearing until 4 January 1972 with the proviso that defendant be relieved of any and all alimony and child support payments "until the hearing and determination of the matters set forth in the motion in this cause."

Plaintiff excepted to the order, particularly that part relieving defendant from payment of alimony and child support payments pending a hearing on the motion, and appealed.

Latham, Pickard & Ennis by James F. Latham for plaintiff appellant.

H. Clay Hemric for defendant appellee.

BRITT, Judge.

Defendant has moved in this court for a dismissal of plaintiff's appeal on the ground that plaintiff is attempting to appeal from the ruling on an interlocutory motion which is not permissible under Rule 4 of the Rules of Practice in the Court of Appeals of North Carolina. The motion is well taken and is allowed.

We think the substantial legal questions plaintiff attempts to raise can best be considered following a hearing on defendant's motion if, in fact, there is a desire for their consideration at that time.

Appeal dismissed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. BONNIE LEE DAYE

No. 7214SC155

(Filed 29 March 1972)

Criminal Law § 161— broadside assignment of error

An assignment of error which attempts to present several questions of law is broadside and ineffective.

State v. Daye

APPEAL by defendant from *McKinnon, Judge,* 14 October 1971 Session of DURHAM Superior Court.

By indictment proper in form, defendant was charged with (1) possession of seven bindles of heroin and (2) selling seven bindles of heroin. The plea was not guilty, the jury found defendant guilty as charged and from judgment imposing prison sentences, defendant appealed.

Attorney General Robert Morgan by Richard B. Conely, Associate Attorney, for the State.

Newsom, Graham, Strayhorn, Hedrick & Murray by E. C. Bryson, Jr., for defendant appellant.

BRITT, Judge.

In his brief, defendant states his two assignments of error brought forward thusly:

(1) "The trial Court erred in failing to grant the defendant appellant's Motion for mistrial based on the gross and well calculated plan by the Solicitor to prejudice the jury against the defendant by (propounding) improper and incompetent questions, by prejudicial responses of State's witnesses and by the Solicitor's argument to the jury."

(2) "The Solicitor by a gross and well-calculated plan propounded improper and incompetent questions calculated to prejudice the jury against the defendant which led to the jury's finding of guilt."

It is well settled in this jurisdiction that an assignment of error which attempts to present several questions of law is broadside and ineffective. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1969); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); Rules of Practice in the Court of Appeals of North Carolina. A review of the exceptions grouped under defendant's two assignments of error discloses that numerous legal questions are raised including failure of the court to sustain defendant's objections to certain testimony, failure of the court to strike certain testimony, the validity of portions of the solicitor's argument to the jury, and the failure of the court to allow defendant's motion for a mistrial interposed after the jury returned its verdict but before judgment was pronounced. However, as indicated in the assignments of error, defendant

contends that considering the trial of the case as a whole, he did not receive a fair trial.

Although defendant's assignments of error are broadside, we have carefully reviewed the record before us, not only with respect to the specific exceptions but in the light of defendant's contentions, and conclude that he had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA EX REL C. A. SIMMONS v. WILBUR JOHNSON AND WIFE, CLAUDINE C. JOHNSON

No. 7215SC179

(Filed 29 March 1972)

Appeal and Error §§ 39, 41— failure to comply with Rules — dismissal of appeal

Appeal is dismissed for failure to comply with the Rules of Practice in the Court of Appeals where no document included in the record shows a filing date, the proceedings are not set forth in the record in the order in which they occurred, and the record was not docketed within the time allowed by the Rules. Court of Appeals Rules 5 and 19.

APPEAL by defendants from *Friday, Judge,* 23 August 1971 Session, Superior Court, CHATHAM County.

This is an action brought under the provisions of G.S. 19-2 to enjoin and have abated a nuisance alleged to exist upon premises of defendants. The jury answered the issue in favor of plaintiff, and from judgment entered on the verdict, defendants appealed.

Gunn and Messick, by Robert L. Gunn and Paul S. Messick, Jr., for plaintiff appellee.

Seawell, Pollock, Fullenwider, Van Camp and Robbins, by H. F. Seawell, Jr., for defendant appellants.

MORRIS, Judge.

Plaintiff has moved that defendants' appeal be dismissed for failure to comply with the rules of this Court. Plaintiff's position is well taken. Defendants have apparently failed to read Rule 19, Rules of Practice in the Court of Appeals of North Carolina. No document included in the record shows a filing date. The record contains the proceedings in this order: evidence, order extending time to docket and time to serve case, complaint, answer, restraining order, order continuing restraining order, judgment, assignments of error, charge of the court, acceptance of service, and agreement of counsel. We refer appellants to *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971). The purported assignments of error, which appear before the charge of the court, do not refer to the exception or exceptions upon which they are based. Additionally, although defendants were granted the maximum time allowed for docketing the record on appeal, they failed to docket the record within the time allowed. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. For failure to comply with the Rules of this Court, the appeal is dismissed.

We have, nevertheless, carefully considered the record and defendants' purported assignments of error. No prejudicial error appears.

Appeal dismissed.

Chief Judge MALLARD and Judge PARKER concur.

BANK OF NORTH CAROLINA, N. A. v. CHARLES F. BARRY, JR., AND WIFE, JANICE E. BARRY

No. 7211DC228

(Filed 29 March 1972)

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

Appeal is subject to dismissal for failure to docket the record on appeal within the time allowed by Court of Appeals Rule 5.

2. **Appeal and Error § 31— assignments of error to charge — necessity for exceptions**

Assignments of error to the charge based upon exceptions appearing nowhere in the record but under the assignments of error are ineffective. Court of Appeals Rule 21.

APPEAL by defendant from *Lyon, Judge,* 11 October 1971 Session of District Court, JOHNSTON County.

Plaintiff brought this action seeking to recover from defendants the unpaid balance due and owing on a promissory note. The jury returned a verdict in favor of plaintiff, and from entry of the judgment, defendants appeal.

James A. Wellons, Jr., for plaintiff appellee.

T. Yates Dobson, Jr., for defendant appellants.

MORRIS, Judge.

[1] The record on appeal was not docketed within the time allowed by Rule 5, Rules of Practice in the Court of Appeals of North Carolina, and the record contains no order extending the time for docketing. For failure to docket the record on appeal within the time allowed by the rules of this Court, the appeal may be dismissed. Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

[2] The only assignments of error are to the charge of the court. However, no exception is noted in the record. Assignments of error to the charge based upon exceptions appearing nowhere in the record but under the assignments of error are ineffective. *State v. Dunn,* 264 N.C. 391, 141 S.E. 2d 630 (1965); Rule 21, Rules of Practice in the Court of Appeals of North Carolina; 1 Strong, N.C. Index 2d, Appeal and Error, § 31, p. 166. Nevertheless, we have carefully reviewed the charge to the jury as contained in the record, and find no prejudicial error. Defendants' contention that the court expressed an opinion as to whether a fact was fully or sufficiently proven in violation of G.S. 1A-1, Rule 51(a) is without merit.

No error.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. EDWARD GEDDIE

No. 7212SC106

(Filed 29 March 1972)

Narcotics § 4— possession and sale of heroin — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for possession and sale of heroin.

APPEAL by defendant from *Bailey, Judge,* at the 9 August 1971 Session, CUMBERLAND Superior Court.

The defendant was charged in a proper bill of indictment containing two counts. The first count charged him with the felony of possession of narcotic drugs, namely, heroin. The second count charged him with feloniously selling a narcotic drug, namely, heroin. The defendant entered a plea of not guilty, and from a jury verdict and the imposition of a sentence of five years on each count to run consecutively, the defendant appealed.

The evidence on behalf of the State was to the effect that the defendant, during the month of May, 1971, sold a tinfoil packet containing heroin to a law enforcement officer. The sale took place in Fayetteville. The defendant testified in his own behalf to the effect that while he had made a sale on the occasion in question, it was not heroin but quinine sulfex [*sic*], which is a harmless medicine that can be purchased at any drug store.

The factual dispute was submitted to the jury in a charge by the trial judge to which no exception was taken, and the jury as the trier of the facts returned a verdict of guilty on both counts.

Attorney General Robert Morgan by Associate Attorney Richard B. Conely for the State.

James Godwin Taylor, Assistant Public Defender for defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the State was ample to require the submission to the jury. No error in the trial of the case has

been pointed out. We have reviewed the record, and find that the defendant was given a fair trial free from any prejudicial error.

No error.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. FRANKLIN ROOSEVELT HAROLD

No. 7212SC149

(Filed 29 March 1972)

1. **Criminal Law §§ 18, 157— appeal from superior court — failure to show disposition in district court**

Appeal from conviction in the superior court of driving while license was suspended is dismissed where the record does not show the disposition of the case in the district court and how the case reached the superior court.

2. **Criminal Law § 162— necessity for objection**

The admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.

APPEAL by defendant from judgment of *Bailey, Judge,* 20 September 1971 Session, CUMBERLAND Superior Court.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

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

CAMPBELL, Judge.

[1] The record discloses that a warrant was issued in the District Court of Cumberland County charging the defendant with the unlawful operation of a motor vehicle upon the public highways of the State on 12 June 1971, while his operator's license was in a state of suspension; this being a second offense of this type as he had been convicted previously of a similar offense on 2 June, 1971.

The disposition of this case in the District Court is not shown by the record, and it does not appear how this case reached the Superior Court from which court this purported appeal was taken.

In the absence of any showing that the case was properly docketed in the Superior Court and therefore properly appealed to this Court, the appeal is dismissed.

[2] Nevertheless, we have examined the purported appeal and assignments of error and find them without merit. For the most part all errors are assigned to the admission of evidence. There were no objections made to such evidence and in the absence of an objection at the time the evidence was offered a new trial will not be awarded even though the evidence be incompetent. *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1970).

The record reveals that the defendant, if properly in the Superior Court, had a fair trial, free of any prejudicial error.

Appeal dismissed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. DANNY BARBEE

No. 7214SC81

(Filed 29 March 1972)

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

Appeal is subject to dismissal for failure to docket the record on appeal within the time allowed by Court of Appeals Rule 5.

APPEAL by defendant from *Hobgood, Judge,* 24 May 1971 Session of Superior Court held in DURHAM County.

Defendant was tried upon one bill of indictment charging him with selling fourteen bags of heroin for $55.00 to S. H. Conant, a police officer of the City of Durham, and upon another bill of indictment charging him with the unlawful possession of fourteen bags of heroin.

The jury returned a verdict of guilty on each count. From judgment of imprisonment, the defendant appealed.

Attorney General Morgan and Assistant Attorney General League for the State.

Kenenth B. Spaulding and Norman E. Williams for defendant appellant.

MALLARD, Chief Judge.

Defendant was tried in May 1971. The judgment is dated 26 May 1971. On 25 June 1971, the trial judge entered an order allowing defendant sixty days "from August 15, 1971" in which to docket the appeal. The appeal was not docketed in the Court of Appeals within the time allowed under the order of the trial judge or under Rule 5 of the Rules of Practice in the Court of Appeals but was docketed on 11 November 1971.

For failure to comply with the rules of this court, the appeal should be dismissed; but before doing so, we examined defendant's assignments of error and are of the opinion that no prejudicial error is made to appear.

Appeal dismissed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LEROY HENRY, ALIAS HENRY VANN

No. 7212SC186

(Filed 29 March 1972)

Narcotics § 4.5— possession and sale of heroin — instructions

The trial court properly declared and explained the law arising on the evidence and correctly instructed the jury as to the permissible verdicts in a trial for the crimes of possession and sale of heroin.

APPEAL by defendant from *Hall, Judge,* 18 October 1971 Session of Superior Court held in CUMBERLAND County.

In this criminal action the defendant and his attorney waived a bill of indictment and pleaded not guilty to the charges of possession of heroin, sale of heroin, and use of an automobile to facilitate the possession and sale of heroin as set out in an information signed by the solicitor. The State offered evidence

tending to show that on 18 June 1971, at about 10:30 p.m., Devon E. Kinston, employed by the Criminal Investigation Division of the United States Army at Fort Bragg, North Carolina, went to the parking lot of Fayetteville State University where he purchased from the defendant "one-half spoon" of the narcotic drug heroin for $20. When the undercover agent purchased the heroin, the defendant was seated in a red and white Cadillac automobile.

The defendant testified that he was not in the Fayetteville State University parking lot in the late evening of 18 June 1971 and that he had never seen or sold any heroin to Devon E. Kinston. At the close of the State's evidence, the defendant's motion for judgment as of nonsuit was allowed as to the count charging the defendant with use of an automobile to facilitate the possession and sale of narcotics.

The jury found the defendant guilty of the possession and sale of the narcotic drug heroin, and from a judgment imposing a prison sentence of four years, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Henry E. Poole for the State.

Neill H. Fleishman, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

HEDRICK, Judge.

The two assignments of error argued in defendant's brief relate to the court's instructions to the jury.

The defendant contends the court committed prejudicial error "by failing to correctly or sufficiently instruct the jury concerning the elements of the offense of possession of a narcotic drug," and "by erroneously charging the jury concerning possible verdicts." A careful review of the charge reveals that the court fairly, adequately and correctly declared and explained the law arising on the evidence given in the case, and precisely and correctly instructed the jury as to the permissible verdicts.

We find and hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

KATHRYN N. ALLEY v. JOSEPH S. ALLEY

No. 7210DC27

(Filed 29 March 1972)

Appeal and Error §§ 39, 44— failure to docket record in apt time — failure to file brief

Appeal is subject to dismissal where the appeal was docketed more than 90 days from the date of the judgment appealed from and appellant has filed no brief. Court of Appeals Rule 48.

APPEAL by defendant from *Preston, District Judge,* 23 June 1971 Session of District Court held in WAKE County.

Boyce, Mitchell, Burns & Smith by Eugene Boyce for plaintiff appellee.

Malcolm B. Grandy for defendant appellant.

HEDRICK, Judge.

The judgment in this civil action was entered on 23 June 1971. The record on appeal was docketed in this Court on 1 October 1971, which is more than ninety days from the date of the judgment appealed from. No extension of time within which to docket the appeal has been granted. The appellant has filed no brief in this Court. For failure of the appellant to comply with the Rules of Practice in the Court of Appeals, the appeal is dismissed. Rule 48.

Appeal dismissed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. EDWARD GRIFFITH

No. 7212SC202

(Filed 29 March 1972)

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

Appeal is subject to dismissal for failure to docket the record on appeal within the time allowed by Court of Appeals Rule 5.

APPEAL by defendant from *Hall, Judge,* 6 September 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was charged in a bill of indictment, proper in form, with possession of a quantity of the narcotic drug, heroin.

The State's evidence tended to show that a search of defendant's apartment by law enforcement officers had revealed numerous tinfoil packets containing heroin stored in a glass jar in the bathroom and in a flashlight case in the bedroom.

Upon a jury verdict of guilty, defendant was sentenced to a term of not less than three nor more than five years.

Attorney General Morgan, by Associate Attorney Jones, for the State.

Assistant Public Defender Taylor for the defendant.

BROCK, Judge.

This appeal was docketed thirty-three days later than the time provided by Rule 5. For that reason it is subject to dismissal. Nevertheless, we have considered the appeal upon its merits. The Assistant Public Defender states that he is unable to find error. We appreciate his candor and, having examined the record, agree with his appraisal.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. DANNY CARL SCOTT

No. 7216SC91

(Filed 29 March 1972)

APPEAL by defendant from *Peel, Judge,* August 1971 Regular Session Superior Court, ROBESON County.

Defendant appeared at the August 1971 Session of Superior Court, Robeson County, upon four charges of forgery and uttering. He waived, in writing, his right to assignment of counsel, and the court entered upon the record his sworn waiver and the court's certificate thereon. Defendant entered a written plea of guilty, and this sworn plea together with the court's adjudication thereon were made a part of the record. The cases were consolidated for judgment, and judgment of imprisonment for not less than two nor more than three years in the State Prison was entered. Thereafter defendant was brought before the court for hearing upon whether probation granted at the 23 March 1971 Session of Superior Court should be revoked. Upon facts found by the court, it was ordered that probation be revoked and the twelve months' sentence, theretofore suspended, be activated. Thereupon, judgment and commitment was entered. The judgment recited that defendant was personally present after due notice and that the matter was heard upon an inquiry into an alleged violation of condition of suspension of sentence imposed in judgment entered on 23 March 1971. From evidence presented, the court found facts and adjudged that defendant had breached a valid condition of the suspension of sentence and ordered the revocation of suspension and imprisonment of defendant for twelve months in the county jail of Robeson County. Defendant gave notice of appeal, and, upon determination of indigency, counsel was appointed to prosecute his appeal.

Attorney General Morgan, by Assistant Attorney General Harris, for the State.

Musselwhite & Musselwhite, by William E. Musselwhite, for defendant appellant.

MORRIS, Judge.

Counsel for defendant candidly states in his brief that he is unable to find error committed in the proceedings of the trial tribunal. The State in its brief agrees. We have examined and considered the record proper, and no prejudicial error appears.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

ROBERT J. POWELL, JR.; J. LEWIS BIBB; PHIL E. PEARCE; JAMES K. NORFLEET; WALTER L. DULIN; THOMAS E. WALKER; H. CHARLES COVINGTON; GEDDINGS H. CRAWFORD; ERSKINE DUFF; MARVIN G. VICK; HARRY C. SHEEHY, JR.; PETER C. COHAN; AS GENERAL PARTNERS, TRADING AND DOING BUSINESS AS R. S. DICKSON, POWELL, KISTLER & CRAWFORD v. JAMES L. MORRIS

No. 7212SC223

(Filed 29 March 1972)

APPEAL by defendant from *Hall, Judge,* 25 October 1971 Session of Superior Court held in CUMBERLAND County.

On 3 September 1971 plaintiff made application for the issuance of a summons in this cause and requested permission for an extension of time within which to file complaint. Summons was issued on that date by the Assistant Clerk of Superior Court and an order was entered granting plaintiff 18 days within which to file complaint. The summons and complaint were served on 6 September 1971.

On 14 September 1971, a second summons was issued and this summons, along with a complaint, was served on defendant on 17 September 1971.

On 26 October 1971, defendant moved to dismiss the action for a lack of jurisdiction over the person. In his motion, defendant alleged that the summons did not sufficiently identify plaintiffs and that the application and order extending the time to file the complaint were insufficient. This motion was denied and defendant appealed.

McCoy, Weaver, Wiggins, Cleveland & Raper by Alfred E. Cleveland for plaintiff appellees.

Spruill, Trotter & Lane by Michael S. Colo for defendant appellant.

GRAHAM, Judge.

This is a companion case to *Morris v. Dickson,* No. 7212SC222. In an opinion by Judge Britt in that case (filed this date), we held that the summons and order issued in this case on 3 September 1971 were legally sufficient. Even if we had concluded differently with respect to that order and summons, we would still affirm the order denying defendant's motion to dismiss this case. A second summons was issued 14 September 1971, and it is admittedly sufficient in all respects. Therefore, even if the first summons were defective, the court would have obtained jurisdiction over defendant under the second summons.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. ISIAH PETERSON, JR.

No. 7212SC107

(Filed 29 March 1972)

APPEAL by defendant from *Hall, Judge,* 27 September 1971 Session, CUMBERLAND Superior Court.

By indictment proper in form defendant was charged with (1) felonious possession of marijuana in excess of one gram, (2) felonious possession of heroin and (3) felonious transportation of marijuana and heroin. Defendant pleaded guilty to the possession of heroin charge and the State entered a *nolle prosequi* to the other charges contained in the bill of indictment. After due inquiry as to the voluntariness of the plea and hearing testimony, the court adjudged that defendant be imprisoned for a term of not less than two and not more than four years with recommendation that defendant be granted the option

of serving the sentence under the work release plan. Defendant appealed.

Attorney General Robert Morgan by William Lewis Sauls, Associate Attorney, for the State.

James Godwin Taylor, Assistant Public Defender, for defendant appellant.

BRITT, Judge.

Defendant's court appointed counsel concedes that he can find no error in this case. We too have carefully examined the record and find no prejudicial error.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. LAWRENCE TOWNSEND

No. 7212SC198

(Filed 29 March 1972)

APPEAL by defendant from *Bailey, Judge,* 4 October 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was tried before the Honorable E. Maurice Braswell, Judge Presiding, at the 12 July 1971 Criminal Session of the Superior Court of Cumberland County, upon a bill of indictment charging him with possession of lysergic acid diethylamide, transportation of lysergic acid diethylamide in a motor vehicle, and sale of lysergic acid diethylamide. He pleaded not guilty. The State presented evidence and defendant testified in his own behalf and presented other evidence. The jury returned a verdict of guilty as to each offense charged in the bill of indictment. Thereafter defendant was committed for presentence diagnostic study. Defendant was sentenced by the Honorable James H. Pou Bailey, Judge Presiding at the 4 October 1971 Criminal Session of the Superior Court of Cumberland County and appealed.

Attorney General Robert Morgan by Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Public Defender for the Twelfth Judicial District Sol G. Cherry for defendant appellant.

VAUGHN, Judge.

Defendant's court-appointed counsel states that he is unable to find error to bring forward and argue on appeal. We have examined the record proper and hold that no prejudicial error appears on the face thereof.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. BRICE TILLMAN STORY

No. 7219SC88

(Filed 29 March 1972)

APPEAL by defendant from *Gambill, Judge,* April 1971 Session of Superior Court held in CABARRUS County.

Defendant was tried on a bill of indictment which charged incest with his fifteen-year-old daughter. From a verdict of guilty and judgment imposing a prison sentence within the limits provided by law, defendant appealed.

Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.

Webster S. Medlin for defendant appellant.

VAUGHN, Judge.

Defendant's court-appointed counsel brings forward no assignments of error but does ask that the Court review the sufficiency of the evidence and the charge of the court. This we have done and find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

RUSSELL C. WALTON, JR., AND WIFE, MARGIE G. WALTON v. EZRA MEIR AND WIFE, VIOLET S. MEIR

No. 7210SC224

(Filed 26 April 1972)

1. **Highways and Cartways § 11— neighborhood public road — summary judgment**

In an action to have a ten-foot wide dirt road on defendants' property which leads to plaintiffs' property and dwelling declared a neighborhood public road under the provisions of G.S. 136-67 relating to roads serving "a public use and as a means of ingress and egress for one or more families," defendants' motion for summary judgment was properly allowed where the uncontradicted evidence at the hearing on the motion established that, although there may have been some occasions since 1908 or 1910 that the road was used by the public, the road was being used exclusively by defendants' predecessor in title as a driveway to his house when the pertinent provisions of G.S. 136-67 were passed in 1941 and 1949, that in 1953 plaintiffs' predecessor in title built a house on the property now owned by plaintiffs and began using the road as a driveway with the permission of defendants' predecessor in title, and that at present the road serves only as a driveway for defendants and, until obstructed, as a driveway for plaintiffs, their guests and invitees, the evidence disclosing that the road serves an essentially "private" as opposed to a "public" use.

2. **Highways and Cartways § 11— neighborhood public road — action to discontinue use**

Where it does not appear that a road was a neighborhood public road when the pertinent provisions of G.S. 136-67 were passed or since, there was no necessity for any action or proceeding under G.S. 136-68 to "discontinue" its use.

3. **Injunctions § 14— permanent restraining order — motion and notice of hearing**

In an action to have a road on defendants' property declared a neighborhood public road wherein summary judgment was entered in favor of defendants, the court erred in permanently enjoining plaintiffs from using or attempting to use the road where there was no evidence that plaintiffs were using or attempting to use the road other than by this court action, and there was no motion or notice given of a hearing on a motion for such a restraining order.

APPEAL by plaintiffs from *Braswell, Judge,* 18 October 1971 Civil Session of Superior Court held in WAKE County.

This appeal represents the latest episode in a protracted course of litigation between these parties, who are adjoining landowners, going back to an arbitration agreement entered into 21 April 1966. Since that time, the parties have appealed to

this court on three occasions and have once petitioned the Supreme Court for a writ of certiorari, which was denied. For an understanding of the events, proceedings and other matters preceding the present appeal, reference should be made to the following cases: *Meir v. Walton,* 2 N.C. App. 578, 163 S.E. 2d 403 (1968), *cert. denied,* 274 N.C. 518; *Meir v. Walton,* 6 N.C. App. 415, 170 S.E. 2d 166 (1969); and *Walton v. Meir,* 10 N.C. App. 598, 179 S.E. 2d 834 (1971).

The facts necessary for an understanding of the present appeal are as follows: The plaintiffs (Waltons) and defendants (Meirs) are the owners of adjoining tracts of real property in Wake County, North Carolina, abutting State Road #1650 (Reedy Creek Road). The Waltons' tract directly fronts on this state public road for a distance of over four hundred feet. A ten-foot wide dirt road or path, the subject of the present appeal, leads from the Reedy Creek Road onto the lands of the Meirs, just inside of the boundary line between the Meir and the Walton tracts of land. (The Waltons alleged in their complaint that this road or path "is commonly known as Trinity Road," but the Meirs denied this allegation, and we shall refer to it simply as the "dirt road" or "road" in this opinion.)

In their complaint filed 21 November 1969, the Waltons alleged that this dirt road leads from the Meirs' land to their own and thence to their occupied dwelling and is a "neighborhood public road" within the meaning of G.S. 136-67. It was further alleged:

> "7. That said neighborhood public road is a dirt road which has been in existence over 70 years next preceding the institution of this action.
>
> 8. That said road is commonly known as Trinity Road by the members of the public who have used it.
>
> 9. That for a period of at least fifty years Trinity Road extended over a distance of approximately one mile between Reedy Creek Road and Ebenezer Church Road, but after October, 1954, said road was no longer usable over its entire length in that the road became obstructed by trees felled by Hurricane Hazel.
>
> 10. That up until October, 1954, Trinity Road was freely, openly and visibly used by members of the public

who wished to travel from Reedy Creek Road to Ebenezer Church Road; that many people used said road to transport timber and pulpwood to a mill lying in the vicinity of the intersection of Trinity Road and Ebenezer Church Road.

11. That the portion of the road which remained after Hurricane Hazel remained in use by the public to reach a fishing pond, by Carolina Power and Light Company for maintenance of its power lines, by Reedy Creek Park Wardens, by horseback riders coming in and out of the park area, and by farmers who drove their machinery on said road.

12. That at all times hereinabove and hereinafter set out the use of the road by the public and the plaintiffs has been open, visible, notorious, and without the permission of the owners of the land over which Trinity Road has run.

13. That the plaintiffs relying on Trinity Road as a public road built and occupied a dwelling house abutting said road, and said road is now a necessary means of ingress to and egress from plaintiffs dwelling.

14. That Trinity Road is a neighborhood public road within the intent and meaning of North Carolina General Statute 136-67 in that:

(a) It has been a portion of the public road system of the State for over seventy years.

(Note: The word 'system' in paragraph (a) was stricken upon verbal motion of the plaintiffs at the hearing.)

(b) It has remained open and in general use as a necessary means of ingress to and egress from the dwelling house of the plaintiffs.

15. That on or about November, 1969, the defendants by and through their agents and employees obstructed said road by the following actions:

(a) By erection of a fence along the property line between plaintiff's and defendant's boundary line, said fence running across and obstructing the road.

(b) By pushing a large mound of soil onto said road.

(c) By pushing dirt onto said road at another point to the extent that the road is obliterated and impassible by an automobile for a distance of approximately 150 feet.

16. That the plaintiffs have been damaged by the actions of the defendants who have obstructed a neighborhood public road in that the plaintiffs have been denied necessary ingress and egress to their property and dwelling.

17. That the plaintiffs are informed and believe that the obstructions placed in said road by the defendants have been placed there wrongfully and if they are allowed to remain there the plaintiffs will be damaged.

18. That the plaintiffs are informed and believe, and upon information allege that it is the duty of the defendants to remove said obstructions, as well as to pay the plaintiff all damages which he may sustain on account of the obstruction until the same is removed."

For these acts, the Waltons sought an order requiring the removal of the alleged obstructions and damages in the amount of $10,000. The Meirs in their answer to the complaint denied each of the above-quoted allegations and as a first further defense and plea in bar, set out the plea of *res judicata* based upon the prior actions between these same parties. The question of *res judicata* came on to be heard by Judge Clarence W. Hall at a civil session of superior court held in Wake County. There, judgment was entered sustaining the plea and dismissing the Waltons' action, but, on appeal, this court reversed the judgment on the grounds that the prior action "only established the location of the boundary line between the parties' property and did not determine or foreclose a future determination of whether the road in question is a neighborhood public road." *Walton v. Meir,* 10 N.C. App. 598, 179 S.E. 2d 834 (1971).

As a second further answer and counterclaim, the Meirs incorporated by reference the allegations of the first further answer and defense (which dealt primarily with the pre-existing factual situation and litigation between the parties) and further alleged that the Waltons had ingress to and egress from their dwelling to State Road #1650 over a dirt road located entirely on their own property; that Russell Walton, one of the plaintiffs,

had threatened to do physical injury to the Meirs; that this action was brought for the sole purpose of harassing the Meirs; and that the Meirs had incurred considerable legal expense in the extended litigation between the parties.

Whereupon, the Meirs prayed that the Waltons' action be dismissed and that "the Court issue its preliminary order restraining the prosecution of this action or any other legal action arising out of said boundary line dispute and controversy and that upon the trial of this action that the Court issue a permanent injunction restraining the plaintiffs from prosecuting or harassing in any manner the defendants arising out of the boundary line dispute or the dirt path." Reply to this counterclaim denying the material allegations was filed on 9 February 1970.

The cause came on to be heard before Judge Braswell at the 19 October 1971 Civil Session of Superior Court held in Wake County upon an "oral motion for Summary Judgment" by the Meirs. Four witnesses testified at the hearing, two of whom were called by the Meirs and two of whom were called by the court. The record is silent as to why the court called witnesses. The Waltons were given the opportunity to offer evidence but called no witnesses and offered no other type of evidence, other than that attempted to be elicited on cross-examination of the witnesses offered by the Meirs and the court. In the Waltons' brief, however, there are indications that the Waltons and the Meirs did offer into evidence certain exhibits about which there had been an agreement at a pretrial conference, but no exhibits were filed with the record on appeal in this case. At the conclusion of the evidence and argument of counsel, Judge Braswell entered a judgment filed 22 October 1971, granting the Meirs' motion for summary judgment, finding as a fact and concluding as a matter of law that the dirt road in question was not a "neighborhood public road" within the meaning of G.S. 136-67, declaring that the Waltons were not entitled to its use, and permanently enjoining them from using or attempting to use said road. To the findings of fact and conclusions of law, the Waltons excepted and appealed to the Court of Appeals.

Jordan, Morris & Hoke by John R. Jordan, Jr., and Kenneth B. Oettinger for plaintiff appellants.

Manning, Fulton & Skinner by Howard E. Manning and John B. McMillan for defendant appellees.

MALLARD, Chief Judge.

There was no exception, assignment of error or argument about the manner in which the motion for summary judgment was made or served (it was an oral motion made in open court), or about the manner in which the hearing was conducted or testimony presented. Although it does not appear that the movants complied with G.S. 1A-1, Rule 7(b)(1), requiring that motions made prior to a hearing or trial be in writing, or G.S. 1A-1, Rule 56(c) relating to service of motions for summary judgment, the parties stipulated that "this matter was duly heard" and that "his Honor had authority to hear this matter and to enter orders and a judgment therein"; therefore, the Waltons have not raised these procedural questions, and we will not disturb the judgment entered herein on procedural grounds. See, *Ketner v. Rouzer,* 11 N.C. App. 483, 182 S.E. 2d 21 (1971).

We do feel, however, that it is appropriate to note the following: Under Rule 56(e), "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." In this proceeding the Waltons became the "adverse party."

The record does not reveal that the Waltons called any witnesses or presented evidence in any other form (with the possible exception of some exhibits), and summary judgment against them on that ground may have been appropriate. Four witnesses were called, however, two by the Meirs and two by the court, and the judgment herein appears to have been predicated solely upon their testimony and the pleadings of the parties; in effect, the hearing judge conducted a trial without a jury to determine if there was a genuine issue as to any material fact to be tried by the jury. Although *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971), is authority for the admission of oral testimony at a hearing on a motion for summary judgment, by virtue of Rule 43(e), we think that there is some danger in an overzealous use of such testimony.

In 6 Moore's Federal Practice (2d Ed.), ¶56.02[9], p. 2042, concerning the taking of oral testimony on a motion, it is said:

"Rule 43(e) provides that when a motion is based on facts not appearing of record the court may hear the matter on affidavits or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. The provisions of Rule 43(e) *can be* used in supplementing a summary judgment hearing through the use of oral testimony. This procedure should normally be utilized *only if a small link of evidence is needed,* and *not* for a long drawn out hearing to determine whether there is to be a trial."

In 6 Moore's Federal Practice (2d Ed.), ¶56.11[8], pp. 2206 and 2207, it is said:

"Also the summary judgment procedure is apt to be wasteful and burdensome if the summary judgment hearing is a protracted hearing, in effect a trial, to determine that a trial must be held. Of course, if all the parties desire to and do turn the summary judgment into a court trial they cannot be heard to object. In that event the court should make findings of fact and conclusions of law in accordance with Rule 52. * * * "

Federal Rule 52(a) contains the following provision which is not specifically set out in the North Carolina Rule 52: "Findings of fact and conclusons of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." The Waltons do not assign as error the fact that the trial judge made findings of fact and conclusions of law but do contend that these findings and conclusions were erroneous.

In view of the condition of the record and the stipulations of the parties, we will proceed to consider the appeal on its merits.

To the proceedings and judgment, the Waltons have taken thirty-one exceptions, grouped under thirteen assignments of error, and present two questions for decision on appeal:

"1. Did the Trial Court err in concluding that no genuine issue as to any material fact exists for the jury to determine and that the defendants' Motion for Summary Judgment ought to be allowed?

2. Did the Trial Court err in allowing the defendants' Motion for Summary Judgment and declaring as a Finding

of Fact and Conclusion of Law that Trinity Road is not a neighborhood public road within the meaning of North Carolina General Statute Sec. 136-67?"

We will consider the two questions together.

The pertinent portions of G.S. 136-67, as rewritten in 1941 and again in 1949, read as follows:

> "*Neighborhood public roads.*—All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the State Highway Commission, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a *public use* and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads and they shall be subject to all of the provisions of §§ 136-68, 136-69 and 136-70 with respect to the alteration, extension, or discontinuance thereof . . . . Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially *private use,* and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the State Highway Commission and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby specifically excluded from the definition of neighborhood public roads, and the owner of the land, burdened with such portions and segments of such old roads, is hereby invested with the easement or right of way for such old roads heretofore existing." (Emphasis added.)

This statute declares three distinct types of roads to be neighborhood public roads. The first portion of the statute

concerns only those roads which were once a part of the "public road system." The pleadings, after the allowance of the Waltons' motion to strike the word "system" from paragraph 14(a) of the complaint, do not assert that the dirt road in question was ever a part of the "public road system," and the evidence adduced at the hearing below tended strongly to show that it was not; therefore, this portion of G.S. 136-67 is not applicable to the factual situation before us.

The second type of road declared by the statute (G.S. 136-67) to be a neighborhood public road was all those roads that had been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare. There is no allegation or proof that the Department of Public Welfare ever did anything concerning the dirt road in question. Therefore, this portion of the statute is not applicable in this case.

The third type declared by the statute (G.S. 136-67) to be a neighborhood public road (after the 1941 and 1949 revisions) was all those roads outside the boundaries of municipal corporations which served a public use and as a means of ingress and egress for one or more families. In their brief the Waltons contend that their claim for relief is based on this portion of the statute, the portion relating to the third category of neighborhood public road.

If the evidence at the hearing in the superior court discloses that the dirt road in question serves an essentially "private" as opposed to a "public use," and that there was no genuine issue as to any material fact concerning this use, Judge Braswell did not err in granting the Meirs' motion for summary judgment, declaring that said road was not a neighborhood public road. See G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp., supra;* and *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

The evidence adduced at the hearing in the superior court is sumarized as follows, except where quoted: The first witness, called by the defendants Meir, was a highway engineer who had been employed by the State Highway Commission since 1937. His uncontroverted testimony tended to show that the dirt road in question had never been a part of the State or county system. He testified as follows:

" * * * Based upon the records of the State Highway Commission and the studies that I have made, Trinity Road has never crossed Reedy Creek Road and extended in a northeasterly direction. To my knowledge that section has never been maintained by the State or a part of the State System. It does not show anywhere on the records of the State Highway Commission in the inventories made of the county road system that were taken over by the State to have ever been taken over by the State."

The Meirs' other witness was Mrs. Sara Busbee Wyatt, a former employee of Mr. W. Brantley Womble, the Meirs predecessor in title to the tract of land on Reedy Creek Road. She testified, among other things, that in 1936 she became familiar with the tract of land now owned by the Meirs as well as the tract presently owned by the Waltons; that Trinity Road at that time "dead ended" at the Womble (Meir) property; that there was an old log cabin on the property when Mr. Womble bought the land but that was no "dwelling" at that time; that Mr. Womble and his wife had by 1949 used the old log cabin as a "residence" and had a driveway from this residence to the point where Trinity Road dead-ended on the Reedy Creek Road; that there was no road leading east from this driveway and no road in the vicinity of the driveway; that she had never seen a road leading to the present site of the Walton house until a house was constructed there in the 1950's and that the Walton tract prior to that time was only woodland and grazing land. On redirect examination, she testified that the driveway leading to the Womble house (the old cabin) was on Mr. Womble's land and went only to the cabin and made at circle at the doorway.

The court's evidence consisted of the testimony of two witnesses, Mr. Douglas F. Humphreys and Mr. Walter Haley. Humphreys testified that he was the Waltons' predecessor in title and had acquired the piece of property now owned by the Waltons in 1952; that at the time he purchased the property, there had been no dwelling house on it and the land was not being tended as farmland at that time—"it was just pines"; but that he had built a house on the property in 1952 and 1953 and had sold the property to the Waltons in 1958.

He further testified that he had known Mr. Brantley Womble, the adjoining property owner in 1952; that at the time he had bought his land, a road had run from Reedy Creek Road to the Womble house, but that it "went all the way through and to the other road"; that said road left the Womble property and went onto his property and thence into the Umstead State Park but that it was difficult to say if it went back on the Womble property again "because there was always a question about the line right there"; that there was no dwelling house located "in the park on that road"; that he had used the road to go to the Ebenezer Church Road three or four times a week; that the road had gone through to the Mt. Olive Baptist Church graveyard "located back there" almost at the end of his own property; that someone had once put gravel on the road and that it could be travelled by automobile; that some weeks fifteen or twenty people "would come through there," but that there were no other houses on the road at that time; and that the graveyard was now located on land owned by the Waltons and was about 300 or 400 feet from the Ebenezer Church Road.

On cross-examination, Humphreys testified that both he and Womble had used the dirt road to get to their respective houses and that no other way was available at the time; and further, "(i)n answer to your question whether I got permission from anyone to use the Old Trinity Road, I didn't exactly get permission from Mr. Womble. He came over and when I was, when I started building the house and asked me not to cut, said, 'Don't cut another road. We will use this one. It doesn't belong to me and doesn't belong to you. Somebody has to maintain it.'"

Court's witness Haley, a man 78 years of age, testified that, among other things, he lived about two or three miles from the intersection of "what is known as Trinity Road and the Reedy Creek Road"; that he knew where Mr. Brantley Womble had lived; that a "path" had led to the Womble house and then beyond to "the Cooke's Mill," which had last been in operation thirty or thirty-five years ago; that he thought the mill had been closed down before the Depression of the 1930's, but that it could have been several years before that; that there had been only one "dwelling house" between the Reedy Creek Road and the Ebenezer Church Road at that time but that he thought that the house (which had been located on the Womble-Meir tract)

had been torn down or had fallen down "prior to the time Roosevelt took office" but "not so long ago as twenty or twenty-five years ago"; that he was not familiar with the graveyard that had been testified to by Humphreys and had never seen such a graveyard; that he had last been through "that road" in 1909 or 1910 and not thereafter; and that in 1910, one could drive a wagon over the road.

After a brief cross-examination and redirect examination of this witness, the court gave the Waltons an opportunity to offer evidence, but they did not do so at that time.

The Waltons' primary contention is that the testimony we have attempted to summarize above was sufficient to raise a genuine issue as to a material fact and thereby withstand the Meirs' motion for summary judgment. We have reviewed the entire record in this case thoroughly, however, and though the testimony elicited at the hearing is not entirely free from all conflict and confusion, we think that the *material* facts were uncontroverted. If believed, Haley's testimony would tend to show that in 1910 or before, a dirt road, a wagon road presumably used by the public, crossed a portion of the tract now owned by the Meirs and went to a mill, but Haley further testified that he last went over this road in 1908 or 1910 and that the mill "was operated last along about maybe 1930 or 1935." There was only a single dwelling house near the road at that time, and, not only was it situated on the Meir and not the Walton tract, but it had fallen down "prior to the time Roosevelt took office."

Mrs. Wyatt's testimony, if believed, would tend to show that from 1937 to the "early 50's," there was no dwelling house on the Meir (Womble) tract except for the log cabin occupied by the Wombles about 1949; that there was no occupied dwelling on the Walton tract at all; and that the dirt road served only as a private driveway to the Womble house and did not go beyond. In addition, Judge Braswell found as a fact from an exhibit which was not included in the record on appeal:

> "That from *plaintiffs' Exhibit 2,* a map as recorded in Book of Maps 1967, Volume 1, page 39 Wake County Registry, it is made to appear that the roadway in question is referred to as a ten foot soil path and lies exclusively on the defendant Meir's side of the established boundary line;

and *that no portion of said ten foot soil path is shown to be leading to any part of the plaintiff Walton's property* . . . ." (Emphasis added.)

Humphreys' testimony, if believed, would tend to show that he owned the tract of land presently owned by the Waltons from 1952 to 1958; that there was no dwelling house on this land until he caused one to be built there in 1953; that, *at that time,* the road from the state road onto the Meir (Womble) tract went beyond the Meir tract onto the Walton (Humphreys) tract and thence to the Ebenezer Church Road and a graveyard; and that he had used this dirt road as a means of ingress to and egress from his own house after it was constructed. Furthermore, the quoted portion of Humphreys' testimony tends to show that his use of any portion of the dirt road across Womble's property was permissive.

Based upon the evidence adduced at the hearing, Judge Braswell in his "findings of facts" stated the material uncontroverted facts and concluded as a matter of law, among other things, that:

" . . . G.S. 136-67 in its present form was passed in 1949 by the General Assembly, and that in 1949 Trinity Road extended, or that road in controversy by whatever name it may be referred to, did not exist;

That if it may be contended that any portion of said road did exist, it existed only as a private driveway to the Womble log cabin for the exclusive use of the Wombles and guests and not for the use of the public or neighborhood; and that the State Highway Commission never maintained the roadway or driveway into the Womble place; that from at least mid 1930's to August, 1953, the roadway was not in general use as a necessary means of ingress to or egress from the dwelling house of one or more families and that between said years the roadway did not serve any public use or any dwelling house occupied by any family or families.

That the roadway has never been a portion of any State or county road system and has never been maintained by the State Highway Commission; that if it be considered that a roadway existed in any fashion between 1935 and 1953, that the same did not serve as necessary means of

ingress to and egress from an occupied dwelling house and as such was specifically excluded from being a neighborhood public road under the proviso of G.S. 136-67 and that the owner of the land in the interim years was invested with the easement of right-of-way for such old road if it theretofore existed; that the owner of the property embraced by the roadway, if it existed, in 1949 was Brantley Womble;

* * *

And that no issue of fact exists for the jury to determine; and that the defendants motion for summary judgment ought to be allowed."

We note that what Judge Braswell called findings of fact were not findings in the sense of factual determinations of contradictory evidence, and although these "findings" included statements of some irrelevant "findings," as contended by the Waltons, they did accurately set forth all the material undisputed facts relating to the question of whether the dirt path was a neighborhood public road, on which the decision turned. We hold that Judge Braswell's statement of the material facts is based on the uncontroverted evidence and find no error in his conclusion that there is no genuine issue as to any material fact in this case for a jury to determine and, therefore, that the Meirs are entitled to a judgment as a matter of law. There is no evidence or admission in the pleadings in this record on appeal that the dirt road in question, either in 1941 or 1949, or at the date of this hearing, served anything other than a private use.

In 1933, the Legislature created and defined two types of neighborhood public roads, but it was not until 1941 that the statute, G.S. 136-67, was rewritten to include " . . . all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families regardless of whether the same have ever been a portion of any state or county road systems . . . . " (P.L. 1941, Ch. 183) It is this portion of the statute (after the 1949 revision) that the Waltons contend makes the dirt road in question a neighborhood public road. In the 1941 Act, as the last part of the same sentence in which all three types of neighborhood public roads are defined, there

appears for the first time the following: "Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use." In 1949 revision, this proviso again was included and added thereto was the language contained in the present statute, G.S. 136-67, after the words "private use" as is hereinabove quoted. The Act of 1941, as rewritten in 1949, makes clear the legislative intent that no road serving an essentially "private use" is embraced in the definition of neighborhood public road.

[1] The evidence discloses that in 1941 and 1949 the Meirs' predecessor in title (but not the Waltons' predecessor in title) used a dirt roadway or path as a driveway leading from the State road to his cabin or house. At present, it appears that the road serves only as a driveway for the Meirs and, until it was obstructed, as a driveway for the Waltons, their guests and invitees. Such a road or driveway is not a neighborhood public road within the meaning of G.S. 136-67. Nor have the plaintiffs acquired any prescriptive rights or easement over the land of the defendants since Humphreys' completion of the house on the Walton tract in 1953.

In *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371 (1946), Justice Barnhill (later Chief Justice), said:

> "The General Assembly is without authority to create a public or private way over the lands of any citizen by legislative fiat, for, to do so, would be taking private property without just compensation. *Lea v. Johnson,* 31 N.C., 15. In construing the amendment, therefore, we may not assume that such was its intent. It follows that the 1941 Act, ch. 183, Public Laws 1941, necessarily refers to traveled ways *which were at the time established easements or roads or streets in a legal sense. It cannot be construed to include ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor to those adversely used for a time insufficient to create an easement.*
>
> * * *
>
> Furthermore the proviso expressly excludes streets and roads which serve an essentially private use. While there is evidence that the mail carrier used the old road during 1906 and 1907 and that members of the public trav-

eled both the old and the new road, *all the evidence tends to show that the road was laid out and maintained primarily as a convenience for those who resided on the Speight and Anderson tracts, an essentially private purpose. No continuous use for a public purpose is disclosed.*" (Emphasis added.)

Although the *Speight* case was decided before the 1949 Amendment to G.S. 136-67, it contains an excellent discussion of the concept of the "neighborhood public road." See also, *Raynor v. Ottoway,* 231 N.C. 99, 56 S.E. 2d 28 (1949), wherein it was held that a jury finding that a road had been constructed with unemployment relief funds was not, standing alone, sufficient to sustain a judgment that a cartway was a neighborhood public road in the absence of a finding that it served "a *public* rather than a *private* use." (Emphasis added.)

The cases cited by the plaintiffs Walton are distinguishable. In *Smith v. Moore,* 254 N.C. 186, 118 S.E. 2d 436 (1961), the Court specifically noted that there was sufficient evidence to support but not compel a finding that the road in question served a *public* purpose and that a motion for directed verdict had been correctly denied. *Wetherington v. Smith,* 259 N.C. 493, 131 S.E. 2d 33 (1963), was a special proceeding under G.S. 136-68 and G.S. 136-69 to establish a cartway over the lands of another *to* a public road or a neighborhood public road. *Mosteller v. R.R.,* 220 N.C. 275, 17 S.E. 2d 133 (1941), concerned a portion of an *established highway* which had been abandoned by the State Highway Commission, and is not favorable in its result to the Waltons' position. In *Long v. Melton,* 218 N.C. 94, 10 S.E. 2d 699 (1940), access to a *relocated section of a State highway,* upon which the defendants' land had formerly abutted, was at issue; and in *Davis v. Alexander,* 202 N.C. 130, 162 S.E. 372 (1932), it was held that abutting landowners have an easement over a *public highway abandoned* by the State Highway Commission. These cases have little application to the present controversy.

[2] In the case before us, the admissions in the pleadings and the uncontroverted evidence sufficiently establish that the ten-foot wide dirt road involved herein is not and never has been a neighborhood public road under the provisions of G.S. 136-67. While there may have been occasions since 1908 or 1910 that this road was used by some members of the public, it does not

appear that it was a neighborhood public road in 1941 or 1949 or since, and therefore, contrary to the Waltons' contention, there was no necessity for any action or proceeding under G.S. 136-68 to "discontinue" its use.

In its judgment the court said:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of Ezra Meir and wife, Violet S. Meir for summary judgment is hereby allowed. It is specifically ORDERED AND DECLARED that the ten foot soil path, or Trinity Road extended, or by whatever other name it may have been described in the pleadings or evidence, is not a neighborhood public road within the meaning of G.S. 136-67; and it is specifically declared that the plaintiffs, Russell C. Walton, Jr., and wife Margie G. Walton, are not entitled to any use of that ten foot soil path as located upon plaintiffs' Exhibit 2, being map recorded in Volume 1, page 39, 1967, Wake County Registry; and the plaintiffs, Russell C. Walton, Jr. and wife, Margie G. Walton are permanently enjoined from using or attempting to use said ten foot soil path as located upon plaintiffs' Exhibit 2, being map recorded in Volume 1, page 39, 1967, Wake County Registry."

[3] In the counterclaim filed by the Meirs, there was no specific request that the Waltons be permanently enjoined from using or attempting to use the dirt road involved in this action. It is conceded, however, that a specific request in the pleadings is not necessary under G.S. 1A-1, Rule 54(c). The Meirs did request, however, that the court restrain the plaintiffs from "prosecuting or harassing in any manner the defendants arising out of the boundary line dispute or the dirt path." There was no evidence offered at this hearing on the "oral motion" of the Meirs for summary judgment that the Waltons were using or attempting to use (other than by this court action) the dirt road involved in this action. On this record there was no motion for or notice given of a hearing on a motion for a restraining order to enjoin the Waltons from using or attempting to use the dirt road involved in this action. Therefore, it was improper, under these circumstances, for the court to enter its restraining order, and that portion of the judgment reading as follows is vacated:

" * * * (A)nd the plaintiffs, Russell C. Walton, Jr. and wife, Margie G. Walton are permanently enjoined from using or attempting to use said ten foot soil path as located upon plaintiffs' Exhibit 2, being map recorded in Volume 1, page 39, 1967, Wake County Registry."

As thus modified, and for the reasons hereinabove set out, the judgment is affirmed.

Modified and affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WESLEY A. FOYE

No. 728SC318

(Filed 26 April 1972)

1. **Searches and Seizures § 3— affidavit for search warrant — confidential informant**

Affidavit of an A.B.C. officer that he had been supplied information by a confidential informant that defendant has narcotic drugs on his person and on described premises, that the informant has personal knowledge that narcotic drugs are on defendant's person and premises, and that the informant has previously supplied information resulting in the seizure of narcotic drugs and in conviction, *held* sufficient to enable the magistrate to make an independent determination that probable cause existed for the issuance of a warrant to search defendant's premises for narcotics. G.S. 15-26(b).

2. **Searches and Seizures § 3— search warrant — description of contraband — "narcotic drugs"**

Warrant authorizing a search for "narcotic drugs, the possession of which is a crime" described the contraband with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the U. S. Constitution and Article I, § 20 of the N. C. Constitution.

3. **Narcotics § 4— possession of heroin — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury in a prosecution for unlawful possession of heroin where it tended to show that a matchbox found on defendant's person contained heroin, and that a search of defendant's premises revealed 54 packages containing heroin, syringes and needles, a paper bag containing several bloody balls of cotton, and an address book containing packages of heroin.

State v. Foye

ON *certiorari*, upon application of defendant, to review judgment of *Cohoon, Judge,* 22 March 1971 Session of Superior Court held in LENOIR County.

The defendant was charged in a bill of indictment, proper in form, with unlawful possession of a narcotic drug, to wit: heroin. The defendant, through his court-appointed counsel, tendered a plea of not guilty. The evidence for the State tended to show that on 7 January 1971, Lenoir County A.B.C. Officer Paul W. Young, acting pursuant to information received from a confidential informant, obtained a warrant at 3:00 p.m. for the search of defendant's house on 405 Holloway Drive in Kinston, North Carolina. Armed with this search warrant and accompanied by officers from the Lenoir County Sheriff's office and the Kinston Police Department, Officer Young immediately proceeded to the premises at 405 Holloway Drive where he executed the search warrant at about 3:20 p.m. A search of defendant's person and premises was conducted after the search warrant had been read to him, and he had been advised of his constitutional rights. A search of defendant's person produced a matchbox in which five small pink capsules containing a white powder was found. A search of the premises revealed 54 packages of white powder, syringes and needles, a brown paper bag containing several bloody balls of cotton and kleenex, and an address book which contained packages of white powder. Expert testimony tended to show that the white powdery substances contained various percentages of heroin. State's exhibit No. 7 was an envelope containing marihuana and a book of cigarette papers, but it was not introduced into evidence.

The defendant testified that he was a student at Fayetteville State University at the time of his arrest but was visiting at his home in Kinston; that he and the co-defendant Thompson were in his bedroom when one Holloway came in and began to roll a marihuana cigarette; that defendant would not allow Holloway to smoke it in the house so he left; that Holloway returned about 30 minutes later and wanted to use defendant's phone; that Holloway laid his address book on the night stand in the bedroom and defendant had never seen that address book before Holloway took it out; that Holloway lit a cigarette in the house but "I didn't notice him putting the matches that he had on the night table but evidently he did because I didn't know anything about the matchbox containing five packages of whatever it was"; that he picked up the matchbox along with his

cigarettes off the night table when he left the room to make the telephone call; and that "I do not know how the various materials that were found in my bedroom got there." The defendant also introduced the evidence of the co-defendant Thompson which tended to corroborate his testimony.

From a verdict of guilty and judgment of imprisonment for five years entered thereon, the defendant appealed to the Court of Appeals. Due to the inability of defendant's counsel to obtain a trial transcript within the time allowed to perfect his appeal, a petition for writ of certiorari was allowed on 14 January 1972.

Attorney General Morgan, by Assistant Attorney General Eatman, for the State.

Everette L. Wooten, Jr., for defendant appellant.

MORRIS, Judge.

Defendant's principal assignment of error concerns the refusal of the trial court to suppress any evidence seized in the search of the premises located at 405 Holloway Drive on 7 January 1971. He contends that the affidavit of A.B.C. Officer Young, upon which the search warrant was issued, was insufficient to enable the magistrate to make an independent determination of probable cause; and that the affidavit was defective in that it lacks the particular description of the things to be seized resulting in the search warrant's becoming a general search warrant prohibited by the Fourth Amendment to the Constitution of the United States and by Article I, § 20, of the Constitution of North Carolina.

In evaluating the showing of probable cause necessary to support a search warrant, we are initially reminded of the often times quoted admonition of *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965):

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers

in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S., at 108.

[1] The affidavit as appearing in the record on appeal reads in part as follows:

"Paul W. Young, Lenoir County A.B.C. Officer, being duly sworn and examined under oath, says under oath that he has probable cause to believe that Wesley Foye has on his premises and on his person certain property, to wit: narcotic drugs, the possession of which is a crime, to wit: possession of narcotic drugs, 1-7-71, 405 Holloway Dr., Kinston, N. C.

The property described above is located on the premises and on the person described as follows:

A one story house with brick front and shingles on side. The facts which establish probable cause for the issuance of a search warrant are as follows: Based on information furnished by a confidential informer who has worked on narcotic drugs for the City of Jacksonville, N. C., his information resulted in the arrest and seizure of narcotic drugs and convictions. This informer has personal knowledge that narcotic drugs are on the premises and on the person as described above on this date. As result of this informer's information in the year of 1970, to the Jacksonville, N. C. Police Dept. narcotic drugs were seized, arrest was made and conviction resulted."

Based upon the information contained in this affidavit, the Clerk of Superior Court of Lenoir County found probable cause for a search and issued a warrant. The affidavit portion of the search warrant was on one side of the sheet of paper, and the warrant portion was on the reverse. The warrant portion ostensibly incorporated by reference the description of the items to be searched for and the place to be searched contained in the affidavit portion.

When this issue was raised in the Superior Court, the jury was sent out, and a voir dire hearing was conducted. All parties would agree that the testimony during voir dire, taken in the light most favorable to the State, was certainly more persuasive than the affidavit. In fact the trial court, in its order denying defendant's motion to suppress, concluded "1. That the Affidavit, while not prepared in the most desirable manner, does sufficiently indicate the basis for the finding of probable cause" and "5. That while the better practice will always be for the issuing official to set forth in the affidavit more detailed information comprising the grounds for issuing the Warrant, sufficient information was related under oath to the issuing official in this case before preparation of the Affidavit to [indicate] probable cause for the issuance of said Warrant." We are inclined to agree. G.S. 15-26(b) relating to the contents of search warrants specifically requires:

> "(b) An affidavit signed under oath or affirmation by the affiant or affiants and *indicating the basis for the finding of probable cause* must be a part of or attached to the warrant." (Emphasis supplied.)

The affidavit attached to the warrant sufficiently indicates the basis for the finding of probable cause under G.S. 15-26(b). The information given to the affiant by an unidentified informer and recited in the affidavit, if true, is sufficient to establish probable cause. The Clerk of Superior Court was certainly entitled to rely upon the sworn statement of the affiant, an A.B.C. officer who appeared before him in person, in concluding that the affiant was correctly reciting what had been told him by his informer. Personal and recent observations by an unidentified informer of criminal activity show that the information was gained in a reliable manner and was more than a "bald and unilluminating assertion of suspicion." *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969). Finally, the affidavit stated that the informer had furnished information in the past which had resulted in the seizure of narcotic drugs and subsequent conviction, all of which tended to show that the informer was credible and his information reliable. We are of the opinion that the affidavit in the present case contained the material and essential facts necessary to support the finding of probable cause before this search warrant was issued. *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed.

2d 723, 84 S.Ct. 1509 (1964); *Spinelli v. United States, supra; United States v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 (1971); *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820 (1971); *State v. Shirley,* 12 N.C. App. 440, 183 S.E. 2d 880 (1971), cert. den. 279 N.C. 729 (1971); *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814 (1971).

[2] Defendant contends that the search warrant was insufficient to justify seizure and introduction in evidence of heroin, since the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. We find this contention to be without merit. The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and of Article I, § 20, of the Constitution of North Carolina *(State v. Shirley, supra),* and was within the provision of G.S. 15-26(a) which requires that:

> "(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made."

The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. *Marron v. United States,* 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927). In *Stanford v. Texas,* 379 U.S. 476, 485, 13 L.Ed. 2d 431, 85 S.Ct. 506 (1965), reh. den. 380 U.S. 926, 13 L.Ed. 2d 813, 85 S.Ct. 879 (1965), involving a seizure of some 2000 pieces of literature relating to Communist Party operations, the United States Supreme Court held that the particularity requirement "is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for the seizure is the ideas which they contain." But when first amendment rights are not involved, the specificity requirement is more flexible. The Court in *Stanford* refused to decide that the description "cases of whiskey" was too generalized or whether the description of the things to be seized would not have

been particular enough to pass constitutional muster had the things been weapons or narcotics. Id. at 486; see *Steele v. United States,* 267 U.S. 498, 69 L.Ed. 757, 45 S.Ct. 414 (1925). "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods." *Nuckols v. United States,* 69 App. D.C. 120, 122, 99 F. 2d 353, 355 (1938), cert. den. in *Floratos v. United States,* 305 U.S. 626, 83 L.Ed. 401, 59 S.Ct. 89 (1938); *United States v. Joseph,* 174 F. Supp. 539 (D.C.E.D.Pa. 1959), aff'd 278 F. 2d 504 (3d Cir. 1959), cert. den. 364 U.S. 823, 5 L.Ed. 2d 52, 81 S.Ct. 59 (1960). Just as a warrant limited to the seizure of items directly related to a booking operation is not the kind of general search prohibited by the Fourth Amendment, we are of the opinion that a warrant empowering officers to seize a limited class of things, i.e., unlawfully possessed narcotic drugs, is not prohibited. See *United States v. Fuller,* 441 F. 2d 755 (4th Cir. 1971), cert. den. 404 U.S. 830, 30 L.Ed. 2d 59, 92 S.Ct. 74 (1971). See also *United States v. Ketterman,* D.C. App., 276 A. 2d 243 (1971), wherein a search warrant describing ".38 caliber special pistol and narcotics" was held to be sufficiently particular.

Under the circumstances of this case, the description of the search warrant with the attached affidavit is sufficiently particular, especially in light of the fact that the types and classifications of narcotic drugs seem to increase numerically almost daily and most of them cannot be definitely identified except by experts through chemical analysis. Heroin was clearly within the generic classification of "narcotic drugs" as defined by the Narcotic Drug Act, Article 5 in § 90-87(9) and (11) of the General Statutes (now replaced by the Controlled Substances Act § 90-86 to 90-113.8, effective 1 January 1972). The marihuana seized, though it was never introduced into evidence, was also a "narcotic drug." G.S. 90-87(1) and (9). The search warrant and attached affidavit in this case are in substantial compliance with statutory and constitutional requirements.

[3] Defendant also assigns as error the failure of the court to allow his motion as of nonsuit made at the close of the State's evidence and again at the close of all the evidence. We hold that there was ample evidence to require submission of the case to the jury.

No error.

Chief Judge MALLARD and Judge PARKER concur.

CITY OF BREVARD, A MUNICIPAL CORPORATION, AND L. C. CASE, BUILDING INSPECTOR OF THE CITY OF BREVARD v. JOHN F. RITTER, FRANKIE M. WAGONER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF LEWIS MOORE, EUNA ANN CANTRELL AND CHARLES MORGAN COMPANY, A CORPORATION

No. 7229SC332

(Filed 26 April 1972)

1. **Municipal Corporations § 30— private airport — construction of building — extension of nonconforming use**

In an action to restrain defendant from constructing a building containing a lounge or club for pilots and space for the storage of an airplane on property on which a private airport is operated as a nonconforming use, the evidence was sufficient to support the trial court's finding that the building would constitute an enlargement or expansion of the airport facilities in violation of a provision of a municipal ordinance prohibiting the extension of a nonconforming use.

2. **Municipal Corporations § 30— zoning ordinance — recreational use — private airport**

The operation of a private airport and construction of a pilot's lounge and auxiliary hangar do not constitute recreational uses within the meaning of a municipal zoning code provision which permits the use of land for "camps, parks, picnic areas, golf courses, and similar recreational uses," since under the doctrine of *ejusdem generis* the term "similar recreational uses" refers to something in the nature of a camp, park, picnic area or golf course.

APPEAL by defendant from *Falls, Judge,* from order entered 23 February 1972.

This action was instituted by City of Brevard (hereinafter called City) on 22 December 1971 seeking a temporary and permanent restraining order to prevent defendant Ritter from completing construction of a building on property then owned by defendants Wagoner and Cantrell upon which defendant Ritter had an option. Summons and copy of complaint were duly served on all defendants. By amendment to the complaint, plaintiffs alleged facts sufficient to warrant the issuance of a temporary restraining order without notice. Such an order was issued on 5 January 1972, and on 17 January 1972, after a hearing, was continued until a final adjudication of the cause. None of the defendants except John F. Ritter (hereinafter referred to as Ritter) answered the complaint. However, as to defendants Wagoner and Cantrell, it was stipulated that Ritter purchased the property on 3 January 1972, and the judgment entered on 23 February 1972 dismissed the action as to them.

By his answer, Ritter admitted that the lands are located within a one mile radius of the city limits of Brevard; that he had an option to purchase the land; that the City on 4 January 1965 enacted a zoning ordinance which was and is applicable to the property which is zoned R-2 Medium Density Residential District; that Ritter had requested that the property be rezoned from R-2 Residential to F-1 Flood Plain Zone, and his request had been denied; that no appeal had been attempted from said decision; that structures such as apartment complexes, a medical clinic, and the Brevard Senior High School are located in the vicinity of the lands. He denied that he had contracted with the Charles Morgan Company to construct on the land a building containing approximately 3,000 square feet and that construction had begun. He further denied that the building did not constitute the repair or rebuilding or alteration of an existing structure, nor replacement of any existing structure and constituted a violation of § 70 entitled "Non Conforming Uses" and § 51 entitled "R-2 Medium Density Residential District" of the City Zoning Ordinance. He further denied that the building did "not constitute a single family dwelling, a farm or related agricultural use, or any camp, park, picnic area, golf course or similar recreational use."

By his further answer, he averred that he had begun construction of a building on the property which would be used as a "pilot clubhouse to be used by persons now patronizing the small airport runway on the land described in the plaintiffs' Complaint, that the building under construction by the defendant Ritter will not extend or enlarge the existing airport runway nor extend nor enlarge the existing use of the airport runway and other airport facilities." He further averred that the property was then used and would continue to be used as recreational premises "which are lawful within the terms of Section 51 of the Brevard zoning ordinance."

The parties agreed that the matter would be heard upon facts stipulated and submitted to the court and that "the application and trial for a permanent injunction could be heard by the Court out of term and out of District." The facts stipulated by the parties are as follows:

> "1. That the defendant, John F. Ritter, on the 3rd day of January 1972, purchased the lands and premises described in paragraph 7 of the plaintiff's complaint.

2. That there has been located upon said lands a private airport for approximately 15 years and that in December of 1971 there were 3 open aircraft hangars and one metal storage building located upon said premises which are used in conjunction with the airport which consists of a grass or dirt runway approximately 1,000 feet to 2,000 feet in length.

3. That the metal storage building is approximately 12 x 15 feet and constructed of metal siding and without windows; that said building is used as an office and headquarters for the airport and contains a desk, a snack machine and a soft drink machine for use by persons patronizing the airport, plus a phone, aircraft navigational radio equipment, oil, pilot supplies, tie down equipment, etc.; that Exhibit 1 is a fair and accurate representation of said building.

4. That the area encompassed by the presently existing airport is frequently flooded by the French Broad River. The banks of the river are approximately 250 feet from the southeast margin of the airport runway. This area was included within the flood plain area under the Land Use Plan which was adopted by the City of Brevard on January 4, 1965, a copy of which plan is attached hereto marked as Exhibit 2.

5. That one metal hangar building contains 3 T-Hangars and the other 2 metal hangar buildings each contain 2 T-Hangars, and said hangar buildings are constructed of corrugated metal and do not have heat or electricity, and that photographs marked Exhibits 3, 4, and 5 are a fair and accurate representation of some of the hangar buildings located upon said premises.

6. That in December 1971, the defendant, John F. Ritter, began constructing a new building which was to take approximately three thousand square feet, which upon completion was to be used as a pilot clubhouse containing such facilities as restrooms, chairs, tables, and food and drink dispensing machines, etc.; that the clubhouse of the building will have dimensions of approximately 20 x 42 feet, serving as a lounge and recreation area as described above. That immediately adjoining the club or lounge area, and as a part of the same building, will be an area ap-

proximately 51 x 34 feet which is also subject for use in extended social activity or recreation, and which will be of sufficient size to permit the storage of one small aircraft.

7. That as of December 1971 construction of the building had progressed to the point of completion of the foundation and concrete base and the erection of studs around the perimeter of the building, as well as the erection of a metal beam support located across the front or face of said building. Photograph marked as Exhibit 6 is a fair and accurate representation of the building as it existed at the time this lawsuit was instituted.

8. That said new building is not connected with any of the prior existing buildings and upon completion was to be completely separate and apart from any other existing improvements located upon said premises.

9. That in December of 1971 the defendant, John F. Ritter, purchased the improvements located upon the airport premises referred to in plaintiff's complaint from a previous tenant from the sum of $600.00, which improvements included the airplane hangars and metal buildings and gas tank and pump, which gas tank and pump is fairly and accurately represented by a photograph marked Exhibit 1.

10. That the Brevard High School, Athletic Field and bus maintenance garage are adjoining the airport located to the southwest of the airport runway and there are two large apartment complexes located to the northwest of the airport runway, one containing 20 units and the other containing 50 units and there is under construction a new medical clinic to the side of and within approximately three hundred feet of the airport premises situated to the northwest.

11. That by letter dated August 4, 1971, marked as Exhibit 7, the defendant, John F. Ritter, requested the City of Brevard to rezone the airport premises from a R-2 Residential zone to a F-1 Flood Plain zone; that said defendant with such request submitted a map marked as Exhibit 8 depicting said airport property and airport runway.

12. That at a regularly scheduled meeting of the Board of Aldermen for the City of Brevard on October 18, 1971, the defendant's zoning request was considered; the Board of

Aldermen for the City of Brevard accepted the recommendation of the Brevard Planning and Zoning Board which was to deny said zoning request.

13. That on the 13th day of December, 1971, at 7:00 o'clock the Board of Aldermen of the City of Brevard held a special meeting at which Mr. John F. Ritter was present. That the City Clerk, Mrs. Opal Armentrout, was present and recorded the minutes of said meeting a copy of which minutes are attached hereto marked as Exhibit 9.

14. That the defendant, John F. Ritter testified that he intended to organize a Flying Club, and that a portion of the building under construction would be usable as a hangar for a small airplane.

15. That the said John F. Ritter did not contact (sic) with the Charles Morgan Company to construct his new building but that the Charles Morgan Company did in fact lend to him certain trucks and employees who have performed portions of the construction work until said company and the defendant, John F. Ritter, were temporarily restrained from continuing said construction.

16. That the plans of the new structure, which was being constructed prior to the temporary restraining order entered in this cause which was being built by the defendant, John F. Ritter, are attached to the Stipulation of Facts and made a part thereof and marked as Exhibit 10.

IT IS STIPULATED AND AGREED by and between the plaintiffs and the defendant, John F. Ritter, that the controversy in the above-entitled case can be submitted to the Court based upon the foregoing stipulation of facts."

From judgment entered permanently restraining defendants Ritter and Charles Morgan Company from "constructing the pilot lounge clubhouse and auxiliary hangar or extending or enlarging the airport facilities" and directing Ritter to remove within 90 days the portion already completed, the defendant Ritter appealed.

Williams, Morris and Golding, by James N. Golding, for plaintiff appellees.

Van Winkle, Buck, Wall, Starnes and Hyde, by Emerson D. Wall, for defendant appellant.

MORRIS, Judge.

Appellant excepts to findings of fact numbered 23 and 24 as follows:

> "23. That the defendant, John F. Ritter, intends to utilize the new construction in conjunction with the other airport facilities located upon the aforementioned premises, and such construction will in fact constitute an enlargement or expansion of said airport facilities in violation of Section 70 of the Brevard Zoning ordinance entitled 'Non-conforming uses.'
>
> 24. That said structure does not constitute any of the permitted or authorized uses designated by Sections 50 and 51 of the Brevard Zoning ordinance, and this Court specifically finds that such construction does not constitute 'any camp, park, picnic area, golf course or similar recreational use' under either Section 50 or 51 of the Brevard Zoning ordinance."

and to conclusions of law numbered 1 and 2 as follows:

> "1. That the building presently under construction by the defendant, John F. Ritter, with the assistance of the Charles Morgan Company, is in violation of Sections 50, 51 and 70 of the Brevard Zoning ordinance, and such construction is unlawful and should be restrained.
>
> 2. That the construction of a pilot lounge or clubhouse and auxiliary hangar constitutes an enlargement and extension of a nonconforming use in violation of Section 70 of the Brevard Zoning ordinance, since no such structure now exists and such construction does not constitute the repair or remodeling of any existing structure."

These exceptions and an exception to the signing and entry of the judgment are grouped by appellant into two assignments of error. We do not separate them for the purpose of discussion.

The property of appellant is admittedly covered by § 51 of the Brevard Zoning Ordinance entitled "R-2 Medium-Density Residential District." The declared purposes of this type district are, among others, to provide for quiet liveable medium density single and two family neighborhoods, to encourage the discontinuance of nonconforming uses, and to prohibit any use

which would substantially interfere with the development or continuation of single and two family dwellings. Uses permitted are two family dwellings and any use permitted in the R-1 Low Density Residential District. These uses are single family dwellings; farms and related agricultural uses; and camps, parks, picnic areas, golf courses and similar recreational uses.

It is also conceded that the airport on the property is a nonconforming use. Section 70 of the ordinance provides that the nonconforming use may be continued but specifically provides that it may not be extended.

[1] Appellant urges that the facts pleaded and stipulated do not support the finding that the new construction will constitute an enlargement or expansion of the airport facilities, and therefore, it was error for the court to conclude that § 70 had been violated. We do not agree.

It is clear from the facts stipulated that the building under construction is to contain approximately 3,000 square feet, is completely new construction and is not connected in any way to any of the existing structures on the land. It could not, in any way, be regarded as repair, rebuilding, or alteration of any existing structure. Neither could it be considered as a replacement for any existing structure. It would contain, in addition to the lounge or club, space for the storage of an airplane. Ritter purchased all of the physical improvements on the property for $600. Exhibit No. 7, before the Court and a part of the stipulated facts, is a letter addressed to the Board of Aldermen of Brevard requesting the rezoning of the property. It bears the signature "John F. Ritter," and contains the following: "The reason we would like this area rezoned is so that the present airport facility can be expanded and improved." Exhibit No. 9, also before the Court and a part of the stipulated facts, is a copy of the minutes of the meeting of the Board of Aldermen on 13 December 1971. At that meeting, Ritter stated "Very few planes would be coming in and out, perhaps triple as to the present number." We think the evidence plenary to support the court's finding of fact.

In re O'Neal, 243 N.C. 714, 92 S.E. 2d 189 (1956), is not authority for appellant's position.

[2] Nor do we find merit in appellant's position that the building he proposes to create is a lawful recreational use within the

meaning of the permitted use contained in § 50.2 of the Zoning Ordinance, to wit: "camps, parks, picnic areas, golf courses, and similar recreational uses." "It is a well-settled rule of construction, applicable to statutes and ordinance that under the doctrine *ejusdem generis,* when enumerations by specific words or terms are used, and they are followed by general words or terms, the general shall be held to refer to the same classification as the specific. . . . " *Bryan v. Wilson,* 259 N.C. 107, 110, 130 S.E. 2d 68 (1963), quoting from *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211 (1959). The term "similar recreational uses" must obviously refer to something in the nature of a camp, a park, a picnic area, or a golf course. We find no similarity in the operation of a private airport and construction of a pilot's lounge and auxiliary hangar to the activities of a camp, a park, a picnic area, or a golf course.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CLYDE ROYALL

No. 7223SC167

(Filed 26 April 1972)

1. Automobiles § 126; Criminal Law § 169— drunken driving — statements by defendant — denial of cross-examination

In this prosecution for drunken driving, defendant failed to show that he was prejudiced when the court sustained the State's objections to two questions asked on cross-examination of the arresting officer concerning statements made by defendant at the time of his arrest, where (1) no general prohibition of this line of questions was imposed and defendant's counsel was successful in soliciting considerable evidence as to such statements made by defendant, and (2) the record does not show what the answers of the witness would have been had he been permitted to answer.

2. Automobiles § 126— drunken driving — observations of breathalyzer operator

In this prosecution for drunken driving, the trial court did not err in permitting a breathalyzer operator to express his opinion as to defendant's condition based on his observation of and conversation with defendant apart from the results of the test.

3. Criminal Law § 166— abandonment of assignment of error

An assignment of error is deemed abandoned where appellant's brief contains no reason or argument and cites no authority in support thereof. Court of Appeals Rule 28.

4. Criminal Law § 88— cross-examination of State's witnesses — restrictions

The trial court did not commit prejudicial error in sustaining the State's objections to certain questions asked by defendant's counsel in cross-examining the State's witnesses in a drunken driving prosecution, where the record discloses that defendant's right to cross-examine the witnesses against him was not unduly restricted, and nothing in the record suggests that the verdict was in any way improperly influenced by such limitations as were imposed by the trial court.

5. Automobiles § 126— drunken driving — irrelevancy of testimony

In a prosecution for drunken driving, opinion testimony by a defense witness as to whether one of the horses ridden by defendant some one and a half to two hours prior to his arrest was "meaner to ride than the others" was not relevant to the determination of whether defendant was under the influence of intoxicants at the time of his arrest.

6. Automobiles § 126— drunken driving — testimony admitted without objection — recapitulation — inconsistency with court's ruling

Where a highway patrolman testified without objection in a drunken driving prosecution that defendant, following his arrest, "stated he had had a drink or two," the trial court did not commit prejudicial error in instructing the jury that the patrolman testified "that the defendant said he had had a drink or two," notwithstanding the court's mention of such testimony was somewhat inconsistent with the court's ruling after a *voir dire* examination that the patrolman could not testify as to whether defendant had volunteered any information "on what he had been drinking on this occasion."

7. Automobiles § 129— breathalyzer result — presumption — instructions

In this prosecution for drunken driving, the trial court correctly instructed the jury that, despite the presumption created by G.S. 20-139.1 from a breathalyzer test result of .15, the jury was at liberty to acquit the defendant if it should find that his guilt was not proven beyond a reasonable doubt.

8. Criminal Law § 116— failure of defendant to testify — instructions — absence of request

Absent a special request, the trial judge is not required to instruct the jury that a defendant has the right to elect to testify or not to testify and that his failure to testify does not create any presumption against him.

9. Indictment and Warrant § 7— caption — wrong county

There is no merit in defendant's contention that the judgment against him for drunken driving must be arrested because the bill

of indictment on which he was tried is captioned, "State of North Carolina, Forsyth County," while the body of the bill charges that the offense was committed in Alleghany County, since (1) an addendum to the record on appeal shows that the indictment was found and returned in open court as a true bill in Alleghany County by a grand jury composed of citizens of that county and (2) the caption is not part of the indictment, and its recital of the wrong county does not constitute ground for arrest of judgment.

APPEAL by defendant from *Crissman, Judge,* September 1971 Session of Superior Court held in ALLEGHANY County.

Defendant was indicted for the offense of driving a motor vehicle upon the public highways of Alleghany County while under the influence of intoxicating liquor. A first trial resulted in a verdict of guilty, sentence, and appeal to the Court of Appeals, which ordered a new trial. *State v. Royal,* 7 N.C. App. 559, 172 S.E. 2d 901. A second trial also resulted in a verdict of guilty, and from judgment imposed defendant again appeals.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Arnold L. Young and Franklin Smith for defendant appellant.

PARKER, Judge.

[1] Appellant's first assignment of error, based on his first two exceptions, is that the trial judge erred in sustaining the State's objections to two questions asked on cross-examination of the arresting officer concerning statements made by defendant at the time of his arrest. On the earlier appeal of this case this Court held that defendant should be permitted to cross-examine the officer regarding such statements, "if for no other purpose than to attempt to show that defendant talked intelligently and was in control of his mental faculties." On the present appeal the record shows that on the retrial defendant's counsel was successful in eliciting by cross-examination considerable evidence as to such statements made by defendant. In only two instances were his inquiries in this regard limited by the trial court's sustaining objections interposed by the State. No general prohibition to this entire line of questions was imposed as had occurred on the first trial which was the subject of the first appeal to this Court. The present record does not disclose what the witness's answers would have been had

he been allowed to answer the two questions as to which the State's objections were sustained on the second trial. In the absence of any answers in the record, it is impossible for an appellate court to ascertain whether defendant was prejudiced by the action of the trial court in sustaining the objections interposed by the State. *State v. Bailey*, 12 N.C. App. 280, 182 S.E. 2d 881. In view of this fact and in view of the fact that defendant's counsel was not unduly restricted on the second trial in cross-examining as to statements made by defendant at the time of his arrest, we hold that appellant has failed to demonstrate prejudicial error in connection with his first assignment of error.

[2, 3] Appellant's second assignment of error is that the court erred in permitting the breathalyzer operator to express his opinion as to defendant's condition based on his observation of and conversation with the defendant apart from the results of the test. In this there was no error. The witness had ample opportunity to observe defendant and to arrive at an informed opinion as to his condition. In addition, appellant's brief contains no reason or argument and cites no authority in support of his second assignment of error, and it is taken as abandoned by him. Rule 28, Rules of Practice in the Court of Appeals.

[4] Appellant's third, fifth and sixth assignments of error are all directed to the trial judge's actions in sustaining the State's objections to certain questions asked by defendant's counsel in cross-examining the State's witnesses. Appellant contends these questions were proper in that they were either designed to impeach the testimony of a prosecuting witness or were for the purpose of eliciting testimony germane to the case. However, "the legitimate bounds of cross-examination are largely within the discretion of the trial judge, so that his ruling will not be held as prejudicial error absent a showing that the verdict was improperly influenced thereby." *State v. Chance*, 279 N.C. 643, 654, 185 S.E. 2d 227, 234. The record on the present appeal discloses that defendant's right to cross-examine the witnesses against him was not unduly restricted. His counsel did in fact vigorously cross-examine all of the State's witnesses, and nothing in the record even suggests that the verdict was in any way improperly influenced by such limitations as were imposed by the trial judge. These assignments of error are overruled.

[5] A defense witness testified that defendant had traded horses and had ridden horseback at the witness's barn during the evening prior to his arrest. This witness testified that when defendant was riding his condition was good and that "he was riding O.K." Defendant's counsel then asked the witness whether one of the horses ridden by defendant was "meaner to ride than the others." The trial court sustained the State's objection to this question and this ruling is the subject of appellant's fourth assignment of error. In this ruling defendant suffered no prejudicial error. The witness testified that they "completed riding horses about 10:30 or quarter to eleven, something like that." The arresting officer testified he had observed defendant driving his truck about 12:15 a.m. and that in his opinion defendant was then under the influence of some intoxicating liquor. The opinion of defendant's witness as to the relative difficulty of riding one horse as compared with riding another at 10:30 or 10:45 o'clock hardly seems relevant in determining whether defendant was or was not under the influence of some intoxicating liquor at 12:15, some hour and a half or two hours after all horseback riding had ceased. Appellant's fourth assignment of error is overruled.

[6] A State Highway Patrolman testified that he had talked with the defendant at the police station following his arrest and defendant "stated he had had a drink or two." This testimony was admitted on direct examination and without any objection from defendant. Subsequently, after cross-examination, the solicitor on redirect examination asked the witness if the defendant had volunteered any information "on what he had been drinking on this occasion." The defendant objected to this question. After a *voir dire* examination, the court ruled that the witness would not be permitted to answer the question and the jury was instructed not to consider the question. In the course of recapitulating the State's evidence in its charge to the jury however, the court mentioned that the highway patrolman had testified "that the defendant said he had had a drink or two." Appellant now assigns error to this portion of the court's charge. While the court's mention of this testimony may be inconsistent to some extent with its prior ruling instructing the jury to disregard the question as to whether defendant had volunteered information "on what he had been drinking," under the circumstances of this case we do not find that the instruction constituted prejudicial error. The instruc-

tion given was an entirely accurate recital of that portion of the patrolman's testimony which had been admitted without any objection from defendant. The court gave no further or undue emphasis to this testimony. There was ample other evidence, including the results of the breathalyzer test which indicated that defendant's blood contained 0.15 percent alcohol at the time the test was administered, from which the jury could find that defendant had been drinking and that he was driving while under the influence of some intoxicating liquor. Under the circumstances of this case, the portion of the court's charge complained of, even if it be considered somewhat inconsistent with the court's ruling after the *voir dire* examination, was not sufficiently prejudicial to defendant to warrant a new trial.

[7] The trial court correctly instructed the jury as to the State's evidence concerning the results of the breathalyzer test and as to the legal effect of the presumption created by G.S. 20-139.1. In this regard the trial court clearly instructed that despite the presumption arising from the results of the breathalyzer test the jury was at liberty to acquit the defendant if it should find that his guilt was not proven beyond a reasonable doubt. The instruction given complied with the requirements set forth in *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165, and appellant's assignment of error to this portion of the charge is without merit.

[8] Appellant contends the court erred in failing to charge the jury that the defendant was not required to take the stand and that his failure to do so could not be used against him. Defendant did not request such an instruction. Absent a special request, the judge is not required to instruct the jury that a defendant has the right to elect to testify or not to testify and that his failure to testify does not create any presumption against him. *State v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156. Indeed, "[o]rdinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant." *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115.

[9] Finally, defendant contends the judgment against him must be arrested because the bill of indictment on which he was tried is captioned, "State of North Carolina, Forsyth County," while the body of the bill charges that the offense

was committed in Alleghany County. Defendant made no point of this either at his first trial, upon the appeal therefrom, or at his retrial, and raised the question for the first time upon this appeal. His contention is without merit. By addendum to the record on this appeal allowed by order of this Court on motion of the Attorney General, it clearly appears that in point of fact the bill of indictment was found and returned in open court as a true bill in Alleghany County by a grand jury composed of citizens of that County who were duly impaneled, sitting, and acting. The caption is not part of the indictment, and its omission or its recital of the wrong county does not constitute ground for arrest of judgment. *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623; *State v. Francis,* 157 N.C. 612, 72 S.E. 1041; *State v. Sprinkle,* 65 N.C. 463.

In the trial and judgment appealed from we find

No error.

Chief Judge MALLARD and Judge MORRIS concur.

JETTIE BRADY GALLIGAN v. HAROLD P. SMITH

No. 7215SC157

(Filed 26 April 1972)

1. **Judgments § 40; Limitation of Actions § 12; Rules of Civil Procedure § 41— voluntary nonsuit — new action — failure to pay costs of original action**

Action commenced by plaintiff within one year after plaintiff had taken a voluntary nonsuit in her original action against defendant was properly dismissed upon defendant's motion where plaintiff had not paid the costs in the original action at the time she commenced her new action; testimony by the secretary of plaintiff's attorney that on the day the new action was filed she told the clerk of court by telephone that she wanted to get a bill of costs in the original action, but that such bill was never received, was insufficient to show that plaintiff had made a reasonable or diligent effort to pay the costs prior to the institution of the new action. Former G.S. 1-25; G.S. 1A-1, Rule 41.

2. **Pleadings § 32— motion to amend answer — waiver**

Defendant did not waive his right to move to amend his answer to allege that the action was barred by the statute of limitations by failing to make such motion until some 20 months after the action was commenced.

Galligan v. Smith

APPEAL by plaintiff from *Hobgood, Judge,* 20 September 1971 Session of Superior Court for ORANGE County.

Plaintiff alleged that on 18 July 1965, she was involved in an automobile collision with the defendant Smith, who was at that time a policeman employed by the Town of Chapel Hill (Town). A civil action to recover damages alleged to have been sustained by her in said collision and proximately caused by the defendant's negligence was instituted in Randolph County (later removed to Orange County) by the plaintiff on 13 July 1966 against Smith and the Town. The action as to the Town was dismissed on 21 January 1969. See *Galligan v. Town of Chapel Hill,* 5 N.C. App. 413, 168 S.E. 2d 665 (1969), *reversed,* 276 N.C. 172, 171 S.E. 2d 427 (1970). On 21 January 1969, after the trial judge dismissed the action as to the Town, plaintiff announced in open court that she desired to take a voluntary nonsuit as to the defendant Smith. The judgment of voluntary nonsuit was signed by Judge Clark on 28 January 1969, and in this judgment it was ordered, "The plaintiff shall pay those costs which are attributed to the voluntary nonsuit taken in this matter as to the remaining defendant Harold P. Smith."

By complaint filed 19 January 1970, plaintiff instituted the present action in Randolph County against the defendant Smith to recover damages alleged to have been sustained by her on 18 July 1965 in the aforesaid automobile collision. Defendants moved for a change of venue, and from an order filed 7 August 1970 removing the case to Orange County Superior Court, plaintiff appealed. This court affirmed the order of the hearing judge. See *Galligan v. Smith,* 10 N.C. App. 536, 179 S.E. 2d 193 (1971).

On 17 September 1971, defendant moved to dismiss the present action under G.S. 1A-1, Rules 12 and 41, on the grounds that "[a]t the time that this action was reinstituted (19 January 1970) in the Randolph County Superior Court the plaintiff had not paid the costs of the action previously dismissed and that previous action was not brought in FORMA PAUPERIS." Defendant also made a motion (filed 23 September 1971) pursuant to G.S. 1A-1, Rule 15, for an order allowing him to amend his answer to allege that the action was barred by the applicable statute of limitations. In this motion, the following was set out:

"II. Thereafter, on January 19, 1970 the plaintiff reinstituted this action against the defendant Harold P. Smith in the Randolph County Superior Court. The undersigned attorneys for the defendant Harold P. Smith did not know until September 17, 1971 that the plaintiff had failed to pay the bill of costs of the Clerk of Superior Court of Orange County in the prior action. The undersigned attorney for the defendant learned on September 17, 1971 in a telephone conversation with Mr. Archie G. Williams, Assistant Clerk of Superior Court of Orange County, that the bill of costs had not been paid. Thereafter, the undersigned attorney for the defendant prepared and filed in this Court a motion to dismiss this action for the failure of the plaintiff to pay the bill of costs, as required by G.S. 1A-1, Rule 41(d)."

After hearing evidence from both the plaintiff and defendant at the 20 September 1971 Civil Session of Orange County Superior Court, Judge Hobgood entered an order, filed 23 September 1971, allowing defendant to amend his answer, and a subsequent order dated 28 September 1971, dismissing plaintiff's action with prejudice. In this latter order, the judge made, among others, the following findings of fact and conclusion of law:

"* * * That the prior action was dismissed as of voluntary nonsuit in open Court on January 21, 1969, and by a judgment signed and entered on January 28, 1969. That judgment provided that the plaintiff should pay the costs of that action.

II. This action was instituted on January 19, 1971 (sic), in the Superior Court of Randolph County. Prior to the institution of this action on January 19, 1971 (sic), the bill of costs of the Superior Court of Orange County in the prior action had not been paid. The bill of costs of the Clerk of Superior Court of Orange County in the prior action were paid by the plaintiff on September 17, 1971, three days prior to the opening of the session of court at which this case was calendared for trial.

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

I. The plaintiff failed to pay the costs in the prior action between the same parties and the plaintiff did not

make any reasonable or diligent effort to pay the costs prior to the institution of the action, and this action is based upon the same claim as the prior action hereinabove referred to, and by virture of the provisions of G.S. 1A-1, Rule 41(d), this action should be dismissed upon the defendant's motion.

Based upon the foregoing findings of fact and conclusions of law, the Court is of the opinion that this involved a question of law and is not a discretionary matter and the Court is of the opinion that the defendant's motion to dismiss for the failure of the plaintiff to pay the costs in the prior action should be allowed."

To the signing and entering of these orders, plaintiff appealed to the Court of Appeals.

Ottway Burton for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

MALLARD, Chief Judge.

G.S. 1-25, repealed by the General Assembly in 1967 effective 1 January 1970, read as follows:

"*New action within one year after nonsuit, etc.*—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, *if the costs in the original action have been paid by the plaintiff before the commencement of the new suit,* unless the original suit was brought in forma pauperis." (Emphasis added.)

G.S. 1A-1, Rule 41, became effective 1 January 1970 and provides:

"*(a) Voluntary dismissal; effect thereof.*—

* * * If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the

same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

* * *

(d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant *before the payment of the costs of the action previously dismissed,* unless such previous action was brought in forma pauperis, *the court, upon motion of the defendant, shall dismiss the action.*" (Emphasis added.)

Chapter 803 of the Session Laws 1969 amended Chapter 1A of the General Statutes to read as follows:

"Sec. 10.—This Act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date."

When the new Rules of Civil Procedure came into effect, the plaintiff in the case before us had already taken a voluntary nonsuit in her original action against the defendant Smith but had not brought her new action instituted 19 January 1970. When the new action was instituted, the costs in the original action had not been paid. Nothing else appearing, the result is the same under either the old statute, G.S. 1-25, or new Rule 41(d): Upon motion of the defendant, dismissal was proper on the grounds that this new action was instituted before the costs in the original action were paid.

[1] Attorney for the plaintiff, however, relies primarily upon the contention that he made a "reasonable or diligent effort" to pay the costs of the prior action before instituting the action of 19 January 1970. The only evidence adduced at the hearing to support this contention tended to show that on Monday, 19 January 1970, plaintiff's attorney's secretary called the office of the Clerk of Superior Court in Orange County and she testified:

"I asked to speak to the Clerk and when I told her that I wanted to get a bill of costs in the case of 'Jettie Brady

> versus—well, actually, it was "Jettie Brady Galligan" at that time too—versus Town of Chapel and Harold P. Smith,' and when I told her what I wanted she told me that Mr. Archie Williams always figured the costs and that he was out of the office sick and that he would be back on Wednesday and would send the costs probably by Friday. I never got the bill of costs from the Clerk of Superior Court's office of Orange County on this case, *'Jettie Lee Brady Galligan vs. Town of Chapel Hill and Harold P. Smith'* until you (plaintiff's attorney) called Friday, September 17, 1971."

The plaintiff's attorney's secretary did not testify that she told the person she talked to in the Clerk's office in Orange County that she wanted to pay the costs; she merely stated that she wanted "to get a bill." There is no testimony that an *offer to pay* the costs was made prior to or on 19 January 1970, nor does it appear that any other effort of any nature was made before or after this time to pay the costs of the prior action until 17 September 1971, on the same date, but after defendant's motion to dismiss had been filed.

Judge Hobgood properly concluded under the facts found (which are based on competent evidence) that "the plaintiff did not make any reasonable or diligent effort to pay the costs prior to the institution of the (present) action." The case of *Hunsucker v. Corbitt,* 187 N.C. 496, 122 S.E. 378 (1924), not cited by plaintiff but pertinent to the case before us, is distinguishable. In *Hunsucker,* the uncontroverted evidence tended to show that one of the plaintiffs had personally gone to the clerk's office and had repeatedly offered to pay the costs of the first action, and that the clerk had assured him that an entry of the payment would be made for which the plaintiff could later mail in a check. The Court said, referring to the provisions of C.S. 415 (later G.S. 1-25), "This cost must be paid or some good cause shown." The efforts of the plaintiff in *Hunsucker* were held to be a sufficient excuse for the failure to pay the costs of the prior action. We do not think that a single telephone call to the clerk's office nearly a year after the dismissal of the prior action and a year and a half before the costs were actually paid rises to the dignity of "some good cause shown." We certainly do not agree with plaintiff's contention that all that was "humanly possible" was done to tender payment of the costs

prior to the institution of the present lawsuit. See also, *Nowell v. Hamilton*, 249 N.C. 523, 107 S.E. 2d 112 (1959) and *Osborne v. R.R.*, 217 N.C. 263, 7 S.E. 2d 500 (1940).

[2] The remainder of plaintiff's contentions warrant little discussion. Plaintiff contends that, by his inaction, defendant "waived" his right to move to amend his answer. This contention is without merit. The record in the case discloses no facts or circumstances which would raise the question of "waiver" or which would tend to show that defendant took any action which could have misled the plaintiff. We further hold that plaintiff's contention that the hearing judge abused his discretion in allowing defendant to amend his answer pursuant to G.S. 1A-1, Rule 15, is also without merit. The trial court has broad discretion in permitting or denying amendments to the pleadings.

In the signing and entering of the orders appealed from, no error is made to appear.

Affirmed.

Judges MORRIS and PARKER concur.

KATHY L. GADDY v. JERRY L. GADDY

No. 7227DC69

(Filed 26 April 1972)

1. **Divorce and Alimony §§ 21, 23— contempt of court — inability to pay — reduction of support payments**

The trial court's findings support the court's conclusion that defendant should not be held in contempt for failure to make payments required by court order for alimony *pendente lite*, child support and attorney's fees because such failure resulted from defendant's inability to pay, and support the court's order reducing the payments to be made by defendant for child support from $40 per week to $17.50 per week.

2. **Divorce and Alimony § 24— visitation privileges**

Finding that defendant is a fit and proper person to have the exclusive care and custody of the child of the parties supports the court's order giving defendant visitation privileges.

Gaddy v. Gaddy

APPEAL by plaintiff from *Mahoney, District Judge,* 20 September 1971 Session of District Court held in GASTON County.

This is a civil action for alimony without divorce, custody of a minor child, and counsel fees heard on an order for defendant to show cause why he ought not to be adjudged in contempt for willfully violating the former order of the court requiring him to pay alimony *pendente lite,* support for minor child and attorney's fees.

The defendant filed an answer to the motion praying that the order requiring him to pay alimony *pendente lite,* child support, and counsel fees "be changed and modified to the extent that he can comply with the Order. . . . " After hearing, the court made findings and conclusions which, except where quoted, are summarized as follows: The plaintiff and defendant are husband and wife living in a state of separation, and one child, Barbara Faye Gaddy, age 2, now in custody of plaintiff, was born of the marriage. In March 1971, the plaintiff abandoned the defendant, took the child, and went to Atlanta, Georgia, returning to North Carolina nine days later to take up residence with her aunt and uncle in Bessemer City, North Carolina. The plaintiff, 20 years of age, was raised by her aunt and uncle who have never requested support from her. After returning to North Carolina, the plaintiff went to work with North American Mills. Her take-home pay is approximately $83 a week. Plaintiff contributes nothing toward the child's support except payment of medical expenses. This action for alimony without divorce, custody and support for minor child and counsel fees was filed in the District Court on 5 May 1971 and an order requiring the defendant to appear on 13 May 1971 and show cause why he ought not to be required to pay alimony *pendente lite,* support for his minor child and counsel fees was served on the defendant who borrowed money from his sister and employed counsel in Shelby, North Carolina. The copy of the summons and complaint served on the defendant did not contain a date as to when the defendant was to appear. Although the defendant went to the eighth grade in school, he is illiterate with limited intelligence and did not know when he was to appear. On 13 May 1971, after neither defendant nor his attorney appeared, the district court awarded the custody of the minor child to the plaintiff and ordered "the defendant to pay into the office of the Clerk of Superior Court of Gaston County each week the

sum of $40.00 for the use and benefit of the plaintiff and the minor child. . . . " When the defendant received a copy of this order, he immediately took it to his attorney who filed a motion to set aside the order on the basis that the defendant did not have sufficient notice. A hearing on the motion was set and held on 3 June 1971 and when neither the defendant nor his attorney appeared, the district judge "affirmed the original Order of O. F. Mason and dismissed the motion." The defendant received a copy of the order dated 3 June 1971 through the mail which he immediately took to his attorney in Shelby who "refunded his fees paid and turned the file over to him, and he employed Frank P. Cooke, Attorney, in Gastonia, N. C., to represent him."

The plaintiff and the defendant are both suitable persons to have the complete care, custody and control of the minor child. "(9) That the defendant has worked for four and a half years for City Floor Service, Inc. . . . as a laborer earning minimum wages and for the first quarter in 1971, earned the sum of $759.27, averaging $58.00 per week. That he continued to work for the City Floor Service, Inc. until approximately three weeks ago when he was discharged from his employment by reason of the fact that he felt that due to educational limitations, he could not do additional work that the company required in that the company required that he learn to be a mechanic and he is unable to read or write. That immediately thereafter, he went to work for Junior Costner, doing the same type of work . . . earning between $55.00 and $60.00 per week. That he is required to pay the sum of $20.00 per week for board and has been contributing $15.00 per week for the use and benefit of his minor child; his transportation to and from his work amounts to $5.00 per week, and he pays $5.00 per week to the McGinnis Furniture Company for a stereo which he bought prior to this action, and in addition contributes the sum of $3.00 or $4.00 each week for insurance on himself and the child. That he is required to pay the sum of $2.00 per day for his meals and incidental expenses. That the above basic expenses incurred by him are in addition to any unusual expenses such as clothing, medical, dental, etc. That the defendant owns no property, has never owned an automobile, cannot drive, has no bank account or any personal property of any value, and has $9.00 at the present time, and has never been able to comply with the Order of May 13, 1971, or the Order of June 3, 1971.

That this defendant at no time has willfully and intentionally failed and refused to comply with the terms of either Order, and has been economically situated to such an extent that it was impossible for him to comply with these Orders. That he borrowed money from his sister and has been unable to repay that at the present time, but has contributed money each week for the use and benefit of his child. * * * That the Court finds as a fact that the defendant is not in contempt for failure to comply with the monetary payments that are required by the former Orders."

The defendant is in arrears under the former order in the amount of $385 and has not paid the attorney's fees to the Honorable Basil L. Whitener in the amount of $100, and his failure to make the payments was not willful and contemptuous but was because of his inability to pay, "although he has applied himself to the best of his ability and is in good health and is working and has worked continuously."

Based on its findings and conclusions, the court denied the plaintiff's motion to find the defendant in contempt and entered an order modifying the order dated 13 May 1971 by (1) ordering the defendant to pay "each week the sum of $17.50 for the use and benefit of his minor child"; (2) relieving him of paying "the arrearage accumulated under the former Orders of this court"; (3) ordering him to "pay into the office of the Clerk of Superior Court this day the sum of $50.00, to be disbursed by the Clerk to Basil L. Whitener, attorney for the plaintiff, as part payment of attorney's fees. That he shall pay the balance of the sum of $50.00 as quickly as he is financially able to to so"; and (4) providing that plaintiff shall have the custody of the minor child and the defendant have specified visitation privileges.

The plaintiff appealed to the Court of Appeals.

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

No attorney contra.

HEDRICK, Judge.

Appellant contends "the court below erred in reversing and nullifying the prior lawful orders as to custody, support and

alimony *pendente lite"* and "in entering its order without making conclusions of law." These contentions have no merit simply because the order appealed from merely modified the prior order with respect to the amounts the defendant was requried to pay as alimony *pendente lite* and child support. Judge Mason's conclusions, upon which the original order allowing alimony *pendente lite,* custody and child support, and counsel fees was based, were not reversed, nullified or modified by the order appealed from. Judge Mahoney merely made findings of fact from the evidence presented on plaintiff's motion to attach the defendant for contempt and defendant's motion in the cause to have the payments for alimony *pendente lite* and child support fixed in such an amount that "he can comply with the order." Judge Mahoney's findings, when compared with Judge Mason's findings as to the income, needs, expenses, and abilities of the plaintiff and the defendant, reflect the fact that the defendant and his attorney did not participate in the original hearing and that the circumstances surrounding the parties were not the same in September as in May. In May, Judge Mason found that plaintiff was employed and had take-home pay of $60 a week and that the defendant had take-home pay in excess of $75 a week. In September, Judge Mahoney found that the plaintiff had take-home pay of $83 a week and the defendant had take-home pay of $58 a week.

[1, 2] Judge Mahoney's findings support the denial of plaintiff's motion to attach the defendant for contempt and clearly justify and support his order reducing the payments to be made by defendant from $40 per week to $17.50 per week. The finding that the defendant is a fit and proper person to have the exclusive care and custody of the child supports the order giving the defendant visitation privileges.

The order appealed from is affirmed.

Affirmed.

Judges BROCK and VAUGHN concur.

PEGGY SHOAF v. TED B. SHOAF

No. 7228DC259

(Filed 26 April 1972)

1. Divorce and Alimony § 23; Parent and Child § 7— duty to support child — termination at age 18

Since the enactment of G.S. 48A-2, one's obligation to support his child ends when the child reaches the age of 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood.

2. Divorce and Alimony § 23— child support — agreements above legal obligation

Contracts between parents providing for support and educational expenses of their children over and above their legal obligations are binding and must be construed as any other contract.

3. Judgments § 10— consent judgment — construction

A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction and is construed as any other contract.

4. Contracts § 1— laws as part of contract

Laws in force at the time of the execution of a contract become a part thereof, including those laws which affect its validity, construction, discharge and enforcement.

5. Contracts § 12— construction — interpretation given by the parties

An interpretation given a contract by the parties themselves prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used.

6. Divorce and Alimony § 23— child support agreement — age of majority

In entering a consent judgment requiring that defendant make payments for the support of his son "until such time as said minor child reaches his majority," the parties intended that such payments should continue until the son reached age 21 where (1) defendant was legally obligated to support his son until the son reached age 21 when the consent judgment was entered, (2) the judgment provided that the home owned by the parties be sold after the son finished high school, which was after the son reached age 18, and that reduced support payments be made thereafter, and (3) defendant recognized his obligation under the consent judgment after the son reached age 18 and G.S. 48A-2 was passed by making part of the payments required by the judgment.

Judge VAUGHN dissents.

Shoaf v. Shoaf

APPEAL by defendant from *Israel, District Judge,* December 1971 Session of District Court held in BUNCOMBE County.

This is a civil action for alimony, custody and support of minor child and counsel fees, heard on plaintiff's motion to attach the defendant for contempt for willfully violating the terms of the consent judgment entered on 11 June 1970. The defendant filed a motion in the cause asking that the consent judgment "be modified so as to delete any requirement on the part of said defendant to pay moneys or support payments to the plaintiff for the support of JEFFREY BYRON SHOAF."

At the hearing on the motions, the parties stipulated that the court could consider and decide the case on the following agreed statement of facts:

"1. That a final Consent Judgment was entered in the General County Court of Buncombe County on the 11th day of June, 1970 in an action entitled *'Peggy Shoaf, plaintiff vs. Ted B. Shoaf, defendant,'* a true copy of which Judgment is attached hereto.

2. That the plaintiff, Peggy Shoaf, and the defendant, Ted B. Shoaf, were legally divorced from each other on the 26th day of February, 1971.

3. That Jeffrey Byron Shoaf, the son of the plaintiff and the defendant who was 17 years of age at the time the June 11, 1970 Judgment was entered, became 18 years of age on the 13th day of January, 1971; that said Jeffrey Byron Shoaf graduated from high school in May or June of 1971, and is presently residing with his mother, Peggy Shoaf, Route 3, Leicester, North Carolina, and is presently enrolled as a student in the University of North Carolina at Asheville.

4. That the defendant paid to the plaintiff the total sum of $400 during the month of October, 1971 and a like sum during the month of November, 1971.

5. That the former home of the plaintiff and the defendant located at Route 3, Leicester, North Carolina, has not as yet been sold but that the plaintiff is presently residing therein with Jeffrey Byron Shoaf and paying the payments on said home."

The pertinent portions of the consent judgment dated 11 June 1970, referred to in the agreed statement of facts, are as follows:

> "4) IT IS FURTHER ORDERED that the Plaintiff be, and she is hereby, entitled to a Writ of Possession of the home presently owned by the parties hereto as tenants by the entireties located at Route #3, Leicester, County of Buncombe, State of North Carolina, wherein to reside with said minor child, free from any interference from the Defendant, until such time as said minor child graduates from high school; that upon graduation from high school of the minor child, the parties shall place said home and property on the market for sale at an agreed price, and shall make all efforts to expeditiously sell the same . . . that pending said sale, the Plaintiff shall be entitled to use and occupy the premises, and until such time as the home is sold, the Plaintiff shall pay the payments on said property;
>
> 5) IT IS FURTHER ORDERED that the Defendant shall pay to the Plaintiff until such time as the said home is sold, as hereinbefore provided, the sum of FIVE HUNDRED and no/100 DOLLARS ($500.00) per month, of which sum THREE HUNDRED and no/100 DOLLARS ($300.00) shall be alimony for the use and benefit of the Plaintiff and TWO HUNDRED and no/100 DOLLARS ($200.00) shall be child support; that as such time as the home is sold, the Defendant shall thereafter pay to the Plaintiff alimony in the sum of THREE HUNDRED and no/100 DOLLARS ($300.00) per month, and as long as the minor child is residing in said home, whether or not a full-time student or otherwise, the Defendant shall pay an additional ONE HUNDRED and no/100 DOLLARS ($100.00) per month for the support of said minor child;
>
> That said payments of alimony, support and maintenance for the Plaintiff shall continue during the lifetime of the Plaintiff or until such time as she remarries, and that said payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated. . . . "

Based on the stipulated facts and the consent judgment, the trial court concluded "that it was the intention of the parties to contract for the Defendant to pay to the Plaintiff the sum

of $500.00 per month until the home was sold and thereafter payments in accordance with Paragraph (5) of the Judgment until said child attained 21 years of age. . . . "

From an order denying defendant's motion in the cause and directing the defendant to pay to the plaintiff the arrearage due under the terms of the consent judgment through November 1971 in the sum of $200, the defendant appealed.

Riddle & Shackelford by Robert E. Riddle for plaintiff appellee.

Williams, Morris and Golding by James W. Golding for defendant appellant.

HEDRICK, Judge.

The only question presented on this appeal is whether G.S. 48A-2, effective 5 July 1971, relieved the defendant of his obligation to pay support for his son Jeffrey Byron Shoaf under the terms of the consent judgment dated 11 June 1970.

G.S. 48A-1 provides: "The common law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated." G.S. 48A-2 provides: "A minor child is any person who has not reached the age of 18 years."

The defendant contends that his son Jeffrey Byron Shoaf, having become 18 years of age on 13 January 1971, "reached his majority" on 5 July 1971, the effective date of G.S. 48A-2, and that as a result thereof he had no further obligation under the terms of the consent judgment to contribute to his support.

[1-4] Before the enactment of G.S. 48A, it was evident that the meaning of "minor child" within the purview of the custody and support statutes, G.S. 50-13.4 *et seq.*, contemplated the common law age of majority, 21. *Speck v. Speck,* 5 N.C. App. 296, 168 S.E. 2d 672 (1969); *Crouch v. Crouch,* 14 N.C. App. 49, 187 S.E. 2d 348 (1972). After the enactment of G.S. 48A-2, one's legal obligation to support his on her child ends at age 18, absent a showing that the child is insolvent, unmarried and physically or mentally incapable of earning a livelihood. *Crouch v. Crouch, supra;* 1 R. E. Lee, North Carolina Family Law (Cum. Supp. 1972), § 223. However, contracts between parents providing for support and educational expenses of their chil-

dren over and above their legal obligation to do so are binding and must be construed as any other contract. *Owens v. Little,* 13 N.C. App. 484, 186 S.E. 2d 182 (1972); *Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425 (1971); *Layton v. Layton,* 263 N.C. 453, 139 S.E. 2d 732 (1965); *Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 81 (1964); *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113 (1962). A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction. It is construed as any other contract. 5 Strong, N.C. Index 2d, Judgments, § 10; *Owens v. Little, supra; Mullen v. Sawyer, supra; Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826 (1961). " 'The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time.' *Pike v. Trust Co.,* 274 N.C. 1, 161 S.E. 2d 453." *Mullen v. Sawyer, supra.* Laws in force at the time of execution of a contract become a part thereof, including those laws which affect its validity, construction, discharge and enforcement. 2 Strong, N.C. Index 2d, Contracts, § 1, p. 292.

[5, 6] When the consent judgment was entered in the present case, the parties presumably knew that the defendant was legally obligated to support his son until he was 21 years of age. Thus, it appears that the primary purpose of the agreement was to fix the amount of the payments. The house, according to the terms of the consent judgment, was to be placed on the market when the son graduated from high school which was in "May or June of 1971" after his eighteenth birthday in January 1971. Obviously, the parties did not consider that their son would possibly attain his majority at age 18; moreover, the defendant recognized his obligations under the consent judgment after the effective date of G.S. 48A-2 by making at least part of the payments required by the judgment. An interpretation given a contract by the parties themselves prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used. *Goodyear v. Goodyear, supra.* Thus, we think the trial judge correctly concluded that it was the intention of the parties that the defendant would make payments for the support of his son in accordance with paragraph 5 of the consent judgment until said child attained 21 years of age.

The order appealed from is affirmed.

Affirmed.

Judge BROCK concurs.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. LARRY JAMES HUNTLEY

No. 7226SC319

(Filed 26 April 1972)

1. **Constitutional Law § 32; Criminal Law § 145.1— condition of probation — reimbursement of State for court-appointed counsel**

A condition of probation requiring defendant to reimburse the State for the cost of court-appointed counsel does not infringe defendant's constitutional right to counsel.

2. **Criminal Law § 145.1— revocation of probation — insufficiency of findings**

Revocation of defendant's probation is vacated and the proceeding is remanded for failure of the court to make findings of fact sufficient to support its conclusion that defendant's failure to make the payments set out in the probation judgment was willful or without lawful excuse.

APPEAL by defendant from *McLean, Judge,* 15 November 1971 Session of Superior Court held in MECKLENBURG County.

This appeal is from an order revoking defendant's probation and activating his suspended sentence. In September 1971, defendant entered a plea of *nolo contendere* to the crime of unlawful possession of narcotic drugs. The court's judgment imposing a prison sentence of five years was suspended and the defendant was placed on probation for a period of five years subject to the rules and regulations of the Probation Commission and the conditions of probation as set out in the probation judgment. One of the conditions of probation was as follows:

"That he pay into the Office of the Clerk of Superior Court of Mecklenburg County the sum of $500.00 in manner as follows: the sum of $25.00 on or before the 4th day of October, 1971, and a like amount on or before each Monday thereafter until the total amount is paid in full. That

out of the monies ordered to be paid in under the foregoing judgment, the Clerk of Superior Court shall deduct the cost of the action, which shall include attorney fee of $400.00, and remit the balance to the school fund as provided by law."

On 19 November 1971, after a hearing, Judge McLean made the following pertinent findings:

"2. That the defendant has wilfully violated the terms and conditions of the Probation Judgment as hereinafter set out:

(a) * * * Since being placed on probation, he has failed and refused to keep his payments up to date and as of November 1, 1971, he was in arrears in said payments in the amount of $125.00. His failure and refusal to make payments into the Clerk's Office as ordered by the Court is in violation of the special condition of probation. . . ."

From an order revoking defendant's probation and activating the suspended sentence, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Ann Reed for the State.

Lila Bellar for defendant appellant.

HEDRICK, Judge.

[1] In his brief defendant's counsel asserts: "The court may not lawfully require an indigent defendant to reimburse the State for counsel fees paid on his behalf." Citing *In Re Allen,* 78 Cal. Rptr. 207, 455 P. 2d 143 (1969), the defendant contends that a probation condition requiring him to reimburse the State for the cost of his court-appointed counsel is an infringement on his constitutional right to counsel. In a similar case, *State v. Foust,* 13 N.C. App. 382, 185 S.E. 2d 718 (1972), this Court rejected the same contention and held as a condition of probation an indigent defendant could be required to reimburse the State for fees paid his court-appointed counsel.

[2] Although we find the conditions defendant is charged with having violated to be valid, the proceeding must be remanded for the court did not make findings of fact sufficient to support its conclusion that the defendant's failure to make the

payments set out in the probation judgment was willful or without lawful excuse. The court merely concluded that the defendant had willfully violated his probation condition by not making the payments and that he was in arrears $125. In *State v. Foust, supra,* the Court said: "* * * Has he had the financial ability to comply with the judgment at any time since he became obligated to pay? If not, has his continued inability to pay resulted from a lack of reasonable effort on his part or from conditions over which he had no control? These are essential questions which must be answered by appropriate findings of fact before the court can determine whether defendant's failure to comply was willful or without lawful excuse."

The judgment activating the sentence is vacated and the proceeding is remanded for further hearing in order that the judge may determine, by appropriate findings of fact, whether the failure of defendant to make the required payments was willful or without lawful excuse. The judge's findings of fact should be definite and not mere conclusions. *State v. Foust, supra; State v. Caudle,* 7 N.C. App. 276, 172 S.E. 2d 231 (rev'd on other grounds, 276 N.C. 550, 173 S.E. 2d 778) ; *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376 (1958).

Vacated and remanded.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOE BERRY NEAL

No. 7227SC236

(Filed 26 April 1972)

Criminal Law § 145.1— revocation of probation — insufficiency of findings

Revocation of defendant's probation is vacated and the proceeding is remanded for failure of the trial court to make sufficient findings of fact as to whether defendant's failure to make support payments required by the probation judgment was willful or without lawful excuse.

Judge BROCK concurs in the result.

APPEAL by defendant from *Thornburg, Judge,* 25 October 1971 Regular Criminal Session of Superior Court held in GASTON County.

State v. Neal

This appeal is from an order revoking defendant's probation and activating his suspended sentence. In January 1971, defendant entered a plea of guilty to the crime of nonsupport. The judgment imposing a prison sentence of six months was suspended, and the defendant was placed on probation for a period of five years, subject to the rules and regulations of the Probation Commission and the conditions of probation as set out in the probation judgment. One of the conditions of probation was as follows:

> "That the defendant pay into the office of the Clerk of Court the sum of $80.00 every other Friday, first payment to be made on or before Friday, February 12, 1971 and a like payment every other Friday thereafter until further ordered by the court."

On 27 October 1971, after a hearing, Judge Thornburg made findings and concluded that the defendant had willfully and without lawful excuse violated the terms of a valid condition of probation in "[t]hat as of September 28, 1971 the said probationer is $320.00 in the arrears in his support payments, having made his last payment of $40.00 on September 13, 1971, and having paid a total of $1,000.00 to this date . . . that furthermore he did fail to pay into the office of the Clerk of Gaston County Superior Court every other Friday the sum of $80.00 from July 29, 1971 until September 28, 1971."

From an order revoking defendant's probation and activating the suspended sentence, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Edwin M. Speas, Jr., for the State.

Basil L. Whitener and Anne M. Lamm for defendant appellant.

HEDRICK, Judge.

In this case, as in *State v. Foust*, 13 N.C. App. 382, 185 S.E. 2d 718 (1972), and *State v. Huntley*, 14 N.C. App. 236, 188 S.E. 2d 30 (1972) (filed at the same time as this opinion), the trial court's findings of fact are not sufficient to support his conclusion that the defendant's failure to make the payments set out in the probation judgment was willful or without lawful excuse.

The judgment activating the suspended sentence is vacated and the proceeding is remanded for further hearing in order that the judge may determine, by appropriate findings of fact, whether the failure of defendant to make the required payments was willful or without lawful excuse. The judge's findings of fact should be definite and not mere conclusions. *State v. Foust, supra; State v. Caudle,* 7 N.C. App. 276, 172 S.E. 2d 231 (rev'd on other grounds, 276 N.C. 550, 173 S.E. 2d 778); *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376 (1958).

Vacated and remanded.

Judge VAUGHN concurs.

Judge BROCK concurs in the result.

Judge BROCK concurring in the result.

I think it will be helpful and instructive to set out in whole the findings and judgment of the trial judge.

"THIS CAUSE coming on to be heard, and being heard, at the October 27, 1971 session of the Gaston County Superior Court before the Honorable Lacy H. Thornburg, Judge Presiding, the defendant being in Court in person and being represented by Counsel, WHEREUPON the Court finds the following facts:

1. That at the January 28, 1971 session of the Gaston County 27th District Court the defendant entered a plea of guilty to the crime of Non-Support and was sentenced by the Honorable Robert Kirby, Judge Presiding, to the Gaston County Jail to be assigned to work under the supervision of the State Department of Correction of North Carolina for a period of six (6) months, which sentence was suspended and the defendant placed on probation for a period of five (5) years under the supervision of the North Carolina Probation Commission and its officers, subject to the rules and orders of said Commission and the Conditions of Probation as set out in the probation judgment.

2. That the defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment as hereinafter set out:

That as of September 28, 1971 the said probationer is $320.00 in the arrears in his support payments, having made his last payment of $40.00 on September 13, 1971, and having paid a total of $1,000.00 to this date; that the aforesaid constitutes a violation of that special condition of probation that 'The defendant pay into the office of the clerk the sum of $80.00 every other Friday, first payment to be made on or before Friday, February 12, 1971, and a like payment every other Friday thereafter until further ordered by the Court'; that furthermore he did fail to pay into the office of the Clerk of Gaston County Superior Court every other Friday the sum of $80.00 from July 29, 1971 until September 28, 1971.

IT IS THEREFORE ORDERED, in the discretion of the Court, that the probation be, and the same is hereby, revoked and the sentence to the Gaston County Jail to be assigned to work under the supervision of the State Department of Correction of North Carolina for a period of six (6) months, heretofore suspended, is hereby ordered into immediate effect and commitment shall be issued by the clerk of the court."

As can be seen the trial judge has traced the history of the case in Paragraph I, and in Paragraph II has merely concluded that the defendant has willfully and without lawful excuse failed to comply with the original judgment. He states in Paragraph II that the defendant has violated the terms "as hereinafter set out." He then merely recites findings with respect to payments made and the payments that he failed to make. Thereafter, the judgment activates the original six month sentence.

These findings and the judgment, as entered by the trial judge, failed to disclose any findings of fact concerning the defendant's earnings and ability to pay or any findings of fact that his inability to pay resulted from lack of effort. As cogently stated by Judge Graham in *State v. Foust*, 13 N.C. App. 382, 387, 185 S.E. 2d 718, 722:

"Has he had the financial ability to comply with the judgment at any time since he became obligated to pay? If not, has his continued inability to pay resulted from a lack of reasonable effort on his part or from conditions over which he had no control? These are essential questions

which must be answered by appropriate findings of fact before the court can determine whether defendant's failure to comply was willful or without lawful excuse."

For the above reasons, I concur that the order appealed from should be vacated and the cause remanded for a new hearing upon the question of whether defendant has willfully or without lawful excuse failed to comply with the provisions of the probationary judgment.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY v. WATSON SEAFOOD AND POULTRY COMPANY, INC., AND FEATHER PROCESSORS, INC.

No. 7210SC209

(Filed 26 April 1972)

1. **Appeal and Error § 2; Insurance § 6— retroactive rating plan endorsement — construction — insufficiency of record on appeal**

Question of whether the trial court erred in ruling that "Retrospective Rating Plan" endorsements on three insurance policies issued by plaintiff to defendants contained no provision for rate adjustment where cancellation is by the insurer for reasons other than nonpayment of premiums was not properly presented and was not decided by the appellate court where the contents of the endorsements were not included in the record on appeal.

2. **Appeal and Error § 46— judgment appealed from — presumption of correctness**

There is a presumption in favor of the correctness of the judgment appealed from, and the burden is on appellant to show prejudicial error.

APPEAL by plaintiff from *Brewer, Judge,* April 1971 Session of Superior Court held in WAKE County.

Plaintiff seeks to recover insurance premiums in the amount of $3,073.35 it alleged was due from the defendants on six policies of insurance issued to defendants by the plaintiff. The policies were issued to cover Workmen's Compensation, general liability and automobile liability. The first three policies, WC 889587-03-5-E (Workmen's Compensation—hereinafter referred to as #03-5), CGL 889587-04-5-E (general liability—hereinafter referred to as #04-5), CAL 889587-06-5-E (automobile liability—hereinafter referred to as #06-5),

were for the term of one year beginning 1 April 1965, but by endorsement were renewable so as to afford insurance for a three-year period from the effective date, subject to cancellation by either of the parties as set out in the policies.

Effective 1 April 1966, plaintiff issued three renewal policies, WC 889587-03-6-E (Workmen's Compensation—hereinafter referred to as #03-6) which was a renewal of #03-5; CGL 889587-04-6-E (general liability—hereinafter referred to as #04-6) which was a renewal of #04-5; and CAL 889587-06-6-E (automobile liability—hereinafter referred to as #06-6) which was a renewal of #06-5.

Defendants denied owing plaintiff any sum and in a counterclaim alleged that the plaintiff was indebted to them in the amount of $13,049.85 for amounts paid to plaintiff in excess of the premiums due on the policies.

At a pre-trial conference, the parties stipulated, among other things:

"E. That effective August 4, 1966, the Plaintiff cancelled all of the above policies (those set forth in item D) for reasons other than the non-payment of premiums.

F. That attached to and made a part of each of the policies above was an endorsement known as 'Retrospective Premium Endorsement-Three Year-Plan D', that copy of said endorsement is attached hereto.

G. That the defendants have paid all standard earned premium due under the policies for the period from April 1, 1966 until August 4, 1966, the date of cancellation by the Plaintiff insurance company.

H. That in addition, after the cancellation of the policies by the Plaintiff, the plaintiff billed the Defendants for, and the Defendants paid a 'first interim retrospective premium adjustment' of $6,064.80 computed concerning the policies enumerated in sub-division 3C hereof; such amount having been paid on April 18, 1967.

* * *

13. The parties stipulate and agree to waive jury trial and that the Court shall be the trier of facts and may make such findings of fact as the evidence warrants.

14. The parties stipulate that the contested issues to be tried by the Court are as follows:

(a) What amount, if any, is the Plaintiff entitled to recover of the Defendants?

(b) What amount, if any, are the Defendants entitled to recover from the Plaintiff?

15. That the only real issues for determination are issues of law, which are determinative of the issues stated in paragraph 14. Such issues of law may be stated:

(a) When the policies were cancelled by the Plaintiff,-insurer for reasons other than non-payment of premiums, was the Plaintiff nevertheless entitled to retrospective premiums under the wording of its Retrospective Rating Plan D endorsement?

(b) Is the Defendant entitled to recovery (sic) any amount from Plaintiff, whether or not the Retrospective Endorsement was in force?"

After a hearing the trial judge found facts, stated his conclusions and entered a judgment awarding the defendants the sum of $6,064.87, "plus appropriate interest," and costs.

The plaintiff appealed to the Court of Appeals.

Dan Lynn for plaintiff appellant.

Wolff & Harrell by Bernard A. Harrell for defendant appellees.

MALLARD, Chief Judge.

Plaintiff contends that the trial court committed error in ruling that the "Retrospective Rating Plan" contained no provision for rate adjustment where the cancellation is by the insurer for reasons other than non-payment of premium.

In the pre-trial stipulations the parties agreed that on each of the policies there was an endorsement known as "Retrospective Premium Endorsement-Three Year-Plan D." Although it is asserted that this endorsement was attached to the stipulations, it does not appear in this record; therefore, we do not know the contents of this stipulation. There was no stipulation relating to the "Retrospective Rating Plan," about which plain-

tiff argues. "Stipulations duly made during the course of a trial constitute judicial admissions binding on the parties and dispensing with the necessity of proof, and unless limited as to time or application, such stipulations continue in force for the duration of the controversy. A party may not thereafter take an inconsistent position. * * *" 7 Strong, N. C. Index 2d, Trial, § 6. See also *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966).

[1] It appears, however, that the trial judge construed the language contained in the "Retrospective Premium Endorsement-Three Year-Plan D" attached to and made a part of a copy of an insurance policy purporting to be a copy of #03-5. (There is no identifying mark to indicate that this instrument was introduced in evidence; however, it appears with the exhibits in this case.) The construction given it by the judge is supported by interpretations given to similar language by the Supreme Court of Colorado in the case of *Travelers Ins. Co. v. Jeffries-Eaves, Inc., of Colo.*, 166 Colo. 220, 442 P. 2d 822 (1968), and by the Supreme Court of Minnesota in the case of *Bituminous Casualty Corporation v. Swartout*, 270 Minn. 216, 133 N.W. 2d 32 (1965). But inasmuch as we do not have the contents of the "Retrospective Premium Endorsement-Three Year-Plan D" (which was stipulated) before us, we are unable to know what *its* contents are; the questions plaintiff seeks to present concerning the "Retrospective Rating Plan" are not properly presented and are not decided.

[2] There is a presumption in favor of the correctness of the judgment appealed from, and the burden is on an appellant to show prejudicial error. 1 Strong, N. C. Index 2d, Appeal and Error, § 46. After examining all assignments of error properly presented, we hold that plaintiff has not shown prejudicial error on this record.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. BENJAMIN LIPSEY

No. 7225SC289

(Filed 26 April 1972)

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

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of assault with a deadly weapon or other means or force likely to inflict serious injury to another person, where it tended to show that a witness saw defendant jump up and come down with his hands and cut a police officer across the head and shoulder, that as a result of the cutting the officer was in the hospital four days, and that the wounds required fourteen stitches on the officer's head and twenty-four stitches on his back. Former G.S. 14-33(b)(1).

2. **Criminal Law § 159— record on appeal — chronological order**

The proceedings should be set forth in the record on appeal in the order of time in which they occurred. Court of Appeals Rule 19(a).

3. **Criminal Law § 131— newly discovered evidence — motion for new trial — insufficiency of affidavits**

Affidavits filed by defendant were insufficient to sustain his motion for a new trial on the ground of newly discovered evidence.

4. **Criminal Law § 131— newly discovered evidence — sufficiency for new trial**

In order to obtain a new trial on the ground of newly discovered evidence, the movant must negative laches and show that the newly discovered evidence is more than merely cumulative of or contradictory to the evidence adduced at the trial, and that such evidence is competent.

APPEAL by defendant from *Snepp, Judge,* 15 November 1971 Session of Superior Court held in BURKE County.

Defendant was placed on trial upon a charge of the felony of assault with a deadly weapon with intent to kill, inflicting serious injury. G.S. 14-32(a) as it was written prior to the 1971 amendment.

The State's evidence tended to show: On the night of 10 September 1971, defendant was present at a football game being played at Morganton High School. Defendant had been drinking vodka with friends before arriving at the game. The second half of the game was in progress when he arrived and he stood behind the bleachers with two other men. The School Board had requested that everyone be seated during the game,

and several officers of the Morganton Police Department were on duty. Officer Whitesides asked defendant four times to be seated. Officer Prewitt asked defendant to be seated and, when he did not, the officer told him he would have to be seated or leave. Defendant began cursing the officer, stating that he was not going anywhere. Two officers seized defendant and were escorting him from the premises when a crowd gathered to follow the defendant and the officers. The crowd of about forty rushed them, and the officers were knocked loose from defendant. Officer Whitesides undertook to assist in controlling the crowd and restoring order. He was jumped upon and knocked to the ground. Defendant was seen going towards Officer Whitesides and one witness saw "Benjamin Lipsey [the defendant] jump up and come down with his hands and cut him [Officer Whitesides] across the head and across the shoulder. I saw blood on David Whitesides' shirt." As a result of the cutting, Officer Whitesides was in the hospital four days. The wounds required fourteen stitches on his head and twenty-four stitches on his back.

Defendant's evidence tended to show: Defendant and his brother arrived at the game at the start of the second half. Defendant stood with a group to watch the game. The officers told him that he would either have to sit down or leave the game, and he asked them about getting his money back. The officers grabbed him by his arms and "I might have cussed them because they were twisting my arms behind my back." Someone knocked the officers down and they released defendant. Defendant then went and sat with his brother in the stands. Defendant saw Stacey Tom fighting with Officer Whitesides, but he (defendant) did not engage in any fighting with the officer.

The trial judge withdrew the felony charge from consideration by the jury and submitted the case to them only upon the misdemeanor charge of assault with a deadly weapon or other means or force likely to inflict serious injury or serious damage to another person. G.S. 14-33(b)(1) as it was written prior to the amendment, effective 1 October 1971.

The jury returned a verdict of guilty of the misdemeanor offense as submitted to them. Defendant appealed.

Attorney General Morgan, by Associate Attorney Baxter, for the State.

W. Harold Mitchell for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge denied his motion for dismissal at the close of the State's evidence and again at the close of all the evidence. These assignments of error are without merit. The State offered the testimony of a witness who saw "Benjamin Lipsey [the defendant] jump up and come down with his hands and cut him [Officer Whitesides] across the head and across the shoulder." This testimony coupled with the testimony of the extent of the injury to the officer was clearly sufficient to require submission of the case to the jury upon the question as submitted.

During the morning after the jury rendered its verdict of guilty, counsel for defendant made the following statement to the court: ". . . [L]ast night I was called and was informed that certain witnesses of whom I was not aware of at the time of trial of this case, knows who actually did the cutting of the officer and based on this newly discovered evidence that we be granted a new trial." The trial judge then continued the matter until the next week of the term, and released defendant upon bond, for the stated purpose of giving counsel ample time to secure appropriate affidavits to support the motion for a new trial. The next week defendant's counsel stated in open court that he and defendant had been unable to locate the witnesses.

[2] The record on appeal in this case is unnecessarily jumbled. Our rules require that proceedings shall be set forth in the order of the time in which they occurred. Rule 19(a). For example, in this record the motions for nonsuit appear after the jury verdict; none of the motions, affidavits, orders, or judgment show the filing dates; an order for continuance dated 29 September 1971, follows a judgment dated 27 November 1971. We have called attention to the difficulty created for the appellate courts by misarrangement of the record on appeal and have pointed out that a simple chronological arrangement in accordance with our rules makes a study of the record on appeal more accurate. In *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29, we outlined the order for arrangement of a record on appeal in criminal cases.

[3, 4] Nevertheless, we have examined the affidavits which appear to have been intended to support defendant's motion for a new trial and find them insufficient. In order to obtain a new trial upon the grounds of newly discovered evidence, "[t]he movant must negative laches and show that the newly discovered evidence is more than merely cumulative of or contradictory to the evidence adduced at the trial, and that such evidence is competent." 3 Strong, N. C. Index 2d, Criminal Law, § 131. "Moreover, a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its refusal to grant the motion is not reviewable in the absence of abuse of discretion." *State v. Sherron,* 6 N.C. App. 435, 170 S.E. 2d 70. No abuse of discretion is shown.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. MARY ELIZABETH CHAMBERS

No. 7226SC140

(Filed 26 April 1972)

1. **Assault and Battery § 15— self-defense — instructions**

The trial court fairly and correctly charged the jury on self-defense in this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury.

2. **Criminal Law § 131— newly discovered evidence — denial of new trial**

In a felonious assault prosecution wherein defendant contended she shot the victim as the victim advanced upon her with a knife and one of the investigating officers testified that defendant did not relate to him anything concerning a knife, the trial court did not abuse its discretion in the denial of defendant's motion for a new trial on the ground of newly discovered evidence—a notation in a police file that defendant had told another officer that the victim had a knife—where the court found that such evidence was cumulative and corroborative and would not likely have produced a different result.

3. **Criminal Law § 131— newly discovered evidence — new trial**

A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial court.

State v. Chambers

APPEAL by defendant from *Martin (Harry C.), Judge,* 27 September 1971 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

The defendant was charged in a bill of indictment, proper in form, with assaulting McFadden Jeanette Williams with a deadly weapon; to wit, a .32-caliber pistol with intent to kill inflicting serious injury on 22 May 1971, in violation of G.S. 14-32(a) as it existed prior to the amendment effective 1 October 1971.

The State offered evidence tending to show that the defendant, Mary Elizabeth Chambers, and Jeanette Williams got into an argument regarding defendant's fifteen-year-old daughter. Defendant went into her house, came back out, and sat on the porch with her hand by her side. At the time Jeanette Williams was in the yard next door talking with a man named Sam Phillips. The defendant told Phillips to move out of the way, that she didn't want him to be shot and that she was getting ready to shoot Jeanette Williams. The defendant fired a .32-caliber pistol three times, one bullet hitting Williams in the arm and passing into her chest.

Defendant offered evidence tending to show that on the day in question she heard Mrs. Williams trying to get defendant's daughter to stop a car. When defendant asked Mrs. Williams not to ask her daughter to do anything of that type, Williams replied that she had been wanting to fight her and that she could be whipped. Defendant went into her house, Mrs. Williams went into the house next door and came out shortly with a knife. The defendant told her not to come on her property, but she walked up on the second step of her porch with the knife in her hand and the defendant fired at her from behind the partly open screen door.

The jury found the defendant guilty of assault with a deadly weapon inflicting serious injury, in violation of G.S. 14-32(b) as it existed prior to the amendment effective 1 October 1971. From a judgment imposing a sentence of three years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Carl W. Howard for defendant appellant.

HEDRICK, Judge.

[1] The defendant first contends that the court committed prejudicial error in its instructions to the jury in the matter of self-defense. We do not agree.

The evidence of the State and the defendant was in sharp conflict as to exactly how the prosecuting witness happened to get shot. All of the evidence tended to show that an argument between the parties had ended and the defendant had gone into her house. The defendant's evidence tended to show that she shot Jeanette Williams as she came up to the steps toward the defendant with a knife in her hand. The court's instructions to the jury completely, fairly, and correctly covered this aspect of the case as it related to self-defense. That portion of the charge complained of, when considered contextually with the remainder of the charge on self-defense, and in connection with the evidence is fair and correct and without prejudicial error.

[2] The defendant assigns as error the court's denial of her motion for a new trial on the grounds of newly discovered evidence. In denying the defendant's motion for a new trial, the court made the following pertinent findings and conclusions:

> ". . . [T]he Court finds as facts that this motion is based upon the contention that although Officer Starnes testified that the defendant made no statement to him concerning the prosecuting witness having a knife at the time in question, that Officer Starnes said, at a time after the trial, that the defendant did tell Officer Kirkpatrick that the prosecuting witness had a knife at the time in question; that there is no evidence before this Court that Officer Starnes had knowledge of such a statement being made by the defendant to Officer Kirkpatrick at the time he testified at the trial of the case; that Officer Kirkpatrick was available as a witness and could have been called by the State or the defendant; that the defendant testified in the trial that she did tell the police that the prosecuting witness had a knife at the time in question; that she also made a written statement and signed it.
>
> The Court further finds that the Solicitor, on this date, has stated that there was a notation in the police file that this defendant had made a statement to Officer Kirkpatrick concerning a knife. There is no evidence in this record of

the case at this time that the Solicitor knew that such a statement was contained within the police file at the time of the trial of the case.

* * *

2. That the defendant has failed to show at this hearing that the outcome of this trial would be any different or likely to be any different if upon a retrial the testimony that the defendant made a statement to Officer Kirkpatrick about the prosecuting witness having a knife at the time in question was allowed before the jury. That such evidence would only be corroborative and cumulative and not substantive evidence.

3. That the defendant has not carried the burden to show that a new trial with this additional evidence would likely produce a different verdict."

[3] A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial court. 7 Strong, N.C. Index 2d, Trial, § 49; *State v. Blalock,* 13 N.C. App. 711, 187 S.E. 2d 404 (1972).

In the present case the record supports Judge Martin's material findings and conclusions, which in turn support the order denying the defendant's motion. *State v. Casey,* 201 N.C. 620, 161 S.E. 81 (1931). The defendant has failed to show that the trial judge abused his discretion in denying his motion for a new trial.

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

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD HINTON

No. 7210SC254

(Filed 26 April 1972)

1. **Assault and Battery § 14— felonious assault — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felonious assault with a deadly weapon with intent to kill, inflicting serious injury, where the State's evidence tended to show that while defendant was in the process of robbing another person, the victim squirted gas in defendant's face, that defendant shot the victim in the wrist and head, and that the victim received permanent brain damage and paralysis as a result of the assault.

2. **Criminal Law § 138— sentence — credit for confinement awaiting trial**

Sentence imposed for assault with a firearm inflicting serious injury must be credited with the time defendant spent in confinement awaiting trial as a result of the charge against him in that case. G.S. 15-176.2.

3. **Robbery § 4— armed robbery — victim — fatal variance**

There was a fatal variance between the indictment and proof in an armed robbery prosecution where the indictment charged the robbery of a named person, who was an employee of an insurance agency, and all the evidence tended to show that a demand for money was made only upon another employee of the insurance agency, that the person named in the indictment stepped into a robbery already in progress and that defendant shot her, not in an attempt to rob her, but because she sprayed gas in his face.

APPEAL by defendant from *Brewer, Judge,* 18 October 1971 Session of Superior Court held in WAKE County.

Defendant pleaded not guilty in two criminal cases. In Case No. 71CR40341, defendant was indicted for committing a felonious assault upon Elizabeth Putman Blake with a pistol with intent to kill, inflicting serious injuries. In Case No. 71CR40342 defendant was indicted for armed robbery of Elizabeth Putman Blake. The two cases were consolidated for trial.

Evidence for the State showed the following: On 29 July 1969 Mrs. Elizabeth Putman Blake and Mrs. Honore Parker Holmes were employed by Auto Insurance Services at 312 East Martin Street in Raleigh. On that date defendant came in and said he wanted to make a payment for one Carl Jones. Upon being told that there was no such customer but that there was a customer named Carl Johns, defendant left. He returned in

the afternoon and said he wanted to make a payment for Carl Johns. Mrs. Holmes testified:

> "I turned to get the Carl Johns file, and when I turned back around, defendant pulled out a gun and told me to give him my money and to get in the back of the office. At this time Mrs. Elizabeth Putman Blake, who had been in the back, was by my side. Mrs. Blake opened a drawer and took a container of poison gas spray and squirted it into the defendant's face. When Mrs. Blake did so, the defendant shot her. There were two shots, I believe. The defendant then ran out the door."

Mrs. Blake, after testifying concerning defendant's first visit, testified:

> "Later in the day the defendant returned and asked about the same customer. Mrs. Holmes got the file and the defendant pulled a gun. It was black. It was a pistol. I do not remember what happened after that."

There was evidence that Mrs. Blake was shot in the wrist and in the head and that she received permanent brain damage and paralysis as a result of her wounds. Both Mrs. Holmes and Mrs. Blake picked out defendant's picture from a group of photographs shown them by a police detective. In the case of Mrs. Holmes this identification occurred a day or two following the robbery. In the case of Mrs. Blake the picture identification occurred some three months later, soon after she went home from the hospital. In September 1971, Mrs. Holmes went with the detective to a court in Washington, where she saw the defendant.

Defendant offered no evidence.

In Case No. 71CR40341 the jury returned a verdict of guilty of assault with a firearm inflicting serious injury. In Case No. 71CR40342 the verdict was guilty of armed robbery as charged. Judgments were imposed as follows:

In Case No. 71CR40341 defendant was sentenced to prison for a term of five years, this sentence to commence on the date of the judgment, 20 October 1971.

In Case No. 71CR40342 defendant was sentenced to prison for a term of thirty years to commence at the expiration of

the sentence imposed in Case No. 71CR40341. The judgment in Case No. 71CR40342 also contained the following:

> "It is ordered that the thirty-six (36) days which the defendant has spent in jail awaiting trial be credited to the term of imprisonment herein imposed."

In each of the cases, defendant appealed.

Attorney General Robert Morgan by Associate Attorney General George W. Boylan for the State.

Ball, Coley & Smith by Ernest H. Ball for defendant appellant.

PARKER, Judge.

[1, 2] In Case No. 71CR40341 we find no error. There was ample evidence of the assault charged in the indictment to require submission of the case to the jury, and the sentence imposed was supported by the verdict which found defendant guilty of the lesser included offense described in G.S. 14-32(b). However, the sentence imposed in Case No. 71CR40341 should be credited with the time defendant spent in confinement awaiting trial as a result of the charge against him in that case. G.S. 15-176.2.

[3] In Case No. 71CR40342 the indictment charged defendant with the armed robbery of Elizabeth Putman Blake. All of the evidence in the record discloses, and the State's brief concedes, that it was only upon Honore Parker Holmes that a demand for money was made. There was no evidence from which the jury could find that defendant took or attempted to take any property from Mrs. Blake. Rather, all of the evidence tends to support the conclusion that Mrs. Blake stepped into a robbery already in progress and that defendant shot her, not in an attempt to rob her, but because she sprayed gas in his face. Because of the fatal variance between the indictment and the proof, defendant's motion for nonsuit in Case No. 71CR40342 should have been allowed. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741.

The result is:

In Case No. 71CR40341 the judgment and commitment are modified in that the sentence imposed must be credited with the

time defendant spent in confinement awaiting trial as a result of the charge against him in that case, and accordingly the judgment in that case is so

Modified and affirmed.

In Case No. 71CR40342 the judgment is

Reversed.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. GRADY WILSON

No. 7226SC160

(Filed 26 April 1972)

1. **Robbery § 4— identification evidence — sufficiency**

The State's evidence was sufficient to go to the jury on the question of defendant's identification as one of the persons who committed an armed robbery where the victim testified that he had occasionally seen defendant in a poolroom but did not know his name, that he left the poolroom with defendant and two other men and was in their company for 45 minutes to an hour before he was robbed by defendant and one of the men, that the victim again saw defendant in the poolroom a week later and notified the police, who arrested defendant, and the victim positively and unequivocally identified defendant at the trial as one of the robbers.

2. **Criminal Law § 2— proof of intent**

Intent is a mental attitude which seldom can be proved by direct evidence but must ordinarily be proved by circumstances from which it may be inferred.

3. **Robbery § 4— armed robbery — felonious intent — sufficiency of evidence**

Evidence tending to show that defendant placed a gun to the victim's head and stated, "all right, give it up," whereupon defendant's companion proceeded to remove money and other items from the victim's pocket, *held* sufficient to permit an inference that the money was taken with the intent on defendant's part to deprive the owner of the property permanently and to convert it to his own use.

4. **Criminal Law § 115— necessity for instructing on lesser included offenses**

It is unnecessary to instruct the jury as to a lesser included offense where there is no evidence from which the jury could find that

the lesser included offense was committed, the mere contention that the jury might accept the State's evidence in part and reject it in part being insufficient to require such an instruction.

5. Robbery § 5— failure to submit non-felonious larceny

The evidence in an armed robbery prosecution did not require the court to submit to the jury the lesser included offense of non-felonious larceny.

APPEAL by defendant from *Martin, Judge,* 30 August 1971 Session of Superior Court held in MECKLENBURG County.

Defendant was tried under a bill of indictment, proper in form, charging him with the felony of armed robbery. The court instructed the jury that they could find defendant guilty of armed robbery, guilty of common law robbery or not guilty. The jury returned a verdict of "guilty of armed robbery." Defendant appeals from judgment entered on the verdict imposing a prison sentence of 12 years.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Ray for the State.

Hamel & Cannon by Thomas R. Cannon for defendant appellant.

GRAHAM, Judge.

Through his first assignment of error defendant challenges the sufficiency of the evidence, contending that it does not show that he was the person who allegedly robbed the prosecuting witness and that it is insufficient to establish the element of felonious intent. This assignment of error is overruled.

[1] The prosecuting witness, Richard Howard Doctor, testified that he saw defendant and two unidentified males at a poolroom in Charlotte on 7 May 1971. He had seen defendant on other occasions but did not know his name. Upon learning that Doctor had been in Charlotte only a short while, the three men offered to "show him around." The men rode to a play area near some apartments where they got out of the car and stayed for about 45 minutes to an hour. One of the men then suggested that they go to his girl friend's house in the Double Oaks section. The driver of the car took them to a place near Double Oaks school. They were to walk from there to the girl friend's house. Doctor described what thereafter took place as follows:

"This was about 9:00 or 9:15 p.m., and we were walking down through the school yard. It was very dark there and there weren't any lights around. The defendant, Wilson, pulled a chrome pistol, a 22 or 32, and put it to my forehead. I could see it in his hand, and I am sure it was a pistol. He held it directly to my temple and put pressure on it. Wilson then said 'all right, give it up,' and the other fellow went through my pockets. He, the other fellow, took my change, keys, and the bills in my wallet. I had at least $230.00 in my wallet at the time, because I started out that day with $278.00, which was my pay check plus the $10.00 I had, and I bought two shirts for $15.00, and I played a few games of pool."

The in-court identification testimony of the prosecuting witness was direct and unequivocal. No assertion is made that his testimony was in any way tainted by an illegal out-of-court identification or that any illegal out-of-court identification was made. On the contrary, the record shows that the out-of-court identification was made before defendant was placed in custody. The prosecuting witness testified: "I next saw Wilson about a week later. I had seen him in the poolroom, and I figured he would be back again, so every day when I got off work I went to the poolroom to see if I saw him, and one day I did. Then I went to the square, and told the policeman that the man who had robbed me was in the poolroom. Thereafter, that man was arrested." The witness also stated: "There is no doubt in my mind about Grady Wilson, because I remember him well having seen him before. I didn't know his name, but I had seen him in the poolroom occasionally."

Defendant's contention that this evidence was insufficient to go to the jury on the question of identification is totally without merit. His contention that the State failed to present sufficient evidence on the question of felonious intent is likewise without merit.

[2, 3] Intent is a mental attitude, which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17. Here the evidence tends to show that defendant placed a gun to the victim's head and stated "all right, give it up"; whereupon, defendant's companion proceeded to remove money and other items from the victim's pocket. This evidence

is sufficient to permit an inference that the money was taken with the intent on defendant's part to deprive the owner of the property permanently and to convert it to his own use. *State v. Montgomery,* 12 N.C. App. 94, 182 S.E. 2d 668.

[4, 5] Defendant's final contention is that the court erred in failing to submit to the jury the lesser included offense of non-felonious larceny. It is unnecessary to instruct the jury as to an included offense of a lesser degree where there is no evidence from which the jury could find that the lesser included offense was committed. *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235. The mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24. We find no evidence in this record, and defendant calls our attention to none, which would support a conviction for non-felonious larceny.

In the entire trial, we find

No error.

Judges CAMPBELL and BRITT concur.

ELZIE A. HANEY v. J. O. COCHRANE AND JOHN HENRY FORD

No. 7226SC112

(Filed 26 April 1972)

Negligence § 57— invitee in junkyard — injury from falling car

In this action to recover for personal injuries sustained when a car which had been sitting on its side in a junkyard fell on plaintiff, the evidence was insufficient to show that the car was in a dangerous and unstable position before it fell or that one of the defendants removed a tire which had been supporting the car, and defendants' motions for directed verdicts were properly allowed.

Judge BROCK concurs in the result.

APPEAL by plaintiff from *McLean, Judge,* 2 September 1971 Schedule "B" Session of Superior Court held in MECKLENBURG County.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries allegedly resulting from the joint and concurring negligence of the defendants on 1 November 1968.

The plaintiff offered evidence tending to show that the defendant, John Henry Ford (Ford), owned and operated a junkyard on premises which he leased from the defendant, J. O. Cochrane (Cochrane), at the corner of Valley Dale and Lake Hills Roads in Mecklenburg County, North Carolina. Plaintiff, Elzie A. Haney (Haney), had sold the "junkyard" business to Ford approximately four months prior to the date of the incident complained of. On 1 November 1968, between nine and ten o'clock, Haney went to the junkyard for the purpose of talking with Ford about doing some work for him. While Haney was in the junkyard with Cochrane looking at some used automobile parts, a 1958 Oldsmobile automobile, which had been placed on its side by Ford, fell on plaintiff causing the personal injuries complained of.

Ford's motion for directed verdict made at the close of plaintiff's evidence was allowed and Cochrane's motion for directed verdict made at the close of all the evidence was allowed. From a judgment directing verdicts in favor of the defendants, the plaintiff appealed.

Hugh G. Casey, Jr., for plaintiff appellant.

James B. Ledford for J. O. Cochrane defendant appellee.

Sanders, Walker & London by James E. Walker and Robert G. McClure, Jr., for John Henry Ford defendant appellee.

HEDRICK, Judge.

Assuming, *arguendo,* that plaintiff was an invitee on Ford's premises, the question is raised as to whether the evidence, when considered in the light most favorable to him, is sufficient to be submitted to the jury on the issue of defendants' negligence. With respect to the negligence of Ford and Cochrane, plaintiff alleged:

"18. The defendant John Henry Ford was negligent in that he failed to act with due care, to wit:

He placed, or caused to be placed, or allowed to remain, an automobile in a dangerous and unstable position, and cre-

ated an unsafe condition in a location where he knew, or should have known, that members of the public were likely to be present.

19. The defendant J. O. Cochrane was negligent in that he pulled away a tire, supporting a car in an unstable and dangerous position, without first seeing that such a movement could be made in safety and without giving any warning to the plaintiff when the defendant J. O. Cochrane knew or should have known that pulling away the tire would cause the car to fall and cause injury to anyone in the vicinity."

The plaintiff introduced into evidence from Ford's interrogatories:

"* * * On November 1, 1968, there was located on the premises an Oldsmobile automobile placed there by Elzie A. Haney. * * * The automobile was tilted up on its side and it was braced with tires. These tires were under one side of the automobile. Richard A. Bowers placed the tires under one side of the automobile. * * * John Henry Ford tilted the automobile on its side. The tires placed by Richard A. Bowers under the automobile were the same tires that braced the automobile up on its side. * * * I became aware that Richard A. Bowers had placed the tires under the automobile at the time he did it. * * *"

From Ford's deposition, plaintiff offered the following:

"* * * After I bought the lot, Mr. Richard Bowers put tires under the car, and we turned it up on its side with a truck. * * * We used a chain on a truck to pull it up. Mr. Bowers put some tires underneath it to keep it from tilting back. This was about three weeks before Mr. Haney was hurt, and I was pulling it back when Mr. Bowers put the tires under it. * * *"

Plaintiff testified in pertinent part:

"* * * I saw Mr. Cochrane pull the prop out and take a couple of steps. This prop was an automobile tire and wheel. He was on my left, facing me. The car was behind me. Mr. Cochrane picked up a wheel by the side of me on the left side. I was a couple of feet from the car and the

wheel was touching the car by the back door. I couldn't say the wheel was holding the car up.

* * *

* * * The automobile which fell on me came from behind. It didn't come from my left and it didn't come from my right. I don't know whether I noticed the automobile turned on its side or not before it fell on me.

* * * I must have walked right by the car, I don't remember if I noticed it. * * *

* * *

* * * I did not see the tire and wheel before he picked it up and I actually saw him pick it up. I presume that the car was propped by the tire and I am not sure if I saw it propped by the tire.

* * * He got the tire laying right against the car. The tire was laying flat on the ground and he moved the tire. I can't say it was under the car. * * *"

Other than Ford's statements from his interrogatories and deposition that he and Richard Bowers turned the Oldsmobile on its side and braced it with tires where it remained for three weeks, there is no evidence as to how the automobile was situated on the lot before it fell. The record is devoid of evidence that the vehicle was in a "dangerous and unstable position" before it fell. The plaintiff repeatedly testified that he did not see the automobile before it fell on him, and he obviously "presumed that the car was propped by the tire" which he saw Cochrane pick up and move. Ford's statement in his deposition that "Mr. Cochrane said that he had taken away a tire from underneath the car," when considered together with all the evidence, is not sufficient to raise an inference that Cochrane "pulled away a tire, supporting a car in an unstable and dangerous position."

We agree with the ruling of the trial judge that there is not sufficient evidence of defendants' actionable negligence to require the submission of this case to the jury.

The judgment directing verdicts in favor of the defendants is affirmed.

Affirmed.

Judge VAUGHN concurs.

Judge BROCK concurs in the result.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD CURRENCE

No. 7226SC95

(Filed 26 April 1972)

1. **Criminal Law § 126— acceptance of verdict**

While a verdict is not complete until accepted by the court, if the jury returns a verdict that is permissible under the charge and complete in itself, the court must accept it.

2. **Assault and Battery § 4— assault defined**

An assault is an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace or violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

3. **Assault and Battery § 17— verdict of "attempted assault" — insufficiency**

Jury's verdict purporting to find defendant guilty of "attempted assault with a deadly weapon" was an incomplete verdict which would not support a judgment, and the court correctly rejected the verdict and directed the jury to reconsider the matter.

4. **Assault and Battery § 17— rejection of verdict — reconsideration of all possible verdicts — harmless error**

Where, in a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury, the court rejected the jury's purported verdict of "guilty of attempted assault with a deadly weapon," defendant was not prejudiced by error, if any, in permitting the jury to reconsider possible verdicts requiring a finding of "intent to kill" or "inflicting serious injury," where defendant was not convicted of an offense containing either of those two elements but was convicted of assault with a deadly weapon.

APPEAL by defendant from *Hasty, Judge,* 12 July 1971 Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was tried under a bill of indictment, proper in form, charging him with assault with a deadly weapon with intent to kill inflicting serious bodily injury. The court in-

structed the jury that it could return one of five verdicts: guilty as charged in the bill of indictment; guilty of assault with a firearm inflicting serious injury; assault with a firearm with intent to kill; assault with a deadly weapon, or not guilty.

The record shows that the following transpired when the jurors returned to the courtroom and announced that they had agreed upon a verdict.

"CLERK: How do you find?

FOREMAN: We find the defendant guilty of attempted assault with a deadly weapon.

THE COURT: Well, sir. Just have a seat. Members of the jury, this does not, or is not a verdict, because in the Charge, if you will recall, the Court told you that you were at liberty to return one of five verdicts. First, assault with a deadly weapon with intent to kill, inflicting serious injury; second, assault with a firearm inflicting serious injury; third, assault with a firearm with intent to kill; four, assault with a deadly weapon, or not guilty. So you see what you have denominated as a crime, an attempt to commit an assault, is not included in the verdicts that you were at liberty to render under the evidence and the law in the case.

FOREMAN: Your Honor, I may have worded it improperly.

THE COURT: I have told you. Suppose you do this. I have read these possible verdicts that you might return. Suppose you go back to the jury room now and deliberate further."

After further deliberation, the jury returned and announced as its verdict a finding that defendant was guilty of assault with a deadly weapon. The court entered judgment upon the verdict and defendant appealed.

Attorney General Morgan by Associate Attorney Boylan for the State.

John B. Whitley for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error the court's refusal to accept the first verdict announced by the jury.

[1] While a verdict is not complete until accepted by the court, if the jury returns a verdict that is permissible under the charge and complete in itself, the court must accept it. *State v. Sumner,* 269 N.C. 555, 153 S.E. 2d 111. "When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict." *State v. Hemphill,* 273 N.C. 388, 390, 160 S.E. 2d 53, 55.

The question presented here is whether the jury's verdict purporting to find defendant guilty of "attempted assault with a deadly weapon" was complete in itself. We hold that it was not.

[2] The crime of assault is governed by common law rules and the common law offense of assault is generally defined as " 'an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace or violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.' " *State v. Roberts,* 270 N.C. 655, 658, 155 S.E. 2d 303, 305.

[3] The effect of the first verdict returned by the jury was to find defendant guilty of an "attempt to attempt." "[O]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt." *State v. Hewett,* 158 N.C. 627, 629, 74 S.E. 356, 357. Thus, a finding of "guilty of attempted assault" was not responsive to the indictment. It constituted an incomplete verdict in that it would not support a judgment, and His Honor was correct in rejecting the verdict and directing the jury to reconsider the matter.

[4] Defendant contends that if the court were correct in rejecting the verdict, error was nevertheless committed in permitting the jury to reconsider all of the five possible verdicts. He argues that the verdict first announced amounted to a clear acquittal of those offenses requiring a finding of "intent to

kill" or inflicting serious injury. Even if there be merit in this argument, we fail to see wherein defendant has been prejudiced for he has not been convicted of an offense containing either of these two elements.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LEON LINDSEY

No. 7226SC53

(Filed 26 April 1972)

1. **Criminal Law § 23— guilty plea — voluntariness — showing in record**

A plea of guilty must be vacated where the record does not show affirmatively that the plea was voluntarily entered.

2. **Criminal Law § 159— record on appeal — duty of appellant**

Appellant has the duty to see that the record on appeal is properly made up, and the record must necessarily include the issues involved in the appeal. Court of Appeals Rule 19.

3. **Criminal Law § 23— guilty plea — voluntariness — failure to make findings**

Where defendant entered his plea of guilty in open court after consultation with his attorney, and was examined as to the voluntariness of the plea by his own attorney, it was not error for the trial court to accept defendant's plea without making independent findings that the plea was voluntary.

APPEAL by defendant from *Fountain, Judge,* at the 7 September 1971 Session of MECKLENBURG Superior Court.

This defendant was charged in a warrant with the larceny of three pairs of pants valued at $25.97. He entered a plea of not guilty at his trial in the District Court. The Court returned a verdict of guilty and defendant appealed to the Superior Court.

In the Superior Court the State put on the testimony of the arresting officer. The defendant then requested a recess, and, after conferring with his attorney, withdrew his plea of not guilty and entered a plea of guilty as charged.

The Court rendered judgment imposing a jail sentence.

From the judgment the defendant appeals.

Attorney General Robert Morgan by Associate Attorney Thomas E. Kane for the State.

Plumides & Plumides by Michael S. Shulimson for defendant appellant.

CAMPBELL, Judge.

The sole question presented on appeal is whether the defendant's guilty plea was entered voluntarily.

[1] The defendant contends that the record on appeal is silent as to the voluntariness of defendant's plea of guilty and that the defendant is entitled to a new trial where the record does not reveal that the plea was voluntarily entered. We agree that a plea of guilty must be vacated where the record does not show affirmatively that the plea was voluntarily entered. *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971). *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969).

In this case, however, the Attorney General has, after proper motion, filed an addendum to the record which reveals that, after testimony by the State's first witness, the defendant requested a recess for the purpose of conferring with his attorney. The recess was granted and defendant consulted with his attorney. After such consultation, defendant withdrew his plea of not guilty and entered a plea of guilty as charged. The defendant at this time testified, on examination by his own attorney in open court, that he realized he was tendering a plea of guilty to taking the pants and that he was doing this of his own free will.

[2] The record on appeal, as originally filed, was silent on the issue in point merely because defendant omitted the facts included in the State's addendum from the original record. The appellant has the duty to see that the record on appeal is properly made up. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E. 2d 6 (1970). The record must necessarily include the issues involved in the appeal. Rule 19, Rules of Practice in the Court of Appeals of North Carolina. Appellant will not be permitted to benefit from his own omission. We note that the same attorney appeared for the defendant both in the trial court and on

this appeal. This attorney has evidently attempted to deceive this Court. Such conduct, if true, is reprehensible. We also note that the local solicitor carelessly failed to detect this vital omission from the record when he stipulated to the correctness of the case on appeal. We again remind solicitors, who have the responsibility of getting correct records in criminal cases to this Court, that they should be careful before stipulating to the correctness of records.

[3] A review of the record, as amended, reveals that the defendant entered his plea of guilty in open court after consultation with his attorney. He was then examined as to the voluntariness of the plea by his own attorney. Under these circumstances it was not error for the trial court to accept defendant's plea and not make independent findings that the plea was voluntary. However, it is better practice to always do so. *State v. Johnson*, 7 N.C. App. 53, 171 S.E. 2d 106 (1969); *State v. Ford*, 13 N.C. App. 34, 185 S.E. 2d 328 (1971). The plea will not be disturbed on appeal. *State v. Abernathy*, 1 N.C. App. 625, 162 S.E. 2d 114 (1968); *State v. McKinnon*, 4 N.C. App. 299, 166 S.E. 2d 534 (1969).

No error.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. MILLARD LEE HARRIS

No. 7225SC300

(Filed 26 April 1972)

1. Assault and Battery § 11— warrant — misdemeanor assault

A warrant alleging that defendant assaulted his wife "by threatening to kill her and throwed rocks at her and shooting at her with a gun" charges a misdemeanor under G.S. 14-33, not a felony under any subparagraph of G.S. 14-32; consequently, the district court had original jurisdiction to try the defendant, G.S. 7A-272, and upon appeal from the district court to the superior court for trial *de novo*, the superior court had jurisdiction to try defendant upon the original warrant. G.S. 7A-271(b).

2. Criminal Law § 23— guilty plea — voluntariness — showing in record

Defendant is entitled to have his plea of guilty stricken and to replead to the charge against him where the record fails to show that

the trial judge made any inquiry or adjudication to determine that defendant's guilty plea was made freely and voluntarily and with full understanding of the nature of the charge against him, the constitutional rights being waived, and the likely consequences of the plea.

APPEAL by defendant from *Falls, Judge,* October 1971 Special Criminal Session of Superior Court held in CALDWELL County.

In Case No. 71-Cr-4851 defendant was charged in a warrant with having assaulted his wife on 5 June 1971 in violation of G.S. 14-33. On 10 June 1971 defendant was tried in district court, pleaded not guilty, was found guilty, and from judgment imposing a fine of $25.00 and costs, appealed to superior court. Upon arraignment in the superior court on 5 October 1971, defendant, not represented by counsel, pleaded guilty. Judgment was entered sentencing defendant to jail for a term of six months. On 12 October 1971 defendant gave notice of appeal and requested appointment of counsel. The court appointed Fate J. Beal to perfect this appeal.

Attorney General Robert Morgan by Associate Attorney General Walter E. Ricks III for the State.

Fate J. Beal for defendant appellant.

PARKER, Judge.

Appellant's first and fifth assignments of error are predicated upon his contention that the warrant on which he was tried charges the commission of a felony. From this he argues that the district court lacked jurisdiction to try him, but could only bind him over after a preliminary hearing, and that the superior court had no power to try him on the warrant, but could only proceed by way of indictment or information.

[1] The warrant charged that defendant assaulted his wife "by threatening to kill her and throwed rocks at her and shooting at her with a gun." The allegation that defendant assaulted his wife "by threatening to kill her" falls short of charging that he acted with the specific *intent* to kill required to make the offense a felony under G.S. 14-32(a) or (c), and there was no allegation that he inflicted serious injury so as to bring the matter under G.S. 14-32(b). The offense charged was a mis-

demeanor under G.S. 14-33, and was not a felony under any subparagraph of G.S. 14-32. Therefore the district court had original jurisdiction to try the defendant, G.S. 7A-272, and upon appeal from the district court to the superior court for trial de novo, the superior court had jurisdiction to try the defendant upon the original warrant. G.S. 7A-271(b). Appellant's first and fifth assignments of error are overruled.

[2] The judgment of the superior court was entered upon defendant's plea of guilty. The record contains no transcript of the plea signed by the defendant and is otherwise completely barren of anything to indicate that the trial judge made any inquiry or adjudication to determine that defendant's guilty plea had been made freely and voluntarily and with full understanding of the nature of the charge against him, the constitutional rights being waived, and the likely consequences of the plea. These essentials to a valid guilty plea may not be presumed from a silent record, *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709; *State v. Vanderburg,* 13 N.C. App. 248, 184 S.E. 2d 915; *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29. We must, therefore, order defendant's plea of guilty stricken and the case remanded so that defendant may replead.

New trial.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. MILLARD LEE HARRIS

No. 7225SC161

(Filed 26 April 1972)

1. Criminal Law § 166— abandonment of exceptions

Exceptions not brought forward in the brief are deemed abandoned. Court of Appeals Rule 28.

2. Criminal Law § 161— appeal as exception to judgment

The appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record.

3. Criminal Law § 23— guilty plea — voluntariness — showing in record

Defendant is entitled to have his plea of guilty stricken and to replead to the charge against him where the record fails to show affirmatively that defendant's plea of guilty was entered freely, voluntarily and understandingly.

APPEAL by defendant from *Falls, Judge,* 4 October 1971 Special Session of Superior Court, CALDWELL County.

This is a companion case to *State of North Carolina v. Millard Lee Harris,* 14 N.C. App. 268, 188 S.E. 2d 1 (1972). Defendant in this case was charged under a warrant with assaulting his wife on 7 June 1971 in violation of G.S. 14-33. On 10 June 1971 in District Court, defendant pleaded not guilty and was found guilty. From judgment ordering defendant to pay a $10 fine and costs, he gave notice of appeal to the Superior Court. There was no attorney of record for the defendant at his trial in Superior Court on 5 October 1971, and he entered a plea of guilty. From a judgment imposing a six-month prison sentence to begin at the expiration of the sentence in the companion case, defendant gave notice of appeal to this Court. The same counsel was appointed to represent the defendant on appeal in both cases.

Attorney General Morgan, by Associate Attorney Ricks, for the State.

Fate J. Beal for defendant appellant.

MORRIS, Judge.

[1, 2] The record of the case on appeal contains two exceptions made by defendant, but he failed to bring them forward in his brief. Thus they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Although appellant's brief contains no assignments of error, the appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record. *State v. Johnson,* 7 N.C. App. 574, 173 S.E. 2d 75 (1970).

The record contained no transcript of plea and adjudication thereon. *Ex mero motu,* we entered an order directing the Clerk of the Superior Court of Caldwell County to certify to this Court all portions of the record in this case having to do with defendant's plea of guilty; and further, if no transcript of plea or

adjudication appeared in the record to so certify to this Court. The Clerk has certified that "there is no Transcript of Plea and Adjudication filed" in this case.

[3] For the same reason as in the companion case, i.e., for failure of the record to show affirmatively that defendant freely, understandingly and voluntarily entered his plea of guilty, we must order that defendant's plea of guilty be stricken and the matter remanded so that defendant may replead. *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971); *State v. Vanderburg*, 13 N.C. App. 248, 184 S.E. 2d 915 (1971).

New trial.

Chief Judge MALLARD and Judge PARKER concur.

JAMES L. MARKS, JR. v. LELLA S. THOMPSON

No. 7210SC67

(Filed 26 April 1972)

1. **Insurance § 79; Rules of Civil Procedure § 26— automobile liability insurance — pretrial discovery**

G.S. 1A-1, Rule 26(b) authorizes pretrial discovery of information concerning automobile liability insurance carried by the defendant even though the only issues raised by the pleadings relate to negligence, contributory negligence and damage.

2. **Rules of Civil Procedure § 26— pretrial discovery of insurance — constitutionality**

The Rule of Civil Procedure authorizing the pretrial discovery of existence and contents of insurance does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. Fourth, Fifth and Fourteenth Amendments to the U. S. Constitution; Art. I, §§ 1 and 19 and Art. IV, § 13(2) of the N. C. Constitution.

Judge VAUGHN concurs in the result.

Judge BROCK dissents.

ON *certiorari* to review the order of *Brewer, Judge*, dated 4 October 1971, entered in the Superior Court held in WAKE County.

This is a civil action instituted by plaintiff to recover damages for personal injuries allegedly resulting from a collision between the automobiles of plaintiff and defendant on 29 January 1969.

This is an appeal from a pretrial order of the superior court directing the defendant to answer the following interrogatories:

"1. Were you insured by a policy of automobile liability insurance on January 29, 1969?

2. If so, state the name of the insurance carrier, the policy number, the effective dates and the amounts of coverage."

Herman Wolff, Jr.; and Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard for plaintiff appellee.

Maupin, Taylor & Ellis by William W. Taylor; and Purrington & Purrington by A. L. Purrington, Jr., for defendant appellant.

HEDRICK, Judge.

Pursuant to defendant's request made in response to plaintiff's motion that the appeal be dismissed as being premature, we have considered the appeal as a petition for certiorari and allowed the same.

[1] Defendant contends that G.S. 1A-1, Rule 26(b), as amended, does not authorize pretrial discovery of information concerning automobile liability insurance carried by the defendant where the only issues raised by the pleadings relate to negligence, contributory negligence and damage. We do not agree.

Rule 26(b), as amended, in pertinent part provides:

"*Insurance agreements.*—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement."

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." 7 Strong, N.C. Index 2d, Statutes, § 5, p. 77.

The language of Rule 26(b) is clear and unambiguous. We think the rule definitely and plainly allows discovery in the instant case of information sought in plaintiff's additional interrogatories regarding the existence and contents of any liability insurance agreements.

[2] Citing Article I, sections 1 and 19, of the North Carolina Constitution, and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938), the defendant contends that G.S. 1A-1, Rule 26(b), is unconstitutional in that it subjects defendant's property to unreasonable search and seizure, and authorizes the taking of defendant's property without due process of law. The North Carolina Rules of Civil Procedure were enacted by the General Assembly pursuant to Article IV, § 13(2), of our Constitution which, in pertinent part, provides:

"(2) *Rules of procedure.* * * * The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. * * * "

We hold that none of defendant's substantive rights guaranteed by the North Carolina Constitution or the Constitution of the United States are abridged by Rule 26(b), as amended, or the order dated 4 October 1971 entered pursuant thereto.

Affirmed.

Judge VAUGHN concurs in the result.

Judge BROCK dissents.

STATE OF NORTH CAROLINA v. CARL THOMAS RATLIFF

No. 7229SC252

(Filed 26 April 1972)

Criminal Law § 23— plea of guilty — voluntariness — showing in record

Defendant's plea of guilty is vacated, and defendant is entitled to replead to the charges against him, where the record fails to show that there was an examination of the defendant by the court or anyone under its direction relating to whether defendant understood the connotations and consequences of the plea.

APPEAL by defendant from *Fountain, Judge,* 23 August 1971 Regular Criminal Session of Superior Court held in POLK County.

The defendant was charged in a warrant with wilfully operating a motor vehicle upon the highways of this State during the period that his driver's license was permanently revoked.

The record reveals that "(t)he defendant, Carl Thomas Ratliff, in open court and through his counsel, Guy E. Possinger, enters a plea of guilty to the charge of driving after his operator's license were (sic) permanently revoked."

From judgment of imprisonment for a term of one year, the defendant gave notice of appeal to the Court of Appeals.

Attorney General Morgan and Associate Attorney Witcover for the State.

Guy E. Possinger for defendant appellant.

MALLARD, Chief Judge.

Although it is stated in the printed record in this case that the record on appeal was filed in this court on 22 November 1971, it was not filed until 28 January 1972. This was after the time for docketing the appeal had expired. However, we treat the appeal as a petition for a writ of certiorari, allow it, and consider the matter on its merits.

The motion of the State to dismiss the appeal for failing to serve the case on appeal within the allotted time and for failing to file a brief at the appropriate time is denied.

The record shows that on 24 November 1971 the solicitor accepted service of what the defendant called the case on appeal

and did not serve a countercase within the allotted time. The State cannot complain.

This court, *ex mero motu,* directed the Clerk of the Superior Court of Polk County "to certify to this court any and all portions of the record in this case having to do with defendant's plea of guilty." This report of the clerk containing a certified copy of the "court records" fails to show any questions asked of or statements volunteered by the defendant with respect to his plea. In *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969), it is stated that the trial judge should canvass "the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." The record in the case before us shows that the defendant's attorney entered the plea for him but fails to show that there was an examination of the defendant by the court or anyone under its direction relating to whether the defendant understood the connotations and consequences of the plea. The voluntariness of a plea of guilty cannot be presumed from a silent record. *State v. Boykin, supra.*

The plea of guilty entered herein is vacated, and the defendant is entitled to replead to the charge upon arraignment in the superior court. *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971).

Error and remanded.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ALFRED MONROE GREGORY

No. 7226SC232

(Filed 26 April 1972)

1. **Criminal Law § 161— appeal as exception to judgment**

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

2. **Criminal Law § 23— appeal from guilty pleas — absence of fatal defect on face of record**

Judgments imposed upon defendant's pleas of guilty of felonious breaking and entering and felonious larceny are affirmed where no fatal defect appears on the face of the record proper and the sentences imposed are within statutory limits.

State v. Gregory

APPEAL by defendant from *McLean, Judge,* 10 November 1971 Schedule B Criminal Session of Mecklenburg Superior Court.

Defendant was charged in a bill of indictment with the crimes of felonious breaking and entering and felonious larceny. Upon call of the case defendant, through his court-appointed counsel, tendered a plea of guilty to both offenses. Based upon careful examination of the defendant and the transcript of plea, the trial court adjudged that the plea of guilty by defendant was "freely, understandingly and voluntarily made," and ordered that defendant's plea of guilty be entered into the record.

The State offered evidence which tended to show that numerous items including tools, supplies and equipment valued at $1,500 were stolen from the Charlotte Concrete Company; that defendant voluntarily confessed to the investigating police officer after having been fully advised of his constitutional rights; and that every item reported missing was recovered from the defendant. The defendant offered no evidence.

The trial court entered judgments imposing consecutive prison sentences of eight years for each offense. Defendant appealed in forma pauperis.

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

Whitfield and McNeely, by Richard P. McNeely, for defendant appellant.

MORRIS, Judge.

Defendant's only assignment of error is that the trial court erred "in entering and signing the judgment and sentencing the defendant."

[1] An appeal is an exception to the judgment, and presents the face of the record proper for review. *State v. Thurgood,* 11 N.C. App. 405, 181 S.E. 2d 128 (1971); *State v. Martin,* 10 N.C. App. 181, 178 S.E. 2d 32 (1970).

> "Ordinarily, in criminal cases the record proper consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment." *State v. Tinsley,* 279 N.C. 482, 483, 183 S.E. 2d 669 (1971).

In the case at bar, the indictment sufficiently charged the crimes to which defendant voluntarily pleaded guilty in a properly organized court, and the judgment was in proper form.

The sentences imposed were within the statutory limits and did not constitute cruel and unusual punishment. *State v. Strickland,* 10 N.C. App. 540, 179 S.E. 2d 162 (1971).

[2] No fatal defect appears upon the face of the record, and the sentence imposed was within statutory limits. We find no error. *State v. Shelly,* 280 N.C. 300, 185 S.E. 2d 702 (1972); *State v. Washington,* 11 N.C. App. 441, 181 S.E. 2d 260 (1971).

No error.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. DOUGLAS MACK DAVIS

No. 7226SC260

(Filed 26 April 1972)

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

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from, there being no order in the record extending the time for docketing. Court of Appeals Rule 5.

APPEAL by defendant from *Harry C. Martin, Judge,* 18 October 1971 Schedule "C" Criminal Session, Superior Court of MECKLENBURG County.

Defendant was charged under a bill of indictment, proper in form, with armed robbery in violation of G.S. 14-87. Defendant, through his privately retained counsel, entered a plea of not guilty. The jury returned a verdict of guilty; whereupon, the trial court entered judgment committing defendant to the Department of Correction for not more than five years as a youthful offender. Defendant gave notice of appeal.

Attorney General Morgan, by Assistant Attorney General Magner, for the State.

Plumides and Plumides, by John G. Plumides, for defendant appellant.

MORRIS, Judge.

The judgment appealed from was dated 28 October 1971. The record on appeal was not docketed in this Court until more than 90 days after the date of the judgment appealed from. No order extending the time for docketing the record on appeal appears in the record. For failure of appellant to docket the record on appeal within the time allowed by the rules of this Court, this appeal is dismissed. Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

Counsel for defendant candidly states in the record that he, in good faith, is unable to find reversible error in the trial proceedings and, therefore, makes no assignment of error. He requests that the court review the record. This we have done, despite the failure to docket in time.

Prejudicial error does not appear.

Appeal dismissed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. RUDOLPH JOHNSON

No. 7226SC267

(Filed 26 April 1972)

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

Appeal is subject to dismissal where the record on appeal was not docketed within ninety days after the date of the order appealed from. Court of Appeals Rule 48.

2. Criminal Law § 145.1— revocation of probation

The trial court did not err in finding from the evidence that defendant had wilfully violated the terms of probation judgments and in ordering commitment to issue.

State v. Johnson

APPEAL by defendant from *Crissman, Judge,* 11 October 1971 Schedule "A" Criminal Session of Superior Court held in MECKLENBURG County.

The defendant was charged with the violation of the terms of a probation judgment, imposed upon him after he had freely, understandingly and voluntarily pleaded guilty to the felony of breaking and entering in 1967 and to the felony of larceny in 1970. In each case he was given a suspended prison sentence and placed on probation for a period of five years.

After due and proper notice, a hearing was held to determine whether the defendant had wilfully violated the terms of the probation judgments. At this hearing Judge Crissman found that the defendant had wilfully violated the terms of the judgments, entered an order revoking the probation judgments and ordered commitment to issue.

The defendant appealed to the Court of Appeals.

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

Edmund A. Liles for defendant appellant.

MALLARD, Chief Judge.

[1] On 14 October 1971 Judge Crissman signed orders revoking the suspension of the sentences and ordered commitment to issue. Under Rule 5 of the Rules of Practice in the Court of Appeals, the record on appeal is required to be docketed within ninety days after the date of the order appealed from. This appeal was not docketed in the Court of Appeals until 3 February 1972, which was more than ninety days after the date of the order appealed from, and is therefore subject to dismissal under Rule 48.

[2] However, we have carefully considered the record and defendant's assignments of error. The trial judge did not commit error in finding from the evidence offered that the defendant had wilfully violated the terms of the probation judgments suspending the sentences imposed on him. The judgment and order of the court ordering commitment to issue in each case are affirmed.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. HOWARD RAY GUFFEY

No. 7229SC128

(Filed 26 April 1972)

Criminal Law §§ 155.5, 166— failure to docket record and file brief in apt time

Appeal is subject to dismissal where the record on appeal was not docketed within the time allowed by Court of Appeals Rule 5 and the appellant's brief was not filed within the time allowed by Court of Appeals Rule 28. Court of Appeals Rule 48.

APPEAL by defendant from *Ervin, Judge,* second week of the 9 August 1971 Session of Superior Court held in RUTHERFORD County.

Defendant was charged in a bill of indictment, sufficient in form, with the felony of rape. The Solicitor elected to place defendant on trial for the lesser included offense of assault with intent to commit rape. Defendant pleaded not guilty and was tried by jury which found him guilty of assault with intent to commit rape.

Attorney General Morgan, by Assistant Attorney General Rosser, for the State.

James H. Burwell, Jr., for defendant.

BROCK, Judge.

This case was tried during the second week of the 9 August 1971 Session and the judgment was signed on 19 August 1971. However, the record on appeal was not docketed in this Court until 3 December 1971. There is no order in the record extending the time within which the record on appeal might be docketed in this Court. Therefore, in order to comply with Rule 5 the record on appeal should have been docketed on or before 17 November 1971. There seems to have been no difficulty in securing a transcript of the trial in ample time, because the record shows that the Solicitor accepted service of defendant's case on appeal on 19 October 1971. This was almost a month before the record was due to be docketed in this Court.

Also, defendant's brief was due in this Court on or before 7 March 1972. Rule 28. However, defendant's brief was not filed until 27 March 1972, the day before oral arguments.

For failure to comply with the Rules, this appeal is subject to dismissal. Rule 48. We have reviewed the record on appeal and in our opinion defendant had a fair trial, free from prejudicial error.

Appeal dismissed.

Judges HEDRICK and VAUGHN concur.

H. J. CATER AND H. J. CATER PAINTING CONTRACTOR, INC.
v. ZURICH INSURANCE COMPANY

No. 7226SC244

(Filed 26 April 1972)

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

Appeal is subject to dismissal where the record on appeal was not docketed within 90 days from the date of the judgment appealed from and no extension of time for docketing appears in the record. Court of Appeals Rules 5 and 48.

APPEAL by plaintiffs from *McLean, Judge,* 11 October 1971 Schedule "B" Non-Jury Session of Superior Court held in MECKLENBURG County.

Plaintiff sought to recover on a multi-peril insurance policy issued by the defendant to the plaintiffs. The parties stipulated the facts and agreed that "the court may proceed to adjudicate and determine this case as a matter of law on the basis of the facts" set forth in the stipulation.

Charles B. Merryman, Jr., for plaintiff appellants.

Craighill, Rendleman & Clarkson by J. B. Craighill for defendant appellant.

MALLARD, Chief Judge.

The judgment appealed from is dated and filed 21 October 1971. The record on appeal was docketed in this court on 25 January 1972. This docketing of the appeal was not within the ninety days from the date of the judgment as required by Rule 5 of the Rules of Practice in the Court of Appeals. No extension of time for docketing as permitted by Rule 5 appears in this

record. For failure to docket in time, the appeal is subject to being dismissed under Rule 48. However, before dismissing the appeal, we have examined the record and are of the opinion that under the stipulated facts, the plaintiffs are not entitled to recover and that Judge McLean was correct in so holding.

Appeal dismissed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION, AND THE NORTHWESTERN BANK v. AVERY COUNTY BANK

No. 7210SC78

(Filed 26 April 1972)

1. **Banks and Banking § 1— establishment of branch bank — needs of the community**

   There is no merit in defendant's contention that G.S. 53-62(b) requires an applicant for a branch bank to establish the existence of a specific unmet banking need which existing banks are unable or unwilling to provide as a prerequisite to the establishment of a new facility.

2. **Banks and Banking § 1— establishment of branch bank — needs and convenience of community — administrative decision**

   What "will meet the needs and promote the convenience" of the community is, to a substantial degree, an administrative question involving a multiplicity of factors which cannot be given inflexible consideration.

3. **Banks and Banking § 1— establishment of branch bank — sufficiency of evidence and findings**

   The findings and conclusions of the Banking Commission were supported by competent evidence and were sufficient to support its approval of an application to establish a branch bank.

Judge BROCK concurs in result.

APPEAL by defendant from *Hall, Judge,* 2 August 1971 Session of WAKE Superior Court.

The Northwestern Bank applied to the State Banking Commission for permission to establish a branch in Newland in Avery County. Avery County Bank protested the application.

After due investigation and hearing the Commission approved the application. Avery County Bank appealed to the Superior Court. On review, Judge Hall entered judgment affirming the decision of the Banking Commission. Avery County Bank appealed.

Teague, Johnson, Patterson, Dilthey and Clay by Grady S. Patterson for plaintiff appellee.

Sanford, Cannon, Adams and McCullough by Hugh Cannon and E. D. Gaskins, Jr. for defendant appellant.

VAUGHN, Judge.

[1] Among other things, G.S. 53-62(b) provides that the Commissioner shall not approve the establishment of a branch bank until " . . . he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served . . . . " We concede that this may be considered a somewhat nebulous criteria. The word "need," however, is a relative term. Its meaning, within reasonable limits, varies with the circumstances of its use. Appellant, arguing that the standard is closely akin to the familiar "public convenience and necessity" standard of public utility law, urges that an applicant must establish the existence of a specific unmet banking need, which existing banks are unable or unwilling to provide, as a prerequisite to the establishment of a new facility. We reject this contention as unsound. Differences between the operation of public utilities and the business of banking are so patent as not to require discussion and so are the differences in the public interest which prompts their respective regulation by separate commissions on the hypothesis that each commission possesses a high degree of specialized competence.

[2] In at least one respect, however, the nature of the problem is similar. With respect to public utilities, it has been said that " . . . what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration . . . . " *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201. With respect to banking, what will serve the needs of the community is also, to a substantial degree, and administrative question involving a multiplicity of factors which cannot be given inflexible

consideration. This is not to say that the Banking Commission has untrammeled discretion in determining what "will meet the needs and promote the convenience" of the community. Nor do we hold, absent some indication that additional competition is desirable, that merely offering to provide alternative banking services is sufficient under the statute.

[3] We do not deem it necessary to review the evidence considered by the Banking Commission in the present case. It is sufficient to say that the essential findings and conclusions of the Commission are supported by competent evidence. It is clear to us that the Commission candidly and in detail considered reasonable criteria. The findings and conclusions are sufficient to support the order. We have carefully considered all of appellant's assignments of error and argument in support thereof. We hold that Judge Hall did not err in affirming the order.

Affirmed.

Judge HEDRICK concurs.

Judge BROCK concurs in result.

STATE OF NORTH CAROLINA v. DEWEY LUCAS

No. 7226SC141

(Filed 26 April 1972)

Constitutional Law § 30— speedy trial

Defendant was not denied the right of a speedy trial where the offense occurred on 5 November 1970, a warrant was issued the same day and was executed on 8 November 1970, a true bill of indictment was returned the week of 5 April 1971, and judgment was entered on 10 August 1971.

APPEAL by defendant from *Copeland, Special Judge,* 2 August 1971 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

Attorney General Robert Morgan by Associate Attorney Benjamin H. Baxter, Jr. for the State.

James H. Carson, Jr. for defendant appellant.

VAUGHN, Judge.

The only assignment of error brought forward is that the court erred in failing to quash the bill of indictment upon the ground that defendant was not afforded a speedy trial. The offense occurred 5 November 1970. A warrant was issued the same day and was executed on 8 November 1970. A true bill of indictment was returned by the Grand Jury at the 5 April 1971 Session of Superior Court. Judgment was entered 10 August 1971. Defendant's assignment of error is overruled. This indigent defendant was ably represented by court appointed counsel at trial and on this appeal. In the trial from which the defendant appealed, we find no prejudicial error.

No error.

Judges BROCK and HEDRICK concur.

ELVA WALKER RENO v. WILLIAM H. ROGERS

No. 7227DC346

(Filed 26 April 1972)

Automobiles § 50— sufficiency of evidence for jury

Plaintiff's action and defendant's counterclaim for damages arising out of an automobile accident should have been submitted to the jury.

APPEAL by plaintiff and defendant from *Bulwinkle, District Court Judge,* 10 February 1972 Session of District Court held in GASTON County.

Plaintiff instituted this action to recover damages arising out of an automobile accident with defendant. Defendant counterclaimed for damages sustained by him. Both parties presented evidence. At the conclusion of all the evidence the court granted defendant's motion for a directed verdict against plaintiff and granted plaintiff's motion for a directed verdict against defendant on his counterclaim. Both plaintiff and defendant appealed.

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

Hollowell, Stott and Hollowell by Grady B. Stott for defendant.

VAUGHN, Judge.

A recital of the evidence presented in this case could serve no useful purpose. There was evidence which would have permitted but not required a finding of negligence on the part of the plaintiff. There was evidence which would have permitted but not required a finding of negligence on the part of the defendant. The case was one for the jury.

On Plaintiff's appeal the judgment is reversed.

On Defendant's appeal the judgment is reversed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEROY DAVIS

No. 7226SC165

(Filed 26 April 1972)

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

Appeal is subject to dismissal where the record on appeal was docketed more than 90 days from the date of the judgment appealed from and no extension of time within which to docket the case was granted. Court of Appeals Rule 48.

APPEAL by defendant from *McLean, Judge,* 12 July 1971 Session of Superior Court held in MECKLENBURG County.

The defendant was charged in a bill of indictment, proper in form, with possession of 97 bags of the narcotic drug heroin. The defendant pleaded not guilty and was found guilty by a jury. From a judgment imposing a prison sentence of four years and nine months, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Ralf F. Haskell for the State.

J. Marshall Haywood for defendant appellant.

HEDRICK, Judge.

The judgment appealed from was entered on 5 August 1971. The record on appeal was not docketed in this Court until 23 December 1971, which is more than ninety days from the date of the judgment. No extension of time within which to docket the case on appeal in this Court has been granted. This appeal is subject to dismissal for the defendant's failure to comply with the Rules of Practice in this Court. Rule 48. Nevertheless, we have carefully reviewed the record and find and hold that the defendant had a fair trial free from prejudicial error.

Appeal dismissed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN C. JACKSON

No. 7226SC124

(Filed 26 April 1972)

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

Appeal is subject to dismissal where the record on appeal was docketed more than 90 days from the date of the judgment appealed from and no extension of time within which to docket the case was granted. Court of Appeals Rule 48.

APPEAL by defendant from *Copeland, Judge*, 2 August 1971 Session of Superior Court held in MECKLENBURG County.

The defendant was charged in a bill of indictment, proper in form, with armed robbery, in violation of G.S. 14-87. The defendant pleaded not guilty and was found guilty by the jury. From a judgment imposing a prison sentence of not less than fifteen nor more than twenty years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorneys General Sidney S. Eagles, Jr., and Russell G. Walker, Jr., for the State.

Michael J. Blackford for defendant appellant.

HEDRICK, Judge.

The judgment from which the defendant appealed was entered on 4 August 1971. The record on appeal was not docketed in this Court until 1 December 1971, which is more than ninety days from the date of the judgment. No extension of time within which to docket the case in this Court has been granted. The appeal is subject to dismissal for failure to comply with the Rules of Practice of this Court. Rule 48. Nevertheless, we have carefully examined the record and find and hold that the defendant had a fair trial free from prejudicial error.

Appeal dismissed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. CALBERT REID

No. 7226SC210

(Filed 26 April 1972)

APPEAL by defendant from *Friday, Judge,* 1 November 1971 Schedule "A" Session of Superior Court held in MECKLENBURG County.

Defendant pleaded guilty to the felony of breaking and entering with intent to steal as charged in a bill of indictment, proper in form.

From judgment of imprisonment for a period of two years in the custody of the Commissioner of Corrections as a "Committed Youthful Offender" for treatment and supervision pursuant to Article 3A of the General Statutes of North Carolina, the defendant appealed.

Attorney General Morgan and Assistant Attorney General Cole for the State.

Charles B. Merryman, Jr., for defendant appellant.

MALLARD, Chief Judge.

After questioning the defendant, the trial court found that his plea of guilty was freely, understandingly and voluntarily made. The punishment imposed was permitted under the statute. No prejudicial error appears on the face of the record.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. DENNIS AMMONS

No. 7228SC121

(Filed 26 April 1972)

APPEAL by defendant from *Martin (Harry C.), Judge,* 12 July 1971 Criminal Session of Superior Court held in BUNCOMBE County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felony of larceny. From a verdict of guilty as charged and a judgment of imprisonment of not less than three years nor more than seven years, the defendant appealed.

Attorney General Morgan and Assistant Attorney General Icenhour for the State.

Peter L. Roda for defendant appellant.

MALLARD, Chief Judge.

We have carefully examined the record and each of the defendant's assignments of error. In the trial we find no prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. BOBBY LEONARD WYNN

No. 7226SC154

(Filed 26 April 1972)

APPEAL by defendant from *McLean, Judge,* 25 October 1971 Schedule "B" Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment, sufficient in form, with the felony of robbery with a dangerous weapon. G.S. 14-87. Defendant pleaded not guilty and was tried by jury.

The State's evidence tended to show:

On 6 August 1971, at about 7:00 p.m., Alfred Dallas Metcalfe, the victim, closed his shoe repair shop and started home. The victim, aged 75, carried a bag with his day's receipts to his car in a nearby parking lot. He was attacked and stabbed by the defendant and an unidentified accomplice, and his money was taken.

Defendant offered evidence tending to show that he was elsewhere at the time of the attack and robbery. The jury returned a verdict of guilty of robbery with a dangerous weapon as charged.

Attorney General Morgan, by Associate Attorney Payne, for the State.

T. O. Stennett for defendant.

BROCK, Judge.

Defendant's counsel, with appropriate candor, states that he has searched the record and has been unable to discover any matters properly assignable as error. We have reviewed the record and it appears that defendant had a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEROY DAVIS

No. 7226SC166

(Filed 26 April 1972)

APPEAL by defendant from *Fountain, Judge,* 30 August 1971 Schedule "D" Criminal Session, MECKLENBURG Superior Court.

In separate bills of indictment, defendant was charged with felonious possession of heroin and felonious possession of marihuana. The cases were consolidated for trial. A verdict of guilty was returned in each case. From judgment imposing an active prison sentence, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Claude W. Harris for the State.

J. Marshall Haywood for defendant appellant.

VAUGHN, Judge.

Defendant's court appointed counsel candidly states that he can find no error. We have examined the record and find no prejudicial error in the trial from which defendant appealed.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. ERVIN JONE HARBISON

No. 7225SC175

(Filed 26 April 1972)

APPEAL by defendant from *Snepp, Judge,* 15 November 1971 Session of Superior Court held in BURKE County.

Defendant, represented by counsel, entered pleas of guilty to two counts of operating a motor vehicle on the public highway while his operator's license was suspended or revoked. After an examination of the defendant in open court, the trial judge made an adjudication that the defendant's pleas of guilty were freely, understandingly and voluntarily made. From judgments imposing active prison sentences, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William B. Ray and Assistant Attorney General William W. Melvin for the State.

Livingston Vernon for defendant appellant.

VAUGHN, Judge.

Defendant's court appointed counsel candidly states that he has examined the record in this case and can find no error but asks the court to review the same. We have reviewed the record and find no error.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE STANSBURY

No. 729SC256

(Filed 26 April 1972)

Certiorari was allowed 2 December 1971 as a substitute for appeal from *Canaday, Judge,* 30 August 1971 Session of Superior Court held in FRANKLIN County.

Defendant was charged in a bill of indictment with the offense of unlawfully, willfully and feloniously attempting to burn a stable in violation of G.S. 14-67. He was represented by counsel. Defendant entered a plea of *nolo contendere.* The trial judge questioned the defendant in detail as to the defendant's understanding of the consequences of his plea. Among other things, the defendant told the judge that he was in fact guilty and wanted to plead guilty. The judge then made an adjudication that the defendant's plea of guilty was freely, understandingly and voluntarily made. From a judgment imposing a sentence of imprisonment, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

W. M. Jolly for defendant appellant.

VAUGHN, Judge.

Defendant's court appointed counsel candidly states that he can find no error. We have examined the record and find no error.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. RUFUS OLDEN CRUSE

No. 7226SC125

(Filed 26 April 1972)

APPEAL by defendant from *Copeland, Special Judge,* 2 August 1971 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was convicted on six counts of uttering forged checks, in violation of G.S. 14-120. From judgments imposing active prison sentences, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Henry E. Poole for the State.

Lila Bellar for defendant appellant.

VAUGHN, Judge.

Though docketed more than three weeks late, we have, in our discretion, considered this appeal on its merits. All of defendant's assignments of error have been carefully considered. In the trial from which the defendant appealed, we find no prejudicial error.

No error.

Judges BROCK and HEDRICK concur.

JESSIE BAXTER, ELLEN B. BEAM, MADELINE B. MINCEY, G. BLAINE BAXTER, F. HERMAN BAXTER AND BLANCHE B. DUVAL v. EFFIE LEAH MURRELL JONES, JOE MURRELL, RILEY MURRELL, MRS. JOE WALTER, MRS. CLIFFORD WOODLEY, MRS. GEORGE SCHENOLAL, MRS. WALLY ARROWSMITH, MRS. GEORGE REITER, MRS. LEONA MOWATT, MRS. DENNIS BOKTIN, MRS. MARY BOYD PEARSON, PAUL B. COSTNER AND WIFE, SALLIE A. COSTNER, MILDRED C. CARDWELL, RUTH C. DODENHOFF, DURWARD W. COSTNER, AND WIFE, MARJORIE COSTNER, MRS. MARY DELMA B. SEAGLE, ROSA BLACKBURN McDONALD AND HUSBAND, GENE McDONALD, ESSIE PARKS BLACKBURN, MARY L. BLACKBURN GARDNER AND HUSBAND, WILLIAM GARDNER, REV. L. E. BLACKBURN, FRED J. BLACKBURN, SR., AND WIFE, SARA WILFONG BLACKBURN, SAMUEL W. BLACKBURN, EMILY BLACKBURN DAVIDSON, CHARLES E. BLACKBURN, MRS. BLANCHE BLACKBURN PRINCE, HUGH WOODROW BLACKBURN, CHESTER BLACKBURN, SHUFORD W. BLACKBURN AND WIFE, OVETA WHITE BLACKBURN, MRS. PHOEBE BLACKBURN WILFONG, DOCIA LEDFORD BOYD, S. J. BOYD AND WIFE, PEARL BOYD, INA B. MIXON AND HUSBAND, M. O. MIXON, JOHN F. BOYD AND WIFE, KATHERINE BOYD, MARY B. HOYLE AND HUSBAND, GUY L. HOYLE, W. G. BOYD AND WIFE, MAE BOYD, BESSIE B. SCHRUM AND HUSBAND, E. E. SCHRUM, BEVERLY B. BOYD AND WIFE, OLA BOYD, ETHEL BOYD, W. EUGENE BOYD, JAMES EDWARD BOYD AND WIFE, NINA BOYD, EARL B. BOYD AND WIFE, PATRICIA BOYD, BEVERLY RICHARD BOYD AND WIFE, BETTY BOYD, RALPH AUGUSTUS BOYD AND WIFE, GLORIA BOYD, ANNIE BOYD STARNES, RUTH BOYD BARKLEY AND HUSBAND, ERNEST FRANKLIN BARKLEY, MARY BOYD SIMMONS AND HUSBAND, W. D. SIMMONS, ETHEL BOYD CREEL AND HUSBAND, ROBERT CREEL, JOHN R. BOYD, RALPH BOYD AND WIFE, HELEN BOYD, MARY A. CROWDER AND HUSBAND, R. B. CROWDER, EDITH A. TOMPSON AND HUSBAND, A. A. TOMPSON, THELMA A. OWENS AND HUSBAND, W. J. OWENS, MOZELLE A. WHITE AND HUSBAND, DONALD E. WHITE, MARIDELL B. BANDY AND HUSBAND, ROBERT B. BANDY, CAROLYN B. CARTER, WOODROW BOYD AND WIFE, DOROTHY BOYD, C. C. BOYD AND WIFE, CORRINE BOYD, PEARL B. THORNTON, MAE B. RITCHIE AND HUSBAND, GUY RITCHIE, D. R. BOYD AND WIFE, ILA T. BOYD, IDA B. RUDISILL AND HUSBAND, JASON RUDISILL, ROBERT W. BOYD AND WIFE, JOYCE J. BOYD, IVA S. BOYD, JOE BOYD, HUBERT BOYD, EDWARD BOYD, J. BEN MORROW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF PEARL BOYD BAXTER, DECEASED, AND ALL UNKNOWN HEIRS OF PEARL BOYD BAXTER, DECEASED, WHOSE NAMES AND RESIDENCES ARE UNKNOWN

No. 7227SC38

(Filed 24 May 1972)

1. Trusts § 1— express trust — transfer of title

In order to create an express trust, there must be a transfer of title to property by the donor or settlor for the benefit of another.

2. Trusts § 1— creation of trust

The essentials for creation of a valid trust are (1) sufficient words to raise it, (2) a definite subject, and (3) an ascertained object.

3. Trusts § 1— insufficiency of instrument to create trust

Paperwriting signed by decedent was insufficient to create a trust for the management of decedent's property during her lifetime or for delivery of any part thereof to her step-children after her death, where there was no present and unequivocal transfer of property to trustees by decedent, and it appears that decedent intended to make a testamentary disposition of her property but failed to comply with statutory requirements for the execution of a valid will.

4. Wills § 1— failure to execute will properly — voidness

An instrument which is testamentary in effect but fails to follow the prescribed formalities for the proper execution of a will is void.

5. Rules of Civil Procedure § 56— summary judgment — conditional ruling

The trial court had no authority to provide in its judgment denying plaintiffs' motion for summary judgment that the court would enter summary judgment in favor of plaintiffs if it were decided on appeal that the instrument in question created a trust as contended by plaintiffs.

6. Trusts § 5— purported trust — answering and nonanswering defendants

An instrument cannot be a trust instrument against the defendants who filed answer and not a trust instrument against those defendants who filed no answer.

7. Judgments § 14; Declaratory Judgment Act § 2; Rules of Civil Procedure § 55— declaratory judgment — failure to file answer — default judgment

In this action for a declaratory judgment construing a purported trust instrument, failure of some of the defendants to file an answer to the complaint or to answer interrogatories did not entitle plaintiffs to a judgment against such defendants based on plaintiffs' conclusions and contentions as to the construction of the instrument, since the rights of the parties must be determined by a proper construction of the instrument; consequently, where the court correctly determined that the instrument was insufficient to create a trust in favor of plaintiffs as against those heirs at law of decedent who filed answer, the court erred in ruling that plaintiffs are entitled to recover by default the intestate shares which would otherwise have been received by decedent's heirs at law who failed to answer.

APPEAL by plaintiffs and defendants from *Thornburg, Judge,* 13 September 1971 Session of Superior Court held in Gaston County.

This action was instituted 8 September 1970 under the Declaratory Judgment Act, North Carolina General Statutes,

Article 26, Chapter 1, for the purpose of having a paperwriting construed and the rights of the various parties determined thereunder. On appeal to this court, it was stipulated by the plaintiffs and the attorneys of record for the answering defendants that the plaintiffs are the step-children of one Pearl S. Baxter, deceased (Mrs. Baxter); that the defendants are all of the heirs-at-law of Mrs. Baxter; that Mrs. Baxter was predeceased by her husband (father of the plaintiffs) and never had given birth to any children, nor had she ever legally adopted the plaintiffs; and that the said Mrs. Baxter died intestate 29 January 1969, "and owned property, both real and personal" in Gaston County at the time of her death. It was further stipulated that the paperwriting, attached to the complaint as "Exhibit A" (hereinafter referred to as Exhibit A) and dated 22 December 1968, was dictated to Jessie Baxter, one of the plaintiffs, and signed by the decedent and that none of the parties contend that this instrument is of sufficient solemnity to entitle it to be considered as a last will and testament. This paperwriting reads as follows:

"December 22, 1968

Jessie,

I thought you would never get here. I have been waiting for you to come and help me with some things I want to write. I have done a great deal of thinking in the last three years and I have found that I had to depend upon others and you girls have always come to my rescue when I needed something done. It has long been my intention to write in detail what I want done. I asked you to bring me some paper to use which you did but before I got it done I realized I was too weak to do that much writing. I have just been waiting for you to come and help me with what I want to say.

The first thing I want done before I forget is for you to send a check to the chuch secretary for my tithe before the end of the year. Then I want you to write Aunt Effie in Texas, Elsie C. Murrell in Maryland, Cousin Jewel in Canada and tell them just how sick I am. I think it time to tell them my condition. I can't and don't want to live much longer. Don't worry if none of you are here when it comes (the time comes), you children have been good to me

and it might just come when I am asleep. That's all right. It won't make any difference. You children were good to me when I was living.

There are maybe some people who won't like what I am going to say but you will just have to let them holler and not give in. You children all have been good to me and I am thankful for you. Maurice, Mark, Susan, Tim and Pat are all sweet and good children. I am sorry I couldn't get them something for Christmas but I hope they will understand. It will be so much more expensive to educate them than when I went to school. I wanted to help some.

I have worried about not getting the house cleaned before I had to go to the hospital. I know you and Ellen, Madeline and Blanche will understand that I wasn't able to do more. I don't want ANYONE ELSE to go inside. PROMISE ME THIS. Maybe Madeline and Red might like to live in the house. Jessie, you might like to live in the little one if it is near enough to someone so you wouldn't be afraid. (asked if I'd like it—I told her I'd like whatever she wanted done.) As I have told you before I want you and Ellen to take care of all business matters for me—now and later—personal property—houses and money, etc. I know you will take care of all bills, funeral expenses and obligations and then I want you children—Jessie, Ellen, Blaine, Madeline, Herman and Blanche to have what is left. Remainder part of money came from Aunt Bertha's estate—Dad's business bonds. I have prayed and thought about things a lot the last three years while I had plenty of time to think, and I have seen who has stood by me and done things for me and I have changed my mind about a lot of things during that time. You children already have some plans for my funeral that I still want carried out. You have some and Ellen and Madeline have some. I want Caruthers to have charge and I would like a casket about like the one we had for your Daddy. There are some pins I want used. I hope you can find them.

Church Life Membership
NRTA pin
Woodmen of World Pin
off white—V necked dress

December 22, 1968
Sunday

Fully clothed—pants, hose, slips
Dark pin
Brown—(illegible)

Thessalonians
Romans
John 14-1:4
Teacher—(3)
Ada Harvey
Greenville, S. C.

Jessie & Ellen in charge of everything for me and all things —money—property, etc., later for all the children.

Presidential Chair (Rocker)—Madeline B. Mincey
Large Secretary Living Room—Madeline B. Mincey
Bedroom suit—Madeline B. Mincey
Mother's walnut bed—Jessie Baxter
Sewing machine—Jessie Baxter
Dining Room Table—Jessie Baxter
Refrigerator-TV-all music things—Jessie Baxter unless Blanche needs refrigerator
Dryer—TO ONE needing it or—Jessie Baxter
Mother's small tin trunk to—Mintie Mae Boyd Ritchie
Pink Trunk—Black ones—Jessie Baxter
Large Book Case?—Jessie Baxter
Furs—Blanche (hall)—Jessie authorized to sign checks.

Pearl told me that she wanted me to write down some THINGS she wanted CERTAIN people to have. The above list is what she asked me to write down.—She also expressed a desire for me to write her will (pages 1 and 2). She said she had changed her mind about what she had said at one time she wanted. All you children have stood by me and looked after me. My own cousins haven't like I thought they would. My church friends haven't been as faithful as I had thought they would be. You all are the ones I love.

Pearl B. Baxter
Amelia Brimer
(for signature verification)

Suggested that some things be given to Salvation Army (we must take them out of house)—That fund be given to care for Cemetery at St. Matthews—You people

go once in a while but don't feel have to go too often. You've always taken me or gone for 1st Sunday in September. Maybe someone can go then.

*Remember to see about marker at grave."

In their complaint, plaintiffs alleged that by virtue of the terms of the foregoing writing, plaintiffs Jessie Baxter and Ellen Baxter Beam were "the duly constituted trustees by appointment of Pearl Boyd Baxter in her lifetime" and that they and the other plaintiffs were "the sole *cestuis que trustent* thereunder and are entitled to have all of the estate and property of the decedent remaining, after payment of debts and other items named in said instrument, distributed to them and that the title to all realty owned by the decedent at the time of her death, is owned by the plaintiffs in equal shares." Among other things, the plaintiffs demanded judgment declaring Jessie Baxter and Ellen B. Beam trustees by virtue of the instrument and declaring them and the other plaintiffs to be the sole *"cestuis que trustent"* under the instrument.

The record discloses that there are ninety-nine named defendants to this action. On 14 December 1970, two of these defendants, S. J. Boyd and Pearl Boyd, filed answer admitting all allegations of plaintiffs' complaint (except that there was any basis for any bona fide dispute between the parties) and prayed "that the Court enter a judgment awarding all of the property and estate of Pearl Boyd Baxter, deceased, to the plaintiffs in this action." Further, on 15 September 1971, these two defendants "stipulated" that the court might enter "summary judgment," with prejudice, against them in favor of the plaintiffs and wrote a letter filed 16 September 1971 (addressee unspecified) stating that, should defendants prevail in the present action, they wanted "what we would get to go to the Baxter girls." Plaintiffs filed what they entitled, "Motion for Summary Judgment" against these two defendants, S. J. Boyd and Pearl Boyd, on 16 September 1971; whereupon Judge Thornburg granted what purported to be a summary judgment in favor of plaintiffs as to these two defendants.

On 10 September 1971, plaintiffs filed a "Motion under Rule 37(d)" and a "Motion for Default Judgment" seeking to obtain "default judgments" against a number of the named defendants who allegedly had failed to answer the plaintiffs'

complaint or had failed to properly answer plaintiffs' interrogatories. On 17 September 1971, the Assistant Clerk of Superior Court made what purported to be an "Entry of Default" under the provisions of Rule 55(a) (filed 20 September 1971) against sixty-seven of the defendants, being those alleged not to have filed answer or other pleadings. As to these sixty-seven defendants, Judge Thornburg, in a judgment dated 17 September 1971 and filed 23 September 1971, entered a "Judgment" by default against them.

In addition, there was entered an "Order and Judgment," dated 17 September 1971 and filed 23 September 1971, in which Judge Thornburg found as a fact on a hearing "upon Motion of plaintiffs pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure . . . and upon Motion of the answering defendants for Summary Judgment or Judgment on the Pleadings under Rule 56, NCRCP, and Rule 12(b) (6), NCRCP," that the paperwriting marked plaintiffs' "Exhibit A" was not a valid last will and testament and concluded as a matter of law that it was not a trust agreement. The pertinent portions of this "Order and Judgment" are as follows:

> "4. That judgment by default has been entered against a number of defendants who did not file answer or other pleading, as will appear of record, to which record reference is hereby made.
>
> 5. That S. J. Boyd and his wife, Pearl Boyd, filed Answer admitting the allegations of the Complaint, and summary judgment with prejudice has been entered in favor of the plaintiffs and against said defendants.
>
> * * *
>
> 8. That no persons, other than those individuals named as parties plaintiff and parties defendant in this action, have any right, title or interest in and to any of the property and estate of Pearl Boyd Baxter, deceased.
>
> * * *
>
> 13. That the paper writing marked 'Exhibit A' and attached to the Complaint is not a valid Last Will and Testament of the said Pearl Boyd Baxter for the reason that the same was not executed in accordance with the laws of North Carolina, and none of the parties contend that the

same is of sufficient solemnity to entitle it to be considered as a Last Will and Testament.

14. At the time of her death, the said Pearl Boyd Baxter had not executed a valid Last Will and Testament and therefore died intestate.

15. That J. Ben Morrow, an attorney at law in Gastonia, North Carolina, is the duly qualified and acting Administrator d.b.n. of the estate of the late Pearl Boyd Baxter, said Morrow having been appointed by the Clerk of Superior Court at the suggestion of and by and with the consent of the parties plaintiff and defendant and with the consent of their attorneys of record.

* * *

17. That the defendants constitute all of the heirs at law of the late Pearl Boyd Baxter under the laws of descent and distribution in effect in the State of North Carolina at the time of her death, and at the time of the hearing of this matter in the Court.

18. That the Court is of the opinion that the question of the intent of the deceased, Pearl Boyd Baxter, at the time of the execution of the paper writing marked 'Exhibit A' and attached to the Complaint is immaterial and of no consequences, in view of the fact that the Court is of the opinion that the said paper writing is not sufficient on its face to constitute a trust instrument under the laws of the State of North Carolina.

19. That on the 10th day of September, 1971, the plaintiffs filed a Motion for summary judgment, pursuant to Rule 37(d), North Carolina Rules of Civil Procedure (Chapter 1A-1, General Statutes of North Carolina), as against the defendants named in Paragraph 11 above; that the Court is of the opinion that the matters presented by said motion should not be determined at this time, due to the fact that the Court does not construe said paper writing to be a trust instrument; but that if the ruling of this Court is reversed on appeal, then the Court is of the opinion that the motion for summary judgment lodged by the plaintiffs should be allowed, and this Court will grant said motion at that time.

Upon the foregoing findings of fact, the Court makes the following conclusions of law:

1. That the paper writing marked 'EXHIBIT A' and attached to the Complaint of the plaintiffs is not a trust instrument creating a trust as to the property and estate of the deceased, Pearl Boyd Baxter, and making the plaintiffs, Jessie Baxter and Ellen Baxter Beam, trustees.

2. That the defendants who have not defaulted by failure to plead do own a right, title and interest in and to the personalty and realty of Pearl Boyd Baxter, deceased, to the extent provided for each of them under the laws of descent and distribution in effect at the time of her death on January 29, 1969.

3. That the answering defendants are entitled to have and receive that portion of the estate and property of Pearl Boyd Baxter, deceased, as provided in the laws of descent and distribution of North Carolina in effect on January 29, 1969.

4. That the plaintiffs are entitled to have and recover that portion of the estate and property of Pearl Boyd Baxter, deceased, in equal shares, not awarded to those defendants against whom summary judgment has been entered and signed and those defendants against whom default judgment has been entered and signed because of their failure to answer the Complaint or otherwise file pleadings herein.

5. That pursuant to Chapter 6, General Statutes of North Carolina, the costs of this action, including attorneys' fees for attorneys for plaintiffs and defendants, are taxed against the estate of Pearl Boyd Baxter, deceased. That said attorneys' fees shall not be assessed at this time, but shall be fixed by this Court upon the conclusion of appeals herein.

Now, therefore, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(a) That the Motion for Summary Judgment filed by the plaintiffs on September 10, 1971, as to the answering defendants, under Rule 37(d), NCRCP, is denied at this time. If, however, the ruling of this Court as to the validity

of 'Exhibit A' attached to the Complaint as a trust instrument is reversed on appeal, then the said Motion of the plaintiffs is allowed and judgment to that effect will be entered at the conclusion of said appeals.

(b) That the paper writing marked 'EXHIBIT A' and attached to the Complaint is neither the last will and testament of said Pearl Boyd Baxter, deceased, nor a trust instrument creating a trust as to the property and estate of Pearl Boyd Baxter, deceased, during her lifetime. That Jessie Baxter and Ellen Baxter Beam are not trustees of the estate and property of said decedent. That said writing did not vest title to the personalty and realty of the deceased in said persons as trustees for the purpose of managing the estate and property of Pearl Boyd Baxter during her lifetime and for the further purpose of delivering so much thereof as remained at her death to the plaintiffs.

(c) That those defendants hereinabove named who filed answer (other than S. J. Boyd and his wife, Pearl Boyd, against whom Summary Judgment has been entered by and with their consent) do own a right, title and interest in and to the personalty and realty of Pearl Boyd Baxter, deceased, to the extent provided for each of them by the laws of descent and distribution in effect at the time of her death on January 29, 1969; that said defendants are entitled to have and receive that portion of said estate and property as provided by the said laws of descent and distribution in effect in North Carolina on January 29, 1969.

(d) That the plaintiffs are entitled to have and recover in equal shares that portion of the estate and property of Pearl Boyd Baxter, deceased, not awarded herein to those defendants against whom summary judgment has been entered and signed and not awarded to those defendants against whom default judgment has been entered and signed because of their failure to answer the Complaint or otherwise file pleadings herein.

(e) That the costs of this action, including reasonable attorneys' fees to the attorneys for the plaintiffs and the defendants, shall be taxed against the estate of Pearl Boyd Baxter, deceased; said attorneys' fees shall be assessed by the Court upon the completion of all appeals in this action, in such amount as to this Court seems proper.

(f) That the motion of the answering defendants for Summary Judgment is hereby granted.

(g) That the Motion for Summary Judgment filed by the plaintiffs as to the answering defendants under Rule 37(d), NCRCP, is denied at this time; however, if upon appeal it is held that the paper writing attached to the Complaint and marked 'EXHIBIT A' constitutes a trust instrument as alleged by the plaintiffs in the Complaint, this Court will thereafter enter a summary judgment against the answering defendants as prayed in motion heretofore filed by the plaintiffs."

Sixty-seven of the defendants, including the administrator of Mrs. Baxter's estate, failed to file answer, and did not appeal. The defendants, S. J. Boyd and wife, Pearl Boyd, did not appeal. Thirty defendants (herein referred to as "answering defendants") filed answer (according to the stipulations) and did appeal to the Court of Appeals.

To the signing and entering of the foregoing judgment, both plaintiffs and the answering defendants appealed to the Court of Appeals.

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

Whitesides & Robinson by T. Lamar Robinson, Jr., for defendant appellants.

MALLARD, Chief Judge.

APPEAL OF PLAINTIFFS

Plaintiffs contend that the trial judge committed error in failing to find that "Exhibit A" created a trust and invested title to the personalty and realty of Pearl Boyd Baxter in the plaintiffs.

"Trusts are classified in two main divisions: express trusts and trusts by operation of law. The cardinal distinction between the two classes is that an express trust is based upon a direct declaration or expression of intention, usually embodied in a contract; whereas a trust by operation of law is raised by rule or presumption of law based on acts or conduct, rather than on direct expression of

intention. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83; 54 Am. Jur., Trusts, sections 186 and 187. See also 65 C.J., p. 220 *et seq.*" *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289 (1954). See also *Pegram v. Tomrich Corp.,* 4 N.C. App. 413, 166 S.E. 2d 849 (1969).

We are concerned here with the question of whether "Exhibit A" created an express trust. We hold that it did not.

"The creation of a trust is a present disposition of property, and not an undertaking to make a disposition in the future." 1 Restatement of Trusts 2d, § 16, p. 58.

"In order to create an enforceable trust it is necessary that the donor or creator should part with his interest in the property to the trustee by an actual conveyance or transfer, and, where the creator has legal title, that such title should pass to the trustee." 89 C.J.S., Trusts, § 63, p. 837.

[1] "It is essential to the creation of an express trust that the settlor presently and unequivocally make a disposition of property by which he divests himself of the full legal and equitable ownership thereof." 54 Am. Jur., Trusts, § 34, p. 45.

> " * * * An express trust has been defined as 'a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.' 1 Restatement Law of Trusts, 6. The term signifies the relationship resulting from the equitable ownership of property in one person entitling him to certain duties on the part of another person holding the legal title. 54 Am. Jur., 21. *To constitute this relationship there must be a transfer of the title by the donor or settlor for the benefit of another. Coon v. Stanley,* 230 Mo. App. 524. The gift must be executed rather than executory upon a contingency. *Cazallis v. Ingraham,* 119 Me., 240." (Emphasis added.) *Wescott v. Bank,* 227 N.C. 39, 40 S.E. 2d 461 (1946).

[2] "It is well settled in this State and others that to constitute a valid trust, undoubtedly three circumstances must concur—(1) sufficient words to raise it, (2) a definite subject, (3) and an ascertained object." *Thomas v. Clay,* 187 N.C. 778, 122 S.E.

852 (1924). See also *Trust Co. v. Taylor,* 255 N.C. 122, 120 S.E. 2d 588 (1961); *Finch v. Honeycutt,* 246 N.C. 91, 97 S.E. 2d 478 (1957); and *Starling v. Taylor,* 1 N.C. App. 287, 161 S.E. 2d 204 (1968).

In the case of *Callaham v. Newsom,* 251 N.C. 146, 110 S.E. 2d 802 (1959), the Supreme Court said:

> "When called upon to interpret a trust agreement or other contract, courts seek to ascertain the intent of the parties and, when ascertained, give effect thereto, unless forbidden by law. *In re Will of Stimpson,* 248 N.C. 262, 103 S.E. 2d 352; *DeBruhl v. Highway Com.,* 245 N.C. 139, 95 S.E. 2d 553; *Hall v. Wardwell,* 228 N.C. 562, 46 S.E. 2d 556; *Trust Co. v. Steele's Mills,* 225 N.C. 302, 34 S.E. 2d 425.
>
> The intent of one who creates a trust is to be determined by the language he chooses to convey his thoughts, the purpose he seeks to accomplish, and the situation of the several parties to or benefited by the trust. *Electric Co. v. Insurance Co.,* 229 N.C. 518, 50 S.E. 2d 295."

[3] When "Exhibit A" is read in its entirety and the circumstances under which it was written are considered, it appears that there was no *present and unequivocal* transfer of property to trustees by Mrs. Baxter, and the language employed in the writing is insufficient to create a trust. Although some of the plaintiffs may have been requested to perform certain duties prior to the decedent's death, the overall testamentary character of the writing is apparent: There are numerous references by Mrs. Baxter to her impending death and of her desire to dispose of her property in light of that event. This intent is further demonstrated where it is stated, in a parenthetical way, on page three, the signature page, of "Exhibit A," "She also expressed a desire for me (Jessie Baxter, the draftsman) to write her will (pages 1 and 2). She said she had changed her mind about what she had said at one time she wanted."

[4] It seems that Mrs. Baxter intended to and attempted to make a will, but failed to comply with the statutory provisions which grant and control the right to dispose of property by will. See Article 1 of Chapter 31 of the General Statutes and *Ridge v. Bright,* 244 N.C. 345, 93 S.E. 2d 607 (1956). An instrument which is testamentary in effect but does not follow

the prescribed formalities for the proper execution of a will is void. See Bogert, Trusts & Trustees, 2d Ed., § 102.

Moreover, it appears that the parties have stipulated that Mrs. Baxter died in Gaston County "on January 29, 1969, while a resident of said county, and owned property, both real and personal, in said county at the time of her death." It would seem that this stipulation, together with the admissions in paragraph 7 of the plaintiffs' complaint which reads, "(t)hat since the death of the said Pearl Boyd Baxter there has been no sale, distribution or disposition of the estate and property owned by her at the time of her death," negatives any concept of a transfer of title to all of Mrs. Baxter's property in her lifetime. The parties also admit that "Exhibit A" is not a will.

In the case before us, we hold that "Exhibit A" is neither a trust nor a will, and plaintiffs acquired no interest in the estate of Mrs. Baxter thereunder.

APPEAL OF DEFENDANTS

[5] The answering defendants assign as error those parts of the "order and judgment" signed by Judge Thornburg and dated 17 September 1971, in which it was asserted that "this Court" (probably meaning a superior court at which he, Judge Thornburg, was the presiding judge) would enter a judgment allowing plaintiff's motion for summary judgment, if it were held on appeal that "Exhibit A" is a trust instrument. Although such a ruling is erroneous and is irregular, in this case it is not now prejudicial to the answering defendants because this court has affirmed Judge Thornburg's ruling that "Exhibit A" did not create a trust. But it should be noted that though a superior court judge is vested with great power, he does not have the power to deny a motion and also to allow it in the same judgment, or to bind another judge by such a premature anticipatory and conditional ruling. Moreover, under our system of rotation of superior court judges, the same judge may not be assigned to hold the superior courts of a given county when a case from that county is finally decided on appeal, and therefore it is improper for such judge to include in his judgment how he would rule on a hypothetical state of facts if presented to him at some future date.

The answering defendants also assign as error the signing and entering of those portions of the "order and judgment,"

dated 17 September 1971 and filed 23 September 1971, designated (a), (d) and (g), and the findings and conclusions of law upon which they were based.

On 10 September 1971, plaintiffs filed a motion under Rule 37(d) in which it was asserted that on 12 March 1971, plaintiffs, pursuant to Rule 33, served written interrogatories on the 30 answering defendants. However, this record shows that a notice and interrogatories dated 13 March 1971 were directed to only one of the defendants, to wit: "Effie Leah Murrell Jones and Henry M. Whitesides, Attorney of Record for said defendant." In their motion plaintiffs assert that fifteen of the answering defendants filed answer and fifteen failed to file answer to the interrogatories. However, on this record the only defendant to whom notice and interrogatories was addressed, Effie Leah Murrell Jones, did file an answer and the plaintiffs are not entitled to have their motion under Rule 37(d) allowed.

At the time they filed their motion under Rule 37(d), plaintiffs also filed a motion for judgment by default in which they alleged, among other things, that the summons and complaint in this cause had been duly served upon "the defendants named in said action and/or upon such of them as will fairly insure the adequate representation of all of them (Rule 23, NCRCP)." Although the plaintiffs did not allege in their complaint that the defendants constituted a class so numerous as to make it impracticable to bring them all before the court, they seem to have proceeded, in part, upon such theory, at least in this motion. It was held under old G.S. 1-70, the class action statute, which has now been superseded by Rule 23 of the Rules of Civil Procedure, that in order to bring a proceeding under this section of the statute, it was necessary to make such an allegation. The plaintiffs, in moving for judgment by default, contradict themselves in that they seem to treat this lawsuit as a class action in the first paragraph of the motion, and in the second paragraph thereof, state that although a number of the defendants filed answer to the complaint, plaintiffs are entitled to a judgment by default under Rule 55 of the Rules of Civil Procedure against the sixty-seven defendants who did not.

Judge Thornburg entered a "Judgment" by default dated 17 September 1971 and filed 23 September, against the sixty-seven defendants who did not file answer, as follows:

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

1. That as against the above-named defendants, the plaintiffs, Jessie Baxter and Ellen B. Beam, are trustees by virtue of the instrument attached to the Complaint herein and marked 'Exhibit A', and that the said Jessie Baxter and Ellen B. Beam and the other plaintiffs herein are, as against the above-named defendants, the sole cestuis que trustent under said instrument.

2. That the plaintiffs in this action, as cestuis que trustent under the instrument above-mentioned, are entitled to have and recover of the above-named defendants such share of the property and estate of Pearl Boyd Baxter, deceased, as would otherwise accrue to said defendants as heirs at law of the said Pearl Boyd Baxter, deceased."

[6, 7] There are contradictions in this "Judgment" by default and the "Order and Judgment," both signed by Judge Thornburg and both dated 17 September 1971, and filed 23 September 1971, in that in this "Judgment" by default, it was held that "Exhibit A" was a valid trust instrument and that the plaintiffs take under it as against the sixty-seven defendants who did not file answer, whereas in the "Order and Judgment," as to the thirty answering defendants, the holding was that the instrument did not create a trust. We hold that the instrument cannot be a trust instrument against the defendants who failed to file answer and, on the other hand, not a trust instrument against the answering defendants. The fact that some of the defendants failed to file answer, or may have failed to properly answer interrogatories did not affect the validity or invalidity of the instrument to be construed and did not operate as a conveyance to the plaintiffs herein of the interest to which such defendants were entitled under the Intestate Succession Act, Chapter 29, North Carolina General Statutes, in the property owned by Mrs. Baxter at the time of her death, nor can the failure of the administrator to file answer, under these circumstances, operate as a conveyance to the plaintiffs of the property to which the administrator, as such, is entitled under the statutory laws of North Carolina.

The rule is stated in 22 Am. Jur., Declaratory Judgments, § 94, p. 959, as follows:

> "The failure of a defendant who has been duly served to appear and answer a complaint seeking a declaratory judgment constitutes an admission of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; *the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions.* The default admits only the allegations of the complaint and does not extend either expressly or by implication the scope of the determination sought by the plaintiff, or which could be granted by the court." (Emphasis added.)

The plaintiffs' purpose in bringing this action was to have the court construe "Exhibit A" and enter judgment upon the construction thereof. The failure of sixty-seven of the defendants to file answer in this declaratory judgment action, or the failure of some answering defendants to answer interrogatories, did not entitle the plaintiffs to a judgment based on their own conclusions and contentions. The proper construction of "Exhibit A" determined the rights of the plaintiffs. See *Hall v. Hartley,* 146 W.Va. 328, 119 S.E. 2d 759 (1961); and *St. Paul Mercury Ins. Co. v. Nationwide Mut. Ins. Co.,* 209 Va. 18, 161 S.E. 2d 694 (1968). See also *Machine Co. v. Newman,* 275 N.C. 189, 166 S.E. 2d 63 (1969).

We hold as follows:

1. "Exhibit A" is neither the last will and testament of Mrs. Baxter, deceased, nor a trust instrument creating a trust as to the property of Mrs. Baxter during her lifetime.

2. Jessie Baxter and Ellen Baxter Beam are not trustees of the property of Mrs. Baxter, and "Exhibit A" did not vest title to the personalty and realty of Mrs. Baxter in said persons as trustees for the purpose of managing the estate and property of Mrs. Baxter during her lifetime or for delivering any part thereof to the plaintiffs after her death. Inasmuch as "Exhibit A" did not create a trust, we are of the opinion and so hold that this summary judgment could not and did not convey any interest in the estate of Mrs. Pearl Baxter to the plaintiffs.

3. The summary judgment dated 16 September 1971, filed 16 September 1971, entered against S. J. Boyd and wife, Pearl

Boyd, did not convey to the plaintiffs the interest of S. J. Boyd and wife, Pearl Boyd, in the property owned by Mrs. Baxter at the time of her death.

4. The "Judgment" by default final dated 17 September 1971 and filed 23 September 1971, entered against the sixty-seven defendants who did not file answer to the complaint, including J. Ben Morrow, administrator of the estate of Mrs. Baxter, did not convey to the plaintiffs any interest in the property owned by Mrs. Baxter at the time of her death.

5. Those portions of the "Order and Judgment" of Judge Thornburg dated 17 September 1971 and filed 23 September 1971 reading as follows (together with the "findings of fact" and "conclusions of law" upon which they are based) are hereby declared to be null, void and of no effect and the same are hereby stricken therefrom:

> "(a) * * * If, however, the ruling of this Court as to the validity of 'Exhibit A' attached to the Complaint as a trust instrument is reversed on appeal, then the said Motion of the plaintiffs is allowed and judgment to that effect will be entered at the conclusion of said appeals."
>
> "(d) That the plaintiffs are entitled to have and recover in equal shares that portion of the estate and property of Pearl Boyd Baxter, deceased, not awarded herein to those defendants against whom summary judgment has been entered and signed and not awarded to those defendants against whom default judgment has been entered and signed because of their failure to answer the Complaint or otherwise file pleadings herein."
>
> "(g) . . . (H)owever, if upon appeal it is held that the paper writing attached to the Complaint and marked 'EXHIBIT A' constitutes a trust instrument as alleged by the plaintiffs in the Complaint, this Court will thereafter enter a summary judgment against the answering defendants as prayed in motion heretofore filed by the plaintiffs."

As thus modified, the "Order and Judgment" of Judge Thornburg dated 17 September 1971 and filed 23 September 1971 is affirmed.

Modified and affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. BRIAN DOUGLAS EPPLEY AND ROBERT B. BLOCK, ALIAS JAMES E. BERCH

No. 7226SC104

(Filed 24 May 1972)

1. **Criminal Law § 84; Searches and Seizures § 1— trespassers — standing to object to search**

Defendants had no standing to challenge the lawfulness of a search of a river cabin occupied by defendants where defendants were trespassers on the property, notwithstanding the State relied on the doctrine of recent possession of stolen property found in the cabin in prosecuting defendants for breaking and entering and larceny.

2. **Criminal Law § 84; Searches and Seizures § 1— lawfulness of search — failure to hold voir dire — absence of prejudice**

Defendants were not prejudiced by the trial court's denial of their motion for a *voir dire* examination on the question of the legality of a search of a river cabin occupied by defendants, where the evidence shows that defendants were trespassers on the premises and had no standing to contest the validity of the search.

3. **Burglary and Unlawful Breakings § 4; Larceny § 6— stolen items not named in indictment — admissibility**

In a prosecution for breaking and entering a river cabin and larceny of property therefrom, the trial court properly admitted a rifle stolen from the cabin and found in defendants' possession when they were arrested, notwithstanding the indictment did not charge defendants with larceny of the rifle, since it is competent in such a prosecution to show all of the goods lost and to trace some or all of the articles to a defendant.

4. **Larceny § 2— title to stolen property**

It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken.

5. **Larceny § 7— joint possession of stolen goods**

There was sufficient evidence of concerted action to support a finding that defendants were in joint possession of a stolen rifle and a stolen shotgun found in the bottom of a boat in which defendants were riding when arrested, where the evidence showed that defendants were living and traveling together and that they attempted to escape together when pursued by an officer.

6. **Burglary and Unlawful Breakings § 7; Larceny § 8— breaking and entering with intent to commit larceny — larceny resulting from breaking and entering — failure to instruct on misdemeanors**

In a prosecution for felonious breaking and entering and felonious larceny, the trial court did not err in failing to instruct the jury on the lesser included offenses of nonfelonious breaking and entering and nonfelonious larceny of goods of less than $200 value, where all of

the evidence tends to show that the breaking and entering was for the purpose of larceny and that the larceny was accomplished by breaking and entering. G.S. 14-54; G.S. 14-72.

7. **Burglary and Unlawful Breakings § 5; Larceny § 7— recent possession — insufficiency of evidence**

Evidence that a blanket and sheet taken from a river cabin were found at a public access area across a channel from an island occupied by defendants was insufficient to be submitted to the jury under the doctrine of recent possession on issues of defendants' guilt of breaking and entering and larceny.

APPEAL by defendants from *McLean, Judge,* at the 9 August 1971 Session of MECKLENBURG Superior Court.

The defendants were tried on several bills of indictment with the felonious breaking and entering of and felonious larceny from four river cabins in the Lake Wylie area of Mecklenburg County. Four indictments were returned against each defendant and each of the indictments charged one of the defendants with the felonious breaking and entering of and felonious larceny from one of the cabins.

The defendants entered pleas of not guilty to all of the counts in all of the indictments.

At the trial the State presented evidence which tended to show the following:

On April 8, 1971, Robert M. Tatum, a State Wildlife Protector, was on patrol on Lake Wylie. At about 3:00 p.m. he approached an island in the lake to investigate a boat which was pulled upon the beach of the island. On the island he found defendant Eppley, defendant Block and Eppley's two children. He observed that they were occupying a cabin on the island. Eppley explained that the island was owned by his uncle and that they were camping on the island. Eppley told Officer Tatum that the boat had been left there by its owner while he looked for someone to repair the engine. Tatum then left the island.

Sometime later he observed the defendants and the children riding in the boat. Block was operating the boat in a manner which violated motor boat regulations. Eppley was in the front of the boat with a pistol. Mr. Tatum chased the defendants into a cove and placed them under arrest. In the bottom of the boat he found a .22 caliber rifle (State's Exhibit 1), a shotgun

(State's Exhibit 2) and another shotgun. The exhibits were introduced into evidence.

The defendants were taken to the county jail and locked up. Approximately three hours later Officer Tatum, Officer S. E. Cato of the Mecklenburg County Police, and one or two other officers returned to the river cabin occupied by defendants. They did not have a search warrant. At the cabin they found a number of items which were subsequently identified as having been stolen from three river cabins in the area. Over defendant's objection the articles found in the cabin were introduced into evidence. There was evidence that the three cabins were entered between April 4 and April 8, the date the articles were found in the cabin occupied by defendants.

On 9 April 1971 Officer Cato returned to the Lake Wylie area and searched a public access area across a channel from the island occupied by defendants. He found a blanket and a sheet (State's Exhibits 10 and 9) which were identified as having been taken from a cabin owned by Robert L. Hendricks. The Hendricks' cabin was the fourth cabin listed in the bills of indictment.

There was testimony that the island and cabin occupied by defendants were owned by Duke Power Company and that defendants did not have permission to be occupying the cabin.

The jury found each defendant guilty of four counts of breaking and entering and four counts of larceny. Judgments were entered imposing prison sentences on each defendant.

From the verdicts and judgments, defendants appeal.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Waggoner, Hasty & Kratt by John H. Hasty for defendant appellant, Brian Douglas Eppley.

James J. Caldwell for defendant appellant, Robert B. Block, alias James E. Berch.

CAMPBELL, Judge.

[1] The defendants contend that it was error to admit into evidence the articles found in the search of the river cabin

occupied by defendants because the search was conducted without a warrant. Defendants argue that the State relied upon the doctrine of recent possession to prove its case and that the State should not therefore be permitted to deny that defendants had possession of the cabin and were entitled to the protection of the Fourth Amendment to the United States Constitution. Defendants maintain that if they had possession of the articles sufficient to invoke the doctrine of recent possession, then they also had sufficient possession to give them standing to object to the search of the cabin. Defendants rely upon the case of *Jones v. U. S.*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725, 78 A.L.R. 2d 233 (1960).

In *Jones,* the defendant was occupying an apartment as guest of the lessee and with his consent. Police searched the premises and found narcotics. Defendant was charged with possession of narcotics. The defendant contended that the warrant was defective and the evidence obtained thereby was therefore inadmissible. The Court noted that the conviction was based upon defendant's possession of the narcotics, but that the narcotics were admitted into evidence on the theory that defendant did not have possession and therefore had no standing to attack the warrant. The Court then held that occupancy of the apartment with the lessee's consent gave defendant standing to assert the invalidity of the warrant under the Fourth Amendment to the United States Constitution. In so holding, the Court abolished, so far as the protection of the Fourth Amendment is concerned, the technical distinctions, derived from property law, between "lessee," "licensee," "invitee" and "guest." The Court did not, however, abolish the distinction between one in legitimate possession of property and one who is a trespasser. The Court stated the rule in the following manner:

> " . . . No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. . . . "

By this language the Court excluded from the protection of the Fourth Amendment those who are not legitimately on the prem-

ises. On this basis the *Jones* case is clearly distinguishable from the case before us. In the case before us there was uncontroverted evidence that the island and building occupied by defendants and subsequently searched by the officers were the property of Duke Power Company. Defendants did not have the consent or permission of Duke Power Company to occupy the island and house. They were not legitimately on the premises and therefore they had no standing to challenge the legality of the search by a motion to suppress the evidence.

[2] Defendants contend that it was error for the trial court to deny their motion for a voir dire examination on the question of the legality of the search. This Court has held that a voir dire examination should be conducted on a motion to suppress the evidence. *State v. Wood,* 8 N.C. App. 34, 173 S.E. 2d 563 (1970). In the case before us, however, the evidence shows without any doubt that defendants were not legitimately on the premises and had no right to contest the validity of the search. Under these circumstances defendants could not have been prejudiced by the trial court's failure to conduct a voir dire. The articles found in the cabin occupied by defendants were properly admitted into evidence.

Defendants moved for nonsuit on two of the indictments on the theory that the evidence obtained from the cabin should be suppressed and that without this evidence the State had failed to prove its case. In view of our holding above that there was no error in the admission of this evidence, the motions for nonsuit were properly denied.

[3] Both defendants assign as error the introduction into evidence of the rifle and shotgun (State's Exhibits 1 and 2) found in the boat when they were arrested. These exhibits were introduced at the trial to show defendants' possession of goods later identified as having been stolen from one of the river cabins, specifically the cabin of James E. Carriker. Both defendants contend that the indictments against them did not charge them with the larceny of the rifle. They are correct in this argument. However, each defendant was charged with the larceny of the shotgun. The evidence was therefore in support of an allegation in the indictment and was sufficient to sustain a conviction. It was not error to admit the rifle into evidence because it is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost and to

trace some or all of the articles to a defendant. *State v. Richardson,* 8 N.C. App. 298, 174 S.E. 2d 77 (1970).

[4] The evidence indicates that the shotgun was not owned by Carriker, but was instead the property of his father. Defendant Block argues that the State has therefore failed to prove its case. This argument is without merit. ". . . It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. . . . " *State v. Richardson, supra.*

[5] At the trial the State proceeded on the theory that defendants were found in recent possession of stolen goods. Defendants argue that the rifle and shotgun were found in the bottom of the boat and there was no evidence as to who had possession. This argument has no merit. The State contends that defendants were in joint possession of the shotgun and rifle. The rule is that there may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert, or have been in *particeps criminis,* the possession of one participant being the possession of all. *State v. Frazier,* and *State v. Givens,* 268 N.C. 249, 150 S.E. 2d 431 (1966); 52A C.J.S., Larceny, § 107. In this case there is evidence that defendants were living and traveling together and that they attempted to escape together when pursued by Officer Tatum. This is sufficient evidence of concerted action to charge defendants with the joint possession of the shotgun and rifle. For the above reasons the admission into evidence of the rifle and shotgun was proper.

[6] The defendants next contend that the trial court erred in not instructing the jury on the lesser included offenses of nonfelonious breaking and entering and larceny of goods of less than $200.00 value. All of the State's evidence indicates that the articles alleged to have been taken by defendants were taken during the breaking and entering of the several river cabins. Breaking and entering with intent to commit larceny is a felony, G.S. 14-54, and larceny committed pursuant to a violation of G.S. 14-54 is a felony without regard to the value of the goods stolen. G.S. 14-72. All the evidence is that the breaking and entering in each case was for the purpose of larceny and each larceny was accomplished by breaking and entering. When all the evidence is of the greater offense and there is no evidence of a lesser included offense, the trial court is not required to charge on the lesser included offense, and it would be error

to do so. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971). Here there was no evidence of a lesser included offense. The trial court's instruction was proper.

The defendants have also assigned as error portions of the trial court's charge on the doctrine of recent possession. We have examined the entire charge carefully and find it to be free from error. Defendants' assignments of error to the charge are overruled.

[7] Defendants' final assignment of error is to the denial of its motions for nonsuit as to the indictments charging the felonious breaking and entering of the Hendricks cabin and felonious larceny from that cabin. (Indictment Nos. 71CR19784 and 71CR19775). The only evidence brought forth at the trial in support of these indictments was the blanket and sheet found at a public access area across a channel from the island occupied by defendants. These items were found the day after defendants' arrest. The State proceeded on the theory of recent possession of stolen goods, but it failed to establish that defendants had ever been in possession of the sheet and blanket. They were found in a public area some distance from, and separated by water from, the island. This evidence is too remote and speculative to charge defendants with possession of these articles. The motions for nonsuit should have been allowed as to Cases Nos. 71CR19784 (2 cases) and 71CR19775 (2 cases.)

For the foregoing reasons, the judgment of the Court below is

Affirmed in Cases Nos. 71CR19371 (2 cases); 71CR19372 (2 cases); 71CR19785 (2 cases); 71CR19363 (2 cases); 71CR19364 (2 cases); and 71CR19776 (2 cases).

Reversed in Cases Nos. 71CR19784 (2 cases) and 71CR19775 (2 cases).

Judges BRITT and GRAHAM concur.

W. ARTHUR MILLSAPS AND WIFE, JEAN MILLSAPS,
PLAINTIFF APPELLANTS
v.
WILKES CONTRACTING COMPANY, DEFENDANT APPELLEE
v.
NORTH CAROLINA STATE HIGHWAY COMMISSION AND RAY SPANGLER, THIRD-PARTY DEFENDANT APPELLEES

No. 7230SC26

(Filed 24 May 1972)

1. **Negligence § 1— mere fact of injury**

Negligence is never presumed from the mere fact of an accident or injury, except in the narrow class of cases to which the doctrine of *res ipsa loquitur* applies.

2. **Rules of Civil Procedure § 56— motion for summary judgment — reliance on pleadings**

When a motion for summary judgment is supported as provided by Rule 56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial.

3. **Rules of Civil Procedure § 56— motion for summary judgment — affidavits — service with motion**

It is not required that all affidavits offered at the hearing on a motion for summary judgment be attached to and served with the motion.

4. **Appeal and Error § 38— settlement of case on appeal — appellate review**

The action of the judge in settling the case on appeal, when the parties cannot agree, is final and will not be reviewed on appeal.

5. **Highways § 7— highway contractor — blasting operations — absence of negligence — summary judgment**

Summary judgment was properly entered in favor of defendant highway contractor in an action to recover for damages to plaintiffs' property allegedly caused by defendant's blasting operations in the construction of a highway for the State Highway Commission, where defendant presented testimony by affidavits tending to show that defendant used approved blasting methods in general use, and plaintiffs failed to produce evidence of any specific acts or omissions on the part of defendant that would constitute negligence in its blasting operations.

APPEAL by plaintiffs from *Thornburg, Judge,* 21 June 1971 Session of GRAHAM Superior Court.

Plaintiffs instituted this action on 29 June 1970 to recover $25,000 damages to their real property allegedly caused by de-

fendant Wilkes. In their amended complaint filed on 23 July 1970 they allege: Plaintiffs are the owners of a tract of land situate in Graham County. On 27 July 1967 and for some time prior thereto defendant Wilkes through blasting operations by the use of explosives caused boulders, rocks, debris and other substances to be hurled and deposited upon and into land, buildings, structures, standing trees and streams belonging to plaintiffs.

In its answer to the amended complaint defendant Wilkes set forth: On the dates alleged in the amended complaint it was acting as a contractor for the North Carolina State Highway Commission in carrying out plans, specifications and requirements of a contract in the relocation and rebuilding of U. S. Highway #129. The blasting complained of occurred on a portion of a right-of-way acquired by the State Highway Commission from plaintiffs in a condemnation proceeding. The blasting done by defendant Wilkes was reasonably necessary to carry out its contract and was done under the supervision of State Highway Commission engineers. As a further defense defendant Wilkes alleged that subsequent to 27 July 1967 and before the institution of this action trial was had in a condemnation proceeding between the State Highway Commission and plaintiffs, following which plaintiffs herein were paid $25,000, plus $4,515 interest, for all damages sustained by plaintiffs by reason of the construction of the highway aforesaid on or through their property. Pursuant to Rule 14 of the Rules of Civil Procedure, defendant Wilkes further alleged that the State Highway Commission and its resident engineer, Ray Spangler, should be joined as parties to this action to indemnify defendant Wilkes against any recovery that might result from plaintiffs' action. The State Highway Commission and Spangler were made third-party defendants.

In its pleadings defendant Wilkes pleaded in full the condemnation proceeding between the State Highway Commission and plaintiffs and also the contract between defendant Wilkes and the State Highway Commission.

Various motions not pertinent to this appeal were filed by certain of the parties and dispositions made of said motions. In due time motions for summary judgment were filed by third-party defendants State Highway Commission and Spangler, asking that the action be dismissed as to them. Pursuant to Rule

56, defendant Wilkes filed motion for summary judgment asking that plaintiffs' action be dismissed with prejudice.

By agreement the motions for summary judgment were heard on 11 June 1971. At the hearing defendant Wilkes in support of its motion for summary judgment against plaintiffs introduced in evidence the following: Pleadings and proceedings in the case of *State Highway Commission v. W. Arthur Millsaps and wife Jean Millsaps;* affidavits of Leland L. Cochrane and J. C. Critcher, III; answer of defendant Wilkes to the amended complaint and its third-party complaint against defendant State Highway Commission and Spangler; a document entitled "Standard specifications for road structures including supplement No. 1" of the State Highway Commission, revised January 1, 1965; pleadings in a separate action instituted by defendant Wilkes against the State Highway Commission and plaintiffs herein. On the question of negligence plaintiffs introduced the affidavit of one Posey Waldroup.

Following a hearing on the motions the court entered summary judgment in favor of third-party defendants State Highway Commission and Spangler. The court, after appropriate findings of fact and conclusions of law including a finding that "no affidavits have been offered by the plaintiffs Millsaps in this action showing affirmatively specific facts that there is any genuine issue for trial" between plaintiffs and defendant Wilkes, entered summary judgment in favor of defendant Wilkes. Plaintiffs appealed.

Williams, Morris & Golding by James W. Williams for plaintiff appellants.

William J. Cocke for defendant appellee Wilkes Contracting Company.

Attorney General Robert Morgan by H. A. Cole, Jr., Assistant Attorney General, for the State.

BRITT, Judge.

Although a brief was filed on behalf of third-party defendants State Highway Commission and Spangler, no appeal was perfected from the summary judgment in their favor. Therefore, the question for determination is: "Did the trial court err in entering summary judgment in favor of defendant Wilkes?" We hold that it did not.

In *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182 (1952), opinion by Ervin, Justice, quoted with approval in *Highway Commission v. Reynolds Co.,* 272 N.C. 618, 624, 159 S.E. 2d 198, 203 (1968), we find the following:

> "A contractor who is employed by the State Highway and Public Works Commission to do work incidental to the construction or maintenance of a public highway and who performs such work with proper care and skill cannot be held liable to an owner for damages resulting to property from the performance of the work. The injury to the property in such a case constitutes a taking of the property for public use for highway purposes, and the only remedy available to the owner is a special proceeding against the State Highway and Public Works Commission under G.S. 136-19 to recover compensation for the property taken or damaged. (Citations.) But if the contractor employed by the State Highway and Public Works Commission performs his work in a negligent manner and thereby proximately injures the property of another, he is personally liable to the owner therefor. (Citations.)"

It is thoroughly established in the instant case that defendant Wilkes was a contractor employed by the State Highway Commission to perform work incidental to the construction of a public highway. The question then arises, did defendant Wilkes perform its work in a negligent manner and thereby proximately injure the property of plaintiffs?

[1] Negligence is never presumed from the mere fact of an accident or injury, except in the narrow class of cases to which the doctrine of *res ipsa loquitur* is applicable. *Coakley v. Motor Co.,* 11 N.C. App. 636, 182 S.E. 2d 260 (1971); cert. den. 279 N.C. 393, 183 S.E. 2d 244. Plaintiffs do not argue nor do we think that said doctrine is appliable in this case. 20 A.L.R. 2d 1372, 1397 (1951).

As was said by Judge Parker in speaking for this court in *Patterson v. Reid,* 10 N.C. App. 22, 28, 178 S.E. 2d 1, 5 (1970): "The motion for summary judgment under Rule 56 of the Rules of Civil Procedure (G.S. 1A-1, Rule 56) is a procedure new to the courts of this State. * * * The purpose of the rule is not to resolve a disputed material issue of fact, if one exists, but to

provide an expeditious method for determining whether any such issue does actually exist."

In *Pridgen v. Hughes,* 9 N.C. App. 635, 639-40, 177 S.E. 2d 425, 428 (1970), Judge Morris, speaking for this court, said: "The burden is on the moving party to establish the lack of a triable issue of fact. The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials. *Griffith v. William Penn Broadcasting Co.* (E.D. Pa. 1945) 4 F.R.D. 475. 'But if the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact. He need not, of course, show that the issue would be decided in his favor. But he may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue.' Moore's Federal Practice, 2d Ed., Vol. 6, § 56.11(3), p. 2171."

[2] When the motion for summary judgment is supported as provided by 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. *Patterson v. Reid, supra.*

At the hearing on its motion for summary judgment, defendant Wilkes presented, along with other documents and materials, the affidavit of its president, J. C. Critcher, III. Pertinent parts of this affidavit are summarized as follows: In performing the contract with the State Highway Commission, defendant encountered solid rock and blasting was required to attain the correct grade specified in the contract. In blasting the rock, defendant used approved methods in general use. Plaintiffs' structure allegedly damaged was only two hundred feet from the center line of the grading and was below the grade at an angle of declivity of at least 45 degrees. Any damage to the structure was done by rocks rolling down the incline. The resident engineer and inspectors of the State Highway Commis-

sion were continually on the project during construction and during the blasting and knew of the difficulties encountered.

Defendant Wilkes also presented the affidavit of Leland L. Cochrane, pertinent parts of which are summarized thusly: Mr. Cochrane is a certified blaster (licensed in certain other states) with fifteen years experience. He did the drilling to go through the rock that was blasted. Regular 40% dynamite was used to move the rock and the charges were set in the best way to avoid any damage to any property. Two State inspectors were on the job at all times during the blasting; they observed the holes drilled, the amount of charges used, were fully informed as to the blasting, and made no objections to the procedures followed. No other precautions could have been taken to prevent the damage. More holes and less dynamite than usual were used in an effort to prevent damage.

[3] Plaintiffs argue that the entire affidavit of Cochrane and portions of the affidavit of Critcher were inadmissible; and that without said inadmissible material there is no support for the summary judgment. They contend that Cochrane's affidavit was inadmissible for the reason that it was not attached to and served with the motion for summary judgment, thus violating the sentence of Rule 56(e) providing "(s)worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." We do not think the quoted sentence or any part of Rule 56(e) has the effect of requiring that all affidavits offered at the hearing on a motion for summary judgment be attached to and served with the motion. In 5 Wake Forest Intra. L. Rev. 91 (1969), it is said: "A motion (for summary judgment) may or may not be accompanied by affidavits, and the adverse party may serve opposing affidavits prior to the day of the hearing. Rule 6(d) provides that when a motion is supported by affidavit, the affidavit shall be served with the motion. However, in view of the express provisions of Rule 56, Rule 6(d) would likely not apply to affidavits presented in support of summary judgment. In any event, subparagraph (e) of Rule 56 gives broad discretion to the court in allowing the filing of affidavits." See also 3 Barron and Holtzoff, Federal Practice and Procedure, § 1237, p. 167 (Wright ed. 1958).

[4] The record on appeal approved by Judge Thornburg (R. p. 67) and his judgment contradict plaintiffs' contention that

the Cochrane affidavit was not introduced at the hearing on defendant Wilkes's motion for summary judgment. It appears to be well established in this State that the action of the judge in settling the case on appeal, when the parties cannot agree, is final and will not be reviewed on appeal. *Thompson v. Williams,* 175 N.C. 696, 95 S.E. 100 (1918); *State v. Gooch,* 94 N.C. 982 (1886).

Although there are portions of the Critcher affidavit that would be inadmissible in evidence, i.e. "damage to said structure was inevitable," "such damage could not have been avoided in the construction and grading of this highway," a substantial portion of the testimony set forth in the affidavit would be admissible and properly supports the summary judgment.

[5] We think defendant Wilkes carried its burden in establishing the lack of a triable issue of fact. It was then up to plaintiffs to set forth specific facts showing a genuine issue for trial. *Pridgen v. Hughes, supra.* With respect to negligence plaintiffs' amended complaint alleges only that defendant through blasting operations caused boulders, rocks, and debris to be hurled and deposited upon structures and property of plaintiffs; that the destruction was caused exclusively by the negligence of defendant Wilkes by conducting blasting in close proximity to plaintiffs' property, knowing such blasting would cause damage and failing to take necessary precautions. Other than the bare allegations of the amended complaint which give no *specific facts* as to the negligence of defendant Wilkes there is the supporting affidavit of Posey Waldroup, a blaster with 38 years of experience, who merely states that in his opinion the construction of the road could have been done without major damages to plaintiffs' property as far as blasting or construction is concerned.

The amended complaint and Waldroup's affidavit do not sufficiently allege specific facts showing a genuine issue for trial. G.S. 1A-1, Rule 56(e). Plaintiffs failed to set forth any specific acts or omissions on the part of defendant Wilkes that would constitute actionable negligence. If the same evidence which was presented to Judge Thornburg had been presented at a trial of this action, defendant Wilkes would have been entitled to a directed verdict; that is the test in determining if a

moving party is entitled to summary judgment. *Pridgen v. Hughes, supra.*

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. BILLY C. DIX

No. 7217SC333

(Filed 24 May 1972)

1. **Kidnapping § 1— definition of offense**

Since G.S. 14-39 does not define the offense of kidnapping, the common law definition may be resorted to for the particular acts constituting the offense.

2. **Kidnapping § 1— definition of offense**

Kidnapping is the unlawful taking and carrying away of a person by force and against his will; it is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping.

3. **Kidnapping § 1— carrying away — removal from one part of jail to another**

There was a sufficient "carrying away" to constitute the offense of kidnapping where a jailer was forced by defendant at gunpoint to go from the front door of the jail through numerous distinct portions of the building to the jail cells, a distance of some 62 feet, where friends of defendant were released from their cells and the jailer was locked in a cell.

4. **Criminal Law § 21— motion for preliminary hearing — denial**

The trial court did not err in the denial of defendant's motion for a preliminary hearing, since the preliminary hearing is not an essential prerequisite to the finding of a bill of indictment.

Judge PARKER dissenting.

APPEAL by defendant from *Exum, Judge,* 7 December 1971 Criminal Session, ROCKINGHAM Superior Court.

Defendant was charged with kidnapping. He was first tried at the 28 March 1971 Session of Rockingham Superior Court, was found guilty and was sentenced to prison for a term of not less than 20 nor more than 25 years. As a result of a

post-conviction hearing held at the October 1971 Session of Rockingham Superior Court, defendant was awarded a new trial because of a denial of effective assistance of counsel at his first trial.

Following a retrial, the jury returned a verdict of guilty as charged. From judgment imposing prison sentence of not less than 12 nor more than 25 years, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Howard P. Satisky for the State.

Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to allow his timely made motions for nonsuit of the charge of kidnapping.

The evidence presented at trial tended to show: On 19 April 1970 at about 1:30 a.m. defendant knocked on the front door of the Rockingham County jail. The assistant jailer, Henry C. Crowder, came out of the jailer's office, unlocked an iron door, entered the vestibule or waiting room of the jail, and opened the front door. Defendant stuck a gun in Crowder's face and told him he would kill him if Crowder didn't let defendant's buddies out of jail. Defendant then forced Crowder along a route to the cell where his friends were held. The route encompassed some 62 feet and led through the jail vestibule, through an iron door into the jailer's office, and from the office through another iron door into a hall. The hall led into the kitchen area of the jail and then to two steps going down into the lower level of the back part of the jail. After reaching the lower level defendant forced Crowder to unlock and go through a solid iron door and then a bar door into the cellblock area. At this point the prisoners were released and Crowder was locked in the jail cell. Crowder yelled for assistance and was released after being in the cell some 9 or 10 minutes.

Defendant contends that the movement and detention of Crowder does not constitute the offense of kidnapping. We do not agree with this contention.

[1] G.S. 14-39, the statute forbidding kidnapping, does not define the offense. Therefore, as set forth in *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965) the common law definition may be resorted to for the particular acts constituting the offense. In *State v. Harrison,* 145 N.C. 408, 59 S.E. 867 (1907) a brief historical treatment is given as follows: "Blackstone and some other English authorities define kidnapping to be the 'forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another.' In 1 East Pleas of the Crown, 429, it is described as 'the most aggravated species of false imprisonment,' and defined to be 'the stealing and carrying away or secreting of any person.' 'The Supreme Court of New Hampshire,' says Bishop, 'more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of this offense.' . . . Bishop states the better definition of kidnapping to be 'false imprisonment aggravated by conveying the imprisoned person to some other place.' "

[2] *State v. Lowry, supra,* provides that "kidnap" as used in G.S. 14-39 means the unlawful taking and carrying away of a person by force and against his will. It also states that it is the fact, not the distance of forcible removal of the victim that constitutes kidnapping. The court has later stated in *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971) that the asportation requirement has now been relaxed so that *any* carrying away is sufficient. The distance the victim is carried is immaterial. In *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971) the court stated that, "(w)here the gravamen of the crime is the carrying away of the person, the place from or to which the person is transported is not material, and an actual asportation of the victim is sufficient to constitute the offense *without regard to the extent or degree of such movement.*" (Emphasis ours.) Then in *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971) the court reiterated the principle that the distance traveled is not material" . . . . The defendant by force and threat of violence took Carter and carried him where he did not consent to go. This constitutes kidnapping under our statute." In *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971) the court repeated the rule that *any* carrying away is sufficient.

The case closest in point to the one at bar is *State v. Reid,* 5 N.C. App. 424, 168 S.E. 2d 511 (1969) written by Parker,

Judge, where the victim upon leaving his office located at his residence was encountered by two men as he rounded the corner of the garage. The victim ran but fell down, whereupon the two men seized him and dragged him through a hedge at the rear of his property approximately 75 feet into a vacant lot. They then bound and gagged the victim and were waiting for the victim's wife to return and then gain admission to the house when they were frightened away by police. These facts were held sufficient to submit the offense of kidnapping to the jury, although the defendant was given a new trial on the kidnapping charge because of prejudicial error in the charge.

We find no distinguishing factors in the principles involved in the instant case and in *Reid.* In view of the opinions of our Supreme Court the only possible distinction would be whether in both cases there was a "carrying away." Obviously this "carrying away" is not based on distance since it has been stated numerous times that distance is immaterial. If this were the factor involved then surely 62 feet in the instant case would be sufficient to support the offense as was the 75 feet involved in *Reid.* If distance is not material to the "carrying away" the essential element must be the term "removal" as used by the court in several opinions such as *State v. Lowry, supra, State v. Barbour, supra,* and in *Reid.*

[3] Black's Law Dictionary, 4th Ed. (1951) defines removal as "in a broad sense, the transfer of a person or thing from one place to another." Webster's Third New International Dictionary (1968) defines removal as a "shift of location." It is this concept that makes the present case a "carrying away" and would prevent certain other cases from constituting kidnapping even though they fit the common law definition. For example, the taking and carrying away of a person by force and against his will from the cash register of his store to the other side of the counter or in the corner of the same room might not constitute kidnapping because there has not been a sufficient "shift of location" or "transfer from one place to another" to meet the requirements of a "carrying away." This is not to say that in a larger building with several distinct areas that the "carrying away" would not be sufficient to constitute the offense. In *Reid* there was a shift from the victim's lot into an adjoining lot through a hedgerow. In the instant case there was a shift even more evident and more dangerous to the victim. Here

Crowder was transported from the front door of the jail through an iron door into his office, through the office, out another iron door, into the hall through the kitchen area, down two steps into the lower back part of the jail, through a solid iron locked door and a double locked cellblock door, and into a cell where he was detained by the defendant. We hold this to be a sufficient "shift of location" or "transfer from one place to another" to constitute a "carrying away," completing the offense of kidnapping. We do not feel that under these facts there would have to be a removal from the physical building. In *Reid* the victim was encountered outside and left outside in the adjoining lot. In the instant case the victim was encountered at the jailhouse door and taken through numerous distinct portions of the building.

We see no distinction in the underlying principle in *Reid* where the shift of location or removal was accomplished outside of any physical structures and in the instant case where the shift of location or removal was done within a physical structure. We hold that such a removal constituted a carrying away and sufficiently established the offense of kidnapping.

[4] Defendant assigns as error the failure of the court to remand the case for a preliminary hearing although a bill of indictment had been returned. We find this contention to be without merit. The preliminary hearing in North Carolina is not an essential criminal proceeding nor is it an essential prerequisite to the finding of an indictment in this jurisdiction. *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967) ; *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961). The court did not err in denying defendant's motion for a preliminary hearing. Furthermore, a preliminary hearing would have been fruitless in this case. Defendant had been tried once, had access to a transcript of the first trial and also had access to a transcript of the post-conviction hearing.

Defendant presents several other assignments of error, all of which we have carefully considered but find them to be without merit.

For the reasons stated, we find

No error.

Judge HEDRICK concurs.

Judge PARKER dissents.

Judge PARKER dissenting:

The unlawful detention of a human being against his will is false imprisonment, not kidnapping; "in order to constitute kidnapping there must be not only an unlawful detention by force or fraud but also a carrying away of the victim." *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577. True, "[i]t is the fact, not the distance of forcible removal of the victim that constitutes kidnapping," *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, but some carrying *away* must occur nevertheless, and I have found no decision of our Supreme Court which dispenses with this requirement.

In my view, the evidence in the present record fails to show such a carrying away of the victim as to make the offense kidnapping. Quite to the contrary, the evidence establishes that the victim was not carried away at all but was securely locked up on his own premises. *State v. Reid,* 5 N.C. App. 424, 168 S.E. 2d 511, relied on by the majority opinion, is distinguishable. In *Reid,* the victim was forcibly removed from his home premises and was dragged away against his will onto an adjoining lot. That case, in my opinion, represents the outer limits to which the courts should go in finding sufficient evidence of a carrying away to constitute the crime of kidnapping.

Should the opinion of the majority in the present case prevail, it seems to me that the crime of kidnapping would necessarily be involved in every case of robbery or rape in which the evidence shows that the defendant, incidental to accomplishing his major purpose, may have forced his victim to move a few steps and forcibly detained him a few moments, even though all events occurred on the victim's own premises. Some courts, interpreting statutes of their jurisdictions, may have gone so far. Annot.: Seizure or Detention for Purpose of Committing Rape, Robbery, or Similar Offense as Constituting Separte Crime of Kidnapping, 43 A.L.R. 3rd 699. Such a holding does not conform with the common law concept of kidnapping which prevails in North Carolina.

Evidence in the present case would support defendant's conviction of a number of crimes. (Assault under G.S. 14-32(c); assault under G.S. 14-34.2; aiding and abetting prisoners to escape from lawful custody; false imprisonment.) Because it fails to show a carrying away of the victim, I find it insufficient to support defendant's conviction of kidnapping and vote to reverse.

In re Jones

IN THE MATTER OF MARGUERITE TRACEY JONES, MINOR

No. 728DC182

(Filed 24 May 1972)

1. **Infants § 9; Parent and Child § 6— child custody — right of parent**

The mother of an illegitimate child is entitled as a matter of law to regain custody of the child from her aunt and uncle with whom she had left the child when she was seventeen years old, unmarried and still in school, where the mother has married and now has a stable home, and the mother and her husband are suitable and fit persons to have custody of the child.

2. **Infants § 9; Parent and Child § 6— child custody — right of parent**

Parents, including the mother of an illegitimate child, have the legal right to have the custody of their children unless clear and cogent reasons exist for denying them this right.

3. **Infants § 9; Parent and Child § 6— best interest of child — presumption — right of parent**

The law presumes that the best interest of a child will be served by committing it to the custody of a parent when the parent is a suitable person; this presumption is not overcome merely by showing that some third person can give the child better care and greater comforts and protection than the parent, a parent's right to custody being forfeitable only by misconduct or by other facts which substantially affect the child's welfare.

APPEAL by petitioners from *Pate, District Judge,* 9 August 1971 Session of District Court held in WAYNE County.

Custody proceedings instituted 2 December 1970 by petitioners, Lamont Richardson and his wife, Joyce Jones Richardson, for the custody of Marguerite Tracey Jones (Tracey), born 29 April 1965. (The name of the child is referred to in some parts of the record as Tracey Margaret Jones.) The child is the illegitimate daughter of Joyce Jones Richardson. Respondents are Mrs. Richardson's aunt, Mae Hines Jones, and her husband Cliff Jones.

Petitioners offered evidence tending to show the following:

Feme petitioner was seventeen years old, unmarried, and a high school senior in Jersey City, New Jersey, when she gave birth to Tracey. By going to night school she was graduated from high school in June of 1965, shortly after the birth of her daughter. Mae Jones came to feme petitioner's graduation and offered to take the infant child into her home and keep her

until the child's mother completed college. Feme petitioner agreed to this, considering it only a temporary arrangement. Accordingly, in late August of 1965, the child was taken to respondent's home in Goldsboro, North Carolina.

The child's mother enrolled in Howard University, Washington, D. C., in the fall of 1965. After studying there for a year and a half she transferred to nursing school in Newark, New Jersey, because it was nearer to her home and less expensive. The record does not show how long she remained in nursing school, but sometime thereafter she terminated and accepted employment with the Federal Reverve Board in Washington, D. C. While in Washington, D. C., feme petitioner met Lamont Richardson. They married on 31 December 1969.

Feme petitioner testified that she visited her daughter during school breaks and at vacation times. She stated: "I spent as much time with my daughter as I possibly could."

The first time respondents indicated they thought Tracey should remain with them permanently was when petitioners started establishing an apartment shortly before their marriage. A short time before this Mrs. Jones had stated that she and her husband were willing to keep the child but the decision was for feme petitioner. Since their marriage petitioners have sought custody of the child and respondents have refused to relinquish her.

Petitioners moved from Washington, D. C., to Jersey City, New Jersey, shortly after their marriage and live there now. Mr. Richardson is assistant project manager for the Jersey City Redevelopment Agency. His annual income from employment is $8,400.00. Mrs. Richardson works for the Federal Reserve Bank in New York at an annual salary of $6,600.00. However, she plans to quit work to care for her family.

Numerous interrogatories, answered under oath by various witnesses, were introduced by petitioners. One of the witnesses was Samuel C. Scott, Judge of the Municipal Court of Jersey City. These interrogatories tend to show that petitioners are of excellent character and enjoy a good reputation in their community. They live in a two-family, six-room house which they are purchasing. In addition they own rental property which has a monthly gross income of $700.00. Their home has an adequate backyard and a porch and it is located a short block from an

elementary school. A library and a hospital are nearby. The neighborhood is a desirable area in which to rear children.

Respondents offered evidence tending to show the following:

Mrs. Jones teaches school and receives an annual salary of more than $9,000.00. Mr. Jones is a brick mason. In 1970 he earned $6,841.00. Respondents accepted Tracey into their home with the understanding they would have permanent custody. They saw no need to institute adoption proceedings. Respondents have no children of their own. They love Tracey and she loves them. Respondents enrolled Tracey in kindergarten, saw to her medical needs, took her to Sunday School and church regularly, and provided her with adequate care while Mrs. Jones was out of the home teaching school. The child is healthy and well adjusted, but she appeared nervous after returning from a short visit with her mother in the summer of 1970.

Various witnesses testified as to the good character and reputation of respondents and expressed the opinion that it would be in the best interest of Tracey to remain in respondents' home.

The court entered extensive findings, including the following, which are summarized: Respondents understood from the placement of the child in their home and from conversations with the child's mother and grandmother that they were to take the child for life. They occupy and own a home in an urban renewal area of Goldsboro. The dwelling house will be relocated on its existing lot, and the lot will be enlarged to make the lot and dwelling house standard. Respondents have reared the child with abundant love and affection and have provided her with excellent care, custody, training and maintenance. The child is well developed, happy and secure. She will enter the first grade in August of 1971. Respondents are financially able to support the child and are of good moral character. The court found the petitioners' home and employment to be as described in their evidence and further "that said parties are of good character and financially able to maintain said child. . . . "

The court concluded that the interest and welfare of the child would best be promoted by awarding her custody to respondents. An order was entered to this effect and petitioners appealed.

Connor and Vickory by C. Branson Vickory for petitioner appellant.

Bland & Wood by W. Powell Bland for respondent appellee.

GRAHAM, Judge.

It has been noted often that a trial judge is probably faced with no more difficult task than that of finding the correct answer when called upon to determine the custody of a child. "Nearly always any decision he makes will produce heartaches." *In re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85.

Respondents have lovingly provided for this child's every need while her care has been entrusted to them. She undoubtedly loves them and would be happy and secure in their permanent custody. The temptation is great to leave His Honor's judgment undisturbed.

On the other hand, there is nothing in the evidence to suggest that the mother does not also love the child or that the child's love and affection for her mother does not, or will not in the future, equal that which she has for respondents. Our attention is called to the fact that the mother relinquished possession of the child to respondents when the child was only a few months old. But this act should not be viewed as a rejection of the child by her mother. At that time, the mother was young and still in school. She regarded it important that she continue her education and establish a home where she could adequately care for her child. In our opinion, placing the child with Mr. and Mrs. Jones under these circumstances does not illustrate a lack of love for the child or a lack of concern by the child's mother for her welfare. Rather, it shows commendable judgment on the part of a 17-year-old unmarried girl facing maternal responsibilities before she was prepared for them.

[1] The mother now has a stable home. The findings of the trial court establish that she and her husband are suitable and fit persons. There is no evidence which would support contrary findings. Indeed, the suitability of the mother for custody of the child is not disputed. Under these circumstances, feme petitioner, as the natural mother of the child, is entitled to her custody and the trial court erred in failing to enter an order accordingly.

[2] It is well settled that parents, including the mother of an illegitimate child, have the legal right to have the custody of

their children unless clear and cogent reasons exist for denying them this right. 3 Lee, N. C. Family Law, Custody of Children, § 224. "This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." *James v. Pretlow,* 242 N.C. 102, 104, 86 S.E. 2d 759, 761.

The case of *In re Shelton,* 203 N.C. 75, 164 S.E. 332, presented a situation analogous to the one at hand. There, the mother took her illegitimate son to live with respondents. The mother left after six months, leaving her child with respondents. The mother thereafter married, established a home, and sought custody. The trial court concluded that it was in the best interest of the child to remain in the home of respondents and that respondents were better prepared to care for, educate and maintain said child. The Supreme Court reversed the judgment and ordered custody awarded to petitioner. In doing so the court stated: "It is well settled as the law of this State that the mother of an illegitimate child, if a suitable person, is entitled to the care and custody of the child, even though there be others who are more suitable."

The case of *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35, is also similar. There, petitioner went with her illegitimate child to live with her aunt. Thereafter, petitioner married and moved, but left the child with her aunt, asserting, according to the aunt, that she waived right to further claim to the child. The trial court found that the mother and aunt were of good character and that both homes were fit and proper places for the child. Custody was awarded to the aunt. The Supreme Court reversed, holding that the mother was entitled to custody as a matter of law, even though in entrusting her child to the custody of her aunt she may have stated that she waived right to further claim. See also *Latham v. Ellis,* 116 N.C. 30, 20 S.E. 1012.

In *Cranford,* Justice Seawell, speaking for the court, made a statement which appears particularly applicable here:

> "There is nothing that tears at the heart more pathetically than separation from a child over whom one has watched, has cared for and loved during the years until it has become a part of the very life; but the natural right of a parent, whose unfitness has not been shown, to the

custody of a child given to it by a higher power is fundamental, intimately concerned with the integrity of the oldest and most sacred human institution, the home, the family; and we dare not say upon the evidence and findings before us that social considerations or the superior suitability of another custodian should be of such paramount consideration as to defeat that right." 231 N.C. at 95, 56 S.E. 2d at 39.

It is apparent in the instant case that the trial judge was of the opinion the interest and welfare of the child would best be promoted by awarding her custody to respondents. G.S. 50-13.2. Were this a contest between persons equally entitled to the child's custody, this exercise of discretion by the court would be sustained. However, there has been no adoption by respondents and they have no legal right to possession of the child. *In re Cranford, supra; In re Shelton, supra.*

[3] The law presumes that the best interest of a child will be served by committing it to the custody of a parent, when the parent is a suitable person. *In re Hughes,* 254 N.C. 434, 119 S.E. 2d 189. This presumption is not overcome merely by showing that some third person can give the child better care and greater comforts and protection than the parent, a parent's right to custody of a child being forfeitable only by misconduct or by other facts which substantially affect the child's welfare. 3 Lee, N. C. Family Law, Custody of Children, § 224.

We conclude that the child's natural mother is entitled to her custody, no facts having been shown which would overcome the presumption that this would be in the best interest of the child.

Reversed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JACOB NOBLES, JR.

No. 723SC278

(Filed 24 May 1972)

1. **Homicide § 21— second degree murder — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of defendant for second degree murder of his wife, where it tended to show that defendant's 12-year-old daughter heard a shot come from her parents' bedroom, that the daughter ran to the bedroom and found defendant holding a pistol with two spent cartridges and the wife lying on the floor, and that the wife died four days later as a result of the pistol wound received on that occasion, notwithstanding defendant testified the shooting was accidental.

2. **Criminal Law § 84; Searches and Seizures § 2— consent to search**

The evidence was sufficient to support the trial court's finding that defendant freely and intelligently consented to a search of his home by police officers without a warrant.

3. **Criminal Law § 169— admission of evidence — harmless error**

Error, if any, in allowing a State's witness to answer over objection the question, "Where did the shot come from?" was cured when the court thereafter sustained the objection and directed the jury to disregard the answer, and defendant testified that the shot came from a gun he was holding.

4. **Criminal Law § 75— in-custody statements — failure to waive counsel — cross-examination — impeachment**

In this homicide prosecution, the trial court properly allowed the solicitor to cross-examine defendant with reference to his in-custody statements for the purpose of impeaching defendant's trial testimony, notwithstanding defendant was not represented by counsel and had not waived the right to counsel when the statements were made.

5. **Criminal Law § 76— erroneous finding of indigency**

The trial court erred in finding that defendant was not an indigent at the time he made in-custody statements to police officers.

6. **Criminal Law § 75— in-custody statements — failure to waive counsel — impeachment**

In this homicide prosecution, the trial court did not err in the admission of testimony by a police officer as to conflicting in-custody statements made by the indigent defendant without having waived counsel, where the statements had no effect other than that of impeaching defendant's trial testimony, notwithstanding the trial court did not instruct the jury that the statements were admitted for that purpose only.

APPEAL by defendant from *Rouse, Judge,* 4 October 1971 Criminal Session of PITT Superior Court.

State v. Nobles

Defendant was tried upon a bill of indictment proper in form charging him with the murder of his wife. When the case was called for trial the State announced it would seek no greater verdict than murder in the second degree. The jury returned a verdict of guilty of involuntary manslaughter and upon such verdict judgment was entered sentencing defendant to prison for not less than six nor more than eight years. From the judgment, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Robert G. Webb for the State.

Mark W. Owens, Jr., and E. Burt Aycock, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to grant his timely made motions for judgment as of nonsuit. The evidence for the State revealed the following: Defendant and his wife returned home late at night; defendant had been drinking. They awakened a 12-year-old daughter to gain entrance to their locked home. After defendant and his wife entered the house they went to their bedroom and their daughter returned to her room and bed. The daughter heard her parents arguing and then heard a shot come from her parents' bedroom. The daughter ran into her parents' bedroom and found her parents by themselves. Defendant was holding a pistol in his hand with two spent cartridges in it and his wife was lying on the floor. Defendant's wife told the daughter to go to her aunt's house and call the rescue squad. Some four days later the wife died as a result of the pistol wound received that night.

Defendant testified thusly: After he and his wife were admitted to the house by their daughter and went to their bedroom, he heard some dogs at the back of the house. His wife took the pistol out of her pocketbook and laid it on the bed. He told his wife that he was going outside and shoot or scare the barking dogs. His wife told him not to, a struggle over possession of the gun followed and his wife was shot. Defendant was not mad with his wife and had no intent to hurt her.

The court in *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661 (1965) stated: "When the motion for nonsuit calls into

question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." See also, *State v. Hart,* 12 N.C. App. 14, 182 S.E. 2d 254 (1971). When the evidence in the instant case is considered in the light most favorable to the State, and the State is given every reasonable inference from the evidence, *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968), we think the evidence was sufficient to survive the motions for nonsuit and the assignment of error is overruled.

[2] Defendant assigns as error the admission of evidence (a .22 caliber pistol) resulting from a search of his home. The sole question presented is whether the defendant freely and intelligently waived his right to require the police to obtain a search warrant. There are sufficient facts in the record to support the finding, following a voir dire hearing in the absence of the jury, that the search was legal, the consent of the owner being freely and intelligently given, without coercion, duress or fraud. The evidence sufficiently rebuts the presumption against the waiver of fundamental constitutional rights. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

[3] Defendant assigns as error the court's allowing the State to ask its witness, "Where did the shot come from?" and allowing the witness to answer over objection. The error, if any, was corrected when the court sustained the objection and directed the jury to disregard the answer. In any event the error was not prejudicial because defendant later testified that the shot came from the gun he held in his hand. *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Dunlap,* 268 N.C. 301, 150 S.E. 2d 436 (1966).

[4] In his next assignment of error defendant contends the trial court erred in allowing the solicitor to cross-examine defendant with respect to certain statements allegedly made by him to police while he was in custody following the shooting. The State contends that it was proper for the solicitor to ask defendant about statements made by him as to how the shooting occurred which statements were not only contradictory to defendant's version of the shooting as given by him on direct examination but the statements contradicted each other. De-

fendant relies on *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398 (1970), and *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

Assuming, *arguendo,* that defendant's in-custody statements were obtained without safeguarding his constitutional rights, we think the State's contention is supported by *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972); we quote from pp. 555-556 of the opinion by Justice Higgins:

> Catrett was decided on June 6, 1970, and was based on our interpretation of the exclusionary rule in Miranda. Some other appellate courts made this same interpretation. However, on February 24, 1971, the Supreme Court of the United States decided *Harris v. New York,* 28 L.Ed. 2d 1, reviewing the Miranda exclusionary rule. In *Harris* the Court held "that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements" which were made during in-custody interrogation, without counsel, and without waiver of rights.
>
> In our case the use of the defendant's in-custody admissions to impeach and contradict his testimony before the jury was proper and his objections thereto are not sustained. The defendant's admissions were not offered to make out the prosecution's case. They were offered to tear down the defendant's defense. *State v. Lynch, supra,* did not involve admissions offered for the purpose of impeaching the defendant's testimony before the jury.
>
> The decision in *Harris* warranted the use of the impeaching testimony. In view of the importance we attach to the *Harris* decision and its current unavailability to some of our trial courts, we quote extensively from it:
>
> "Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is

barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

* * * * * * * * * * *

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

. . . (T)here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. 347 U.S., at 65, 98 L.Ed. at 507.

* * * * * * * * * * *

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States v. Knox,* 396 U.S. 77, 24 L.Ed. 2d 275, 90 S.Ct. 363 (1969); cf *Dennis v. United States,* 384 U.S. 855, 16 L.Ed. 2d 973, 86 S.Ct. 1840 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements."

The assignment of error is overruled.

Finally, defendant assigns as error the testimony of Police Officer William George, offered by the State in rebuttal, in

which the officer related conflicting statements made by defendant with respect to how the shooting occurred. Before admitting this testimony, the trial court conducted a voir dire hearing, found facts and concluded, among other things, that defendant was not indigent at the time of the interrogation and "had sufficient resources to secure and employ counsel had he chose to do so for purposes of that interrogation."

[5] The interrogation took place on 27 June 1971 and on 2 July 1971 defendant was declared to be indigent and counsel was appointed to represent him for subsequent proceedings. It would appear that the conclusion of law of the trial court was erronous under the very recent case of *State v. Wright,* 281 N.C. 38, 187 S.E. 2d 761 (1972). However, we think the testimony was admissible under the principles declared in *Bryant* and *Harris* quoted above.

[6] In *Bryant* the statements were offered solely for the purpose of impeaching the defendant's testimony and the court carefully instructed the jury that the statements were admitted for that purpose only. In the case at bar there is an absence of any such limiting instructions by the court. While we feel that limiting instructions would have been appropriate in this case and can envision instances where their absence would constitute prejudicial error, we hold that the omission in this case was not prejudicial to the defendant. Five statements relating to the shooting were read to the defendant and he was asked if he made these statements during his interrogation by police officers. Defendant was unable to recall making the statements. The statements had no effect other than that of impeaching defendant's testimony given on direct examination. The defendant's admissions were not offered to make out the prosecution's case; they were offered to tear down the defendant's defense. *State v. Bryant, supra.*

We hold that the defendant had a fair trial, free from prejudicial error, and the sentence imposed was within the limits provided by statute.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JESSE BELL

No. 727SC98

(Filed 24 May 1972)

1. **Constitutional Law § 31; Criminal Law §§ 95, 169— co-defendant's confession implicating defendant — harmless error**

Although the trial court in an armed robbery prosecution erred in the admission of a nontestifying co-defendant's extrajudicial confession which implicated defendant, such error was harmless beyond a reasonable doubt in light of the other overwhelming evidence of defendant's guilt, including defendant's confession that he took part in the robbery.

2. **Criminal Law § 181— post-conviction hearing — errors assertible on appeal**

A post-conviction hearing is not a substitute for an appeal, and errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.

3. **Criminal Law § 23— guilty plea — voluntariness — belief that incompetent evidence would be used**

The fact that defendant may have thought that incompetent evidence would be used against him upon a plea of not guilty is not sufficient grounds to strike a plea of guilty that defendant swore, and the court found, was freely, understandingly and voluntarily entered.

ON *certiorari* to review order of *Tillery, Judge*, entered in a post-conviction hearing at the 31 May 1971 Session of Superior Court held in NASH County.

In May 1968, this defendant was jointly indicted with Tommy Justice, Cleveland Banks, Roosevelt Richardson and Truman Dancy and charged (in Case No. 1903-S) with the armed robbery of the clerk in charge of the Cokey Road Package Store on 15 February 1968.

Richardson and Dancy were tried separately and pleaded guilty. Justice, Banks and this defendant were tried together at the May 1968 Criminal Session of Superior Court held in Nash County. Each of the three was convicted and given an active prison sentence.

After being convicted in Case No. 1903-S (the "Cokey Road Package Store Case"), the defendant Jesse Bell chose not to appeal, and at the same session of court, he entered a written plea of guilty to the felony of armed robbery in Case No. 1905-S

(the "Tip Top Bakery Case"). In his written plea the defendant stated, under oath, that he was guilty of the crime of armed robbery (in the Tip Top Bakery Case), that he understood he could be imprisoned for as long as thirty years upon such plea, that he had neither been promised anything nor threatened in any manner to influence him to plead guilty, that he had had ample time to confer with his lawyer and subpoena witnesses, and that he was ready for trial. The trial judge, after further examining the defendant, made an adjudication that the plea of guilty by the defendant was freely, understandingly and voluntarily made, and that it was made without undue influence, compulsion or duress and without promise of leniency. (In the Cokey Road Package Store Case, Bell received a sentence of 18 to 20 years and in the Tip Top Bakery Case, he received a sentence of 25 years, to run concurrently with the first.)

On 14 December 1970, defendant Jesse Bell, *pro se,* filed the petition now under consideration, which petition was later amended after counsel was appointed for him at his request. Defendant contended that he was entitled to a new trial because his constitutional rights were violated in both Case No. 1903-S and Case No. 1905-S, in that he had been told by police officers that he should waive a preliminary hearing; that extrajudicial statements of Cleveland Banks, Truman Dancy and Roosevelt Richardson (who did not testify at the trial) were admitted against him in Case No. 1903-S; that he had requested to see his court-appointed attorney on 16 May 1968, but was transferred to Raleigh without seeing him (this was three days after he had been convicted on one charge of armed robbery, pleaded guilty on another, had been sentenced, and had decided that he would not appeal); that he had entered the plea of guilty in Case No. 1905-S because he believed that the State might use extrajudicial statements of his co-defendants against him in that case; and that he had been informed and believed he would be given a concurrent sentence no longer than the 18 years he had received in Case No. 1903-S.

The defendant was given a plenary hearing on his petition, after which Judge Tillery found facts and concluded that the defendant was not entitled to the relief sought.

Defendant sought and was granted certiorari to review the ruling of Judge Tillery on the post-conviction review.

Attorney General Morgan and Assistant Attorneys General Magner and Harris for the State.

Thomas W. Henson for defendant appellant.

MALLARD, Chief Judge.

In 1968, Banks and Justice (who were tried with the defendant Jesse Bell in Case No. 1903-S) both appealed from their convictions. The defendant Bell, after discussing with his attorneys his right to appeal, decided not to do so. Banks' appeal was dismissed because of the failure to docket the record on appeal in this court within the time required by the rules. Justice was given a new trial (in January 1969) because of the introduction into evidence of that portion of Banks' extrajudicial confession which incriminated Justice. Banks did not testify and therefore Justice and Bell did not have the opportunity to cross-examine him. [See *State v. Justice* 3 N.C. App. 363, 165 S.E. 2d 47 (1969).] In so holding, the Court of Appeals relied mainly on the decision in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), which was based upon the holding in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), and its retroactive application in *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968). *(Bruton* was decided May 20, 1968, and this case was tried May 13, 14 and 15, 1968.)

In the case No. 687SC418, reported as *State v. Justice, supra,* there is on file in this court a transcript of the proceedings at the May 1968 Criminal Session of Superior Court held in Nash County in which Tommy Justice, Jesse Bell and Cleveland Banks were the defendants. It is this trial (Case No. 1903-S) in which the defendant Bell now contends the trial judge committed error by admitting the extrajudicial confessions of his co-defendants Banks, Justice, Dancy and Richardson, which incriminated him. Only portions of this transcript were made a part of the record on appeal in this present case. However, we take judicial notice of our own records, which include the transcript, in this interrelated proceeding. *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891 (1963). After consideration of the record, and for the reasons set forth by Judge Parker in *State v. Justice, supra,* we hold that no error was committed

in allowing introduction in evidence of the confessions of the co-defendants Justice, Dancy and Richardson.

Since *State v. Justice, supra; State v. Fox, supra;* and *Bruton v. United States, supra,* the Supreme Court of the United States has modified and narrowed the application of the *Bruton* holding. In *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972), the Court said: "The mere finding of a violation of the Bruton rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." See also, *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969).

The testimony at the trial of Jesse Bell in May 1968 showed that all five of the defendants were questioned by the officers together and that each admitted taking part in the robbery and receiving part of the money. On a voir dire relating to the admissibility of the confessions, the investigating officer when asked, "Did these three individuals (the defendants) tell on themselves or tell on the others?," replied: "These three boys just told on themselves."

[1, 2] We hold that the properly admitted evidence of this defendant's guilt was so overwhelming and that the prejudicial effect against him of the improperly admitted statement of the co-defendant Banks was so insignificant by comparison, that it is clear beyond a reasonable doubt that its admission was harmless error. Moreover, this defendant did not choose to appeal at that time and waited from the date of this trial in May 1968 until December 1970 before deciding to file a petition, *pro se,* to challenge, among other things, the admissibility of the evidence at his trial. A post-conviction hearing is not a substitute for an appeal. In *State v. White,* 274 N.C. 220, 162 S.E. 2d 473 (1968), Justice Sharp, speaking for the Court, said:

> "In this proceeding, petitioners sought and obtained post-conviction review upon the allegation that the trial judge had erroneously admitted evidence obtained by an unlawful search and seizure. * * *

This Court has consistently held that proceedings under the Act are not a substitute or an alternative to direct appeal. * * *

* * *

We adhere to our former decisions. Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. * * *"

[3] In Case No. 1905-S, the acceptance of defendant's plea of guilty, even though done in 1968, met all of the requirements enumeratead in *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969). The fact, if indeed it is a fact, that defendant may have thought that incompetent evidence would be used against him upon a plea of not guilty is not sufficient grounds to strike a plea of guilty that the defendant swore, and the court found, was freely, understandingly and voluntarily entered. *Parker v. North Carolina,* 397 U.S. 790, 25 L.Ed. 2d 785, 90 S.Ct. 1458 (1970). It has been held that a guilty plea is constitutionally valid even though it may be motivated in part by fear of the death penalty. *North Carolina v. Alford,* 400 U.S. 25, 27 L.Ed. 2d 162, 91 S.Ct. 160 (1970); *Brady v. United States,* 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970).

It is also noted that even if there were prejudicial error in the trial of Case No. 1903-S in 1968, the sentence imposed therein runs concurrently with the sentence imposed in Case No. 1905-S in which the defendant pleaded guilty and which is free from error.

We have considered all of defendant's contentions and no prejudicial error is made to appear.

Affirmed.

Judges CAMPBELL and BROCK concur.

GLORIA OVERTON RICKERT v. JAMES BRYANT RICKERT

No. 7228DC25

(Filed 24 May 1972)

1. **Divorce and Alimony § 18— award of counsel fees — alimony pendente lite**

The husband cannot object on appeal to an award of reasonable counsel fees to the wife where he had stipulated that the wife was entitled to alimony *pendente lite.*

2. **Divorce and Alimony § 18— counsel fees**

The amount of counsel fees is within the discretion of the court and is subject to review only for abuse.

3. **Divorce and Alimony § 18— counsel fees of $8,500**

Order requiring defendant husband to pay $8,500 for counsel fees for plaintiff wife's attorneys was supported by evidence in the record of the nature and scope of the legal services rendered, the skill and time required, and other circumstances concerning the financial condition of the parties.

APPEAL by defendant from *Allen, Chief District Judge,* 14 June 1971 Session of District Court held in BUNCOMBE County.

Plaintiff, wife of the defendant, instituted this action in Buncombe County Superior Court on 10 July 1970 seeking custody of their minor child, child support, alimony pendente lite, permanent alimony without divorce, and counsel fees. Defendant's answer prayed that the court dismiss plaintiff's action, award custody of the child to defendant and award defendant a divorce from bed and board. On 27 August 1970 Judge Harry C. Martin entered an order reciting that by agreement of parties and their counsel, it was agreed that plaintiff would possess the home and car and defendant would pay taxes, insurance and country club dues (details of that agreement are omitted). Judge Martin concluded: "That based upon the evidence before the court and the stipulation of the parties, the court finds that the plaintiff and the minor child are entitled to an Order for alimony pendente lite and support and maintenance of said minor child"; and ordered that custody of the minor child be placed in the plaintiff and that the defendant pay $600 per month as alimony pendente lite and $200 per month for support and maintenance of the child. No exception was made to this order and, because this cause was retained and the order

was not a final determination, the court expressly refrained from ruling on the question of counsel fees for plaintiff's attorneys at the time this order was entered. On 25 June 1971 Chief Judge Allen of Buncombe County District Court entered a consent judgment. All controversy between the parties, excluding the issue of counsel fees, had been settled and agreed upon by consent. In that judgment, Chief Judge Allen substantially adopted the agreement of the parties as recited in Judge Martin's order and ordered that the awards of alimony and support and the granting of custody become permanent. Chief Judge Allen in the consent judgment, as Judge Martin had done previously, expressly refrained from ruling on the question of counsel fees for plaintiff's attorneys because the parties were unable to agree on what amount, if any, should be paid by defendant. The consent judgment did provide, however, that the parties had agreed to submit the question of counsel fees to Chief Judge Allen to be determined by him at some later date. The following stipulation, filed on the same day as the consent judgment, is found in the record on appeal:

> "IT IS HEREBY STIPULATED AND AGREED between counsel for plaintiff and counsel for defendant that the court may consider the entire court file in the alimony case between the parties hereto, as having been properly identified and offered into evidence, in making findings of fact and determing whether or not the court will award counsel fees to plaintiff's attorneys, and if so, the amount thereof.
>
> IT IS FURTHER STIPULATED AND AGREED that the court may proceed to hear the evidence in the case involving absolute divorce between the parties and may sign both the order in regard to counsel fees and the divorce judgment as of this date."

On 26 July 1971 Chief Judge Allen entered a subsequent order in which certain findings of fact were made:

> 1. "That the plaintiff and defendant entered into a consent judgment on the 25th day of June, 1971."
>
> 2. "That plaintiff's counsel, Earl J. Fowler and Robert S. Swain, have been paid no attorneys' fees by the plaintiff up through and including the date of the final hearing on the above captioned matter."

3. "That from the record evidence the income of the plaintiff was $2,253.00 per year."

4. "That from the record evidence, the defendant's 1969 net income was $17,657.84."

5. "That the defendant has stocks and bonds having an approximate value of $677,637.27; and the plaintiff has stocks and bonds in the amount of $141,362.50, the plaintiff's estate being derived principally from the mother of the defendant."

Based upon the above findings of fact, the court made the following conclusion of law:

1. "That the plaintiff is a dependent spouse and that the defendant is the supporting spouse in contemplation of law."

and ordered that defendant pay plaintiff's attorneys $8,500 as counsel fees.

Defendant excepted to certain of these findings of fact and to entry of the order and appeals to this Court.

Swain and Fowler, by Robert S. Swain, for plaintiff appellee.

Bennett, Kelly and Long, by Harold K. Bennett, for defendant appellant.

MORRIS, Judge.

Defendant excepted to and assigns as error the conclusion of law by Chief Judge Allen that plaintiff is a dependent spouse and defendant is a supporting spouse, the resulting order that defendant pay plaintiff's counsel fees, and the failure of the court to enter findings of fact and conclusions of law to the contrary.

G.S. 50-16.4 provides that "[A]t any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony."

[1] Noting that by stipulation "the defendant having conceded for the purpose of this hearing that plaintiff was entitled to such an order," Judge Martin on 27 August 1970 ordered that plaintiff was entitled to alimony pendente lite.

> "Stipulations made during a trial constitute judicial admissions. They are binding upon the parties and continue in force for the duration of the trial unless limited in some manner at the time they are made, and thereafter a party may not take an inconsistent position. 7 Strong, N. C. Index 2d, Trial, § 6." *Dale v. Dale,* 8 N.C. App. 96, 97, 173 S.E. 2d 643 (1970).

The defendant, by stipulating that plaintiff was entitled to alimony pendente lite, conceded an ultimate fact which was later put in issue and cannot now object on appeal to the award of reasonable counsel fees. See *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971).

[2, 3] Appellant in his brief intimates that an effort was made to "blow up the case out of proportion" and certain expenditures were unjustified. The amount of counsel fees is within the discretion of the trial court and is subject to review only for abuse. *Little v. Little,* 9 N.C. App. 361, 176 S.E. 2d 521 (1970); *Harper v. Harper,* 9 N.C. App. 341, 176 S.E. 2d 48 (1970); *Peeler v. Peeler,* 7 N.C. App. 456, 172 S.E. 2d 915 (1970); *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5 (1968). Among the elements to be considered in an allowance of this kind are: ". . . —the nature and worth of the services; the magnitude of the task imposed; reasonable consideration for the defendant's condition and financial circumstances,— . . ." *Stadiem v. Stadiem,* 230 N.C. 318, 321, 52 S.E. 2d 899 (1949); see also *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967). The parties in this case stipulated that Chief Judge Allen should consider the entire court file in making a determination, but not all the evidence considered by Judge Martin and reconsidered by Chief Judge Allen was brought forward in the record on appeal. In addition to the pleadings, the record does, however, reveal some of the evidence which Chief Judge Allen considered in making his findings, including the will of defendant's grandmother, state and federal income tax returns, and affidavits from plaintiff, defendant and plaintiff's attorneys. Some of the evidence contained therein tends to show that the plaintiff employed two attorneys to represent her during

the latter part of March, 1970, when defendant informed her that he wanted a divorce; that "defendant badgered the plaintiff daily, insisting that she contact her attorneys and work with them and to insist on her attorneys doing anything necessary to bring about a conclusion of the marriage between the plaintiff and defendant"; that defendant denied all the material allegations of plaintiff's complaint; that plaintiff did not have sufficient income to pay her attorneys for representing her nor did she have sufficient income to support herself and the minor child pending trial of this action; that plaintiff was in daily contact with her attorneys from the time they were first employed; that the plaintiff's attorneys expended the sum of $2,500 in fees to private investigators to obtain evidence of adultery; that plaintiff's attorneys were required to make two appearances in Justice of the Peace Court and several appearances in court on the preliminary hearing for alimony pendente lite prior to the time of the actual hearing before Judge Martin; that plaintiff's attorneys made two separate trips to Winston-Salem, each taking a full day, to locate a witness; that plaintiff's attorneys both traveled to Havelock, North Carolina, to interview witnesses they felt were necessary in the event of an actual trial on the merits; that plaintiff's counsel had conferences with their client at least once a week after the date of the preliminary order and had conferences with defendant's counsel from time to time concerning a possible settlement; that each of plaintiff's counsel spent a minimum of 100 hours in time for preparation of the case prior to the preliminary hearing (exclusive of secretarial time, time spent by private investigators and time spent in telephone conferences); and finally that plaintiff had paid no counsel fees to her attorneys as of 28 June 1971 which was subsequent to the date of entry of the consent judgment. Suffice it to say that the evidence contained in the record of the nature and scope of the legal services rendered, the skill and time required, and the other circumstances concerning financial condition not recited by this opinion was sufficient, if believed, to support the award made. Nor could we say that the record reveals any abuse of discretion.

The cases of *Austin v. Austin*, 12 N.C. App. 390, 183 S.E. 2d 428 (1971), and *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971), are distinguishable. Contrary to those cases, this record is replete with evidence as to the nature and

scope of the legal services rendered, the magnitude of the task imposed, the time required, and the skill and ability called for. The trial court concluded that the fee awarded constituted "adequate fees for representing the plaintiff." It is always better practice for the court to find specifically that the fee awarded is reasonable. Nevertheless, under the circumstances of this case, we are of the opinion that the judgment meets the minimal requirements.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

IN THE MATTER OF VALERIE LENISE WALKER

No. 7218DC241

(Filed 24 May 1972)

1. **Constitutional Law § 32; Infants § 10— juvenile delinquency proceeding — right to counsel**

In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided in the absence of a proper waiver of counsel.

2. **Courts § 15; Infants § 10— undisciplined child — constitutionality of statute**

The provisions of G.S. 7A-278(5) relating to an "undisciplined child" are not unconstitutionally vague or indefinite.

APPEAL by respondent from *Gentry, District Judge,* 11 October 1971 Session, District Court, GUILFORD County.

This case was instituted by a petition filed 2 August 1971 by Mrs. Katherine Walker, mother of Valerie Lenise Walker (Valerie). The petition sets out that Valerie is under sixteen years of age; lives with her parents; is an undisciplined child as defined by G.S. 7A-278, in that she has been regularly disobedient to her parents during the last six months; that Valerie will not mind and obey; that she goes and comes as she pleases and keeps late hours; that she associates with persons of questionable character and frequents places not approved by her parents; that she is almost beyond the control of her parents.

Based upon the petition a juvenile summons was issued 10 August 1971. A hearing was held on 17 August 1971 before Judge B. Gordon Gentry of the District Court. Valerie was not represented by an attorney at the hearing. Judge Gentry entered an order finding that Valerie was born 14 April 1957; is under the control and supervision of her parents; that she has been regularly disobedient to her parents in that she goes and comes without permission, keeps late hours, associates with persons that her parents object to and goes to places where her parents tell her not to go. The court thereupon found that she was an undisciplined child and in need of discipline and supervision. The court placed Valerie on probation subject to the following conditions:

"1. That she be of good behavior and conduct herself in a law-abiding manner;

2. That she mind and obey her parents and not leave home without permission and then to go only to places that she has permission to go and return as directed;

3. That she attend school regularly during the school year and obey the school rules and regulations;

4. That she report to the court counselor as directed, truthfully answer questions put to her concerning her conduct, behavior, associates and activities and carry out requests given her concerning such;

5. That this matter be reopened for further orders on March 22, 1972 at 2:00 p.m.

This matter is retained for further orders of the court."

Under date of 21 September 1971, Ann M. Jones, Court Counselor, filed a petition requesting the court to further consider the matter for that Valerie is a delinquent child as defined by G.S. 7A-278(2) as she has violated conditions Nos. 1, 2 and 3 of the Order of 19 August 1971, as she continuously disobeys her parents in that she goes and comes as she pleases, keeps late hours and frequents places not approved by her parents. Further she refuses to obey school rules and regulations and misbehaves in the classroom and is disrespectful to school officials and that she is beyond the control of her parents.

Pursuant to this petition and summons issued thereon, the case was set down for hearing. Prior to the hearing the

public defender of the Eighteenth Judicial District was appointed to represent Valerie. On 15 October 1971 the public defender, on behalf of Valerie moved to vacate the order of 19 August 1971 for that it was entered at a time when Valerie was not represented by counsel. This motion was denied, and the hearing proceeded.

Katherine Walker, mother of Valerie, testified that she lives with her husband and seven small children, including Valerie; that she works, and when she returns from work most of the time Valerie is not home and has not done the chores which have been assigned to her to do, such as cleaning her room, the bathroom and washing dishes; that Valerie tells her she has been with Vanessa Cunningham at Mrs. Cunningham's home and that she has told Valerie not to leave without telling her where she is going; that Valerie had been to Paradise Inn and bought a sandwich and she had told her not to go to Paradise Inn; that Paradise Inn has a bad reputation and is no place for a fourteen-year-old girl; that Valerie has stayed out at night till 1:00 o'clock and her mother did not know where she was.

The mother further testified that she had seven children at home but ten children in all; the oldest child at home is twenty-one, another twenty and one nineteen and then Valerie and then three children younger than Valerie. She testified, "Valerie is lazy. She's a lazy child. No, I don't have no complaints. All I want her to do is do like a child should and act like one and not an adult. That's right; I have no complaints other than she acts like an adult and not like a child."

Howard King, the Assistant Principal of Mendenhall Junior High School, testified that Valerie had been enrolled in Mendenhall Junior High School from September 8, 1971; that she was in special education with a group of students who had a great deal of difficulty in adjusting.

Mr. King further testified that he had had numerous conferences with Valerie and that one problem was that in her physical education class she refused "to dress out in there or obey the teacher"; that he had had difficulty in communicating with Valerie and that she would not give him any reason for her conduct; that she would suck her thumb and would not talk and would then begin to talk and it was impossible to keep her

quiet and "it doesn't have any meaning to what we're talking about." He further testified that Valerie was large for her age and as compared to the other children in the class. He further testified that Valerie was sent by her teachers to the office practically every day in school; that she does not fit into the classroom and disrupts whatever the teachers try to do; that if he had any way to get her home, he would have suspended her each day; that as it is, all they can do with her at school is to have her sit in the office and let her sit there and that she occasionally gets up and leaves; that Valerie does not respond to any methods of discipline available at the school.

The probation officer testified that Valerie had had problems at her previous school and was having the same problems at the school she was now attending; that Valerie's attitude was bad and she would not cooperate.

Under date of 27 October 1971, Judge Gentry entered an order finding that Valerie did not obey her parents in that she left home without permission and kept late hours at night; that she went to places that she had been told not to go to by her parents and that she failed to do chores assigned to her by her mother; that she had been sent out of the classroom in school a number of times for disobeying teachers and disturbing the class; that Valerie is a delinquent child and is in need of discipline and supervision; that she has been a constant behavior problem in school since 21 September 1971 and has not responded to disciplinary actions taken by the school authorities and she continues to disobey her mother; that she is in need of more discipline and supervision than can be provided for her within Guilford County. It was thereupon ordered that she be committed to the North Carolina Board of Juvenile Correction to be in the custody and under the control and supervision of the officials thereof until discharged in keeping with the requirements of law.

From this order the respondent appealed.

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

Public Defender, Eighteenth Judicial District, Wallace C. Harrelson and Assistant Public Defender, Eighteenth Judicial District, J. Dale Shepherd, for the respondent appellant.

CAMPBELL, Judge.

[1] The respondent assigns as error the denial of the motion to vacate the order entered 19 August 1971, in which Valerie was found to be an undisciplined child and placing her on probation, for that at said hearing she was not represented by counsel. In order to comply with due process in a juvenile proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. *In re Garcia,* 9 N.C. App. 691, 177 S.E. 2d 461 (1970).

While the order of 19 August 1971 was defective, as based on a hearing where there was a failure to afford Valerie due process in that no attorney represented her or the right to such representation properly waived, nevertheless, the hearing at the October 1971 Session of the court was not improper. A plenary hearing was held and evidence was offered to sustain findings of fact independent of the 19 August 1971 order.

At the October 1971 hearing Valerie was represented by counsel, and due process of law was afforded her.

[2] Respondent further contends that this proceeding should have been dismissed for that G.S. 7A-278 is unconstitutional particularly subsection (5) thereof.

G.S. 7A-278(5) provides:

> " 'Undisciplined child' includes any child who is unlawfully absent from school, or who is regularly disobedient to his parents or guardian or custodian and beyond their disciplinary control, or who is regularly found in places where it is unlawful for a child to be, or who has run away from home."

Respondent cites no authority for the position taken. There is nothing vague or indefinite about the statute. It is quite similar in its provisions and purposes to the previous statute pertaining to juveniles. The previous statute was held to be constitutional and nothing would be gained by a repetition of what was said about the constitutionality of the juvenile act in the case of *In Re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd,* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976.

We have considered the other assignments of error brought forward by the respondent and find them to be without merit.

We find that the respondent in the instant case had a fair hearing in October 1971, which fully met with due process of law, and the order entered by Judge Gentry was fully sustained by the evidence introduced and the facts found thereon.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. CHARLES JOHN LINDQUIST

No. 721SC314

(Filed 24 May 1972)

1. Searches and Seizures § 2— consent to search — waiver of search warrant

The owner of premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent.

2. Searches and Seizures § 2— consent to search — burden of proof

The consent of an owner to a warrantless search of his premises must be freely and intelligently given, without coercion, duress or fraud, and the burden is on the State to prove that it was so.

3. Searches and Seizures § 2— consent to search — sufficiency of evidence

There was ample evidence presented at the *voir dire* hearing to support the trial judge's findings that the defendant freely and intelligently, without coercion, duress or fraud, consented to an officer's search of his automobile.

4. Narcotics § 4— transportation of marijuana — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for transporting marijuana where it tended to show that two match boxes containing 56 grams of marijuana were found under the front seat of a car owned and operated by defendant, and that defendant's responses were slow and the pupils of his eyes were dilated when he was arrested.

5. Narcotics § 5; Criminal Law § 124— possession and transportation — inconsistent verdicts

Where defendant was charged in a two-count bill of indictment with the possession and transportation of 56 grams of marijuana, failure of the jury to reach a verdict on the possession count did not invalidate the verdict of guilty on the transportation count, since consistency between verdicts on several counts is not necessary.

6. **Narcotics § 4.5 —transportation of marijuana — custody of passenger — instructions**

Where the evidence tended to show that marijuana was found under the front seat of an automobile owned and operated by defendant and occupied by two passengers, the trial court did not express an opinion in violation of G.S. 1-180 when it instructed the jury that the driver of an automobile is guilty of transporting marijuana if he knowingly carries in his automobile marijuana belonging to and in the custody of his passengers.

7. **Narcotics § 4.5— control over automobile — narcotics found therein — instructions**

In a prosecution for possession and transportation of marijuana, the trial court did not err in instructing the jury that exclusive control over an automobile is a circumstance to be considered in determining whether the defendant has knowledge and control over narcotics found therein.

8. **Narcotics § 5; Criminal Law § 138— transportation — punishment statute changed pending appeal**

A defendant whose appeal from a conviction of transporting 56 grams of marijuana was pending on the effective date of the Controlled Substances Act, 1 January 1972, is not entitled to the benefit of the more lenient punishment provisions of the new Act.

APPEAL by defendant from *Cohoon, Judge,* 6 December 1971 Session of Superior Court held in DARE County.

The defendant, Charles John Lindquist, was charged in a two count bill of indictment proper in form with the possession and transportation on 10 June 1971 of 56 grams of the narcotic drug marijuana in violation of G.S. 90-88 and 90-111.2(a). Upon the defendant's plea of not guilty the State offered evidence tending to show that on 10 June 1971 at about 12:50 a.m. Officer R. W. Pilgreen of the North Carolina Highway Patrol stopped an automobile owned and operated by the defendant. With the consent of the defendant, the officer searched the vehicle and found two match boxes containing marijuana under a tow bag under the front seat. Additional facts necessary for an understanding of the decision in this case are set out in the opinion. The defendant offered no evidence.

When the jury was unable to reach a verdict on the first count in the bill of indictment, the Court withdrew a juror and declared a mistrial on the count charging felonious possession of marijuana. The jury found the defendant guilty of the transportation of marijuana as charged in the second count of the

bill of indictment. From a judgment imposing prison sentence of 12 months, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene Hafer for the State.

Christopher L. Seawell for defendant appellant.

HEDRICK, Judge.

The defendant first contends that "the Court committed error in allowing into evidence the results of the search of the defendant's automobile by Officer Pilgreen."

[1, 2] "The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent. *State v. Colson, supra,* (274 N.C. 295, 163 S.E. 2d 376, *cert. den.* 393 U.S. 1087); *State v. Moore, supra,* (240 N.C. 749, 83 S.E. 2d 912). To have such effect, the consent of the owner must be freely and intelligently given without coercion, duress or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61. However, the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25." *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

Since the officers in the present case had no search warrant, the defendant's objection to the evidence obtained as a result of the search of the defendant's vehicle raised a question of fact to be resolved by the trial judge as to whether the defendant's consent had been given freely and intelligently without coercion, duress, or fraud. *State v. Vestal, supra.*

To resolve the question thus presented, a *voir dire* hearing was held in the absence of the jury where the court heard evidence and made the following pertinent findings and conclusions:

> " . . . that about 12:50 a.m., o'clock, June 10, 1971, the witness, R. W. Pilgreen, . . . stopped a vehicle in the vicinity of Frisco, which was being operated without a front head-

light, and which came over into his lane of travel, that in talking with the defendant, who was the driver of the vehicle, at the patrol car, as to who owned the car, the defendant stated that he was the owner of the car, but had not had the registration papers transferred, as the car had been traded.

That the defendant was advised by the patrolman that he was going to cite him for improper equipment violation for his light being out, since he, the officer, had seen this same car previously with a light out; that he observed the pupils of the defendant's eyes were somewhat dilated, and the officer asked the defendant for a right to search the vehicle, at which time the defendant responded 'Yes,' and then stated 'No,' that the officer then advised the defendant that he did not have to give consent to him to search the car, but when consent was given that he would have charge of the car for purposes of searching it, and to think about his decision while he was writing the ticket.

The officer thereafter asked the defendant, in the presence of Deputy Sheriff Basnett, who had come to the car in the meantime, 'Do you give me your permission to search your vehicle?', and the defendant stated, 'yes, I do', before asking questions of the defendant he asked the defendant had he thought it over, and he responded 'Yes.'

Thereafter search was made of the car.

. . . the officer had no warrant, and no search warrant.

The Court finds that the defendant was the driver and owner and in control of said vehicle, and freely, voluntarily, understandingly and without compulsion gave consent to the officer to search said vehicle.

The Court concludes . . . that after consent was given a search warrant was not required, and that such evidence, if any, produced as result of the consented search is admitted in evidence for such weight as the jury may see fit to give it."

[3] We hold there was ample competent evidence introduced at the *voir dire* hearing to support the trial judge's findings that the defendant freely and intelligently without coercion, duress or

fraud consented to Officer Pilgreen's warrantless search of his automobile. *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652 (1971); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970). This assignment of error is not sustained.

[4] Assigning as error the denial of his motion "for dismissal or directed verdict of not guilty," the defendant asserts that there is absolutely no evidence that the defendant had any knowledge that the marijuana was in his automobile and that guilty knowledge is an essential element of the crime herein charged. This contention has no merit under the facts of this case. Where, as here, a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. *State v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93 (1950); *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Jiles,* 1 N.C. App. 137, 160 S.E. 2d 125 (1968). It follows therefore that the State made out a *prima facie* case when it offered evidence tending to show that the defendant's responses were "real slow," that the pupils of his eyes were dilated and that he was the owner and operator of the vehicle in which the officer found two match boxes containing 56 grams of marijuana. We hold the evidence was sufficient to require the submission of the case to the jury and to support the verdict.

[5] The defendant contends "the Court committed error in the denial of the defendant's motion to set the verdict aside as being contrary to the law on the ground that failure of the jury to find the defendant guilty of the possession of marijuana precluded the jury from finding the defendant guilty of transportation of marijuana."

Consistency between verdicts on several counts of a bill of indictment is not necessary and a conviction on one count will be upheld even though it is rationally incompatible with an acquittal on other counts in the same bill. 18 A.L.R. 3d 259 (1968); *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104 (1938); *State v. Sigmon,* 190 N.C. 684, 130 S.E. 854 (1925). The two counts in the present case charge the defendant with separate and distinct offenses under the statute, and as was said in *State v. Sigmon, supra,* " . . . (W)hile the jury would have been fully justified in finding the defendant guilty on both counts under

the evidence in this case, their failure to do so does not as a matter of law vitiate the verdict on the count of transporting."

This assignment of error is overruled.

[6] Defendant's exceptions 18 and 20 relate to the Court's instructions to the jury. First, the defendant argues that since there was no evidence tending to show that the marijuana found in the automobile belonged to or was in the custody of either of the passengers other than the defendant, the Court expressed an opinion in violation of G.S. 1-180 when it instructed the jury that the driver of an automobile is guilty of transporting marijuana when he knowingly carries in his automobile marijuana belonging to and in the custody of passengers. The evidence tends to show that the marijuana was found under the front seat of the automobile owned and operated by the defendant and occupied by two passengers. Obviously the Court was following the mandate of the statute by declaring and explaining the law arising on the evidence.

[7] Second, the defendant contends the Court erred in instructing the jury that exclusive control over an automobile is a circumstance to be considered in determining whether the defendant has knowledge and control of narcotics found therein. We do not agree. Evidence that the defendant was owner and operator of the vehicle in which marijuana was found under the front seat raises an inference that the defendant was transporting the marijuana and is a circumstance to be considered together with the other evidence in the case. *State v. Jiles, supra.* This assignment of error has no merit.

[8] Finally, we consider defendant's contention that he is entitled to be resentenced under the more lenient penalties prescribed by the North Carolina Controlled Substances Act effective 1 January 1972.

In *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972), Justice Branch, writing for the North Carolina Supreme Court, said: "Thus, the pre-existing law as to prosecution and punishment as set forth in Articles 5 and 5A, Chapter 90 of the General Statutes as written prior to 1 January 1972, remain in full force and effect as to offenses committed prior to 1 January 1972." The defendant's contention in the present case has no merit since he was charged, tried, convicted and sentenced for a violation of G.S. 90-111.2(a) which occurred on 10 June 1971.

In the defendant's trial in Superior Court we find no error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. FRANK ED BLAKE

No. 727SC156

(Filed 24 May 1972)

1. **Criminal Law § 25— nolo contendere — failure to inform defendant of minimum sentence**

Where the trial court informed defendant that he could be imprisoned for as much as 30 years upon his plea of *nolo contendere* to a charge of armed robbery, the failure of the court to inform defendant that the minimum sentence was five years did not vitiate defendant's plea of *nolo contendere.*

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

A sentence of not less than 20 nor more than 25 years for armed robbery is not cruel and unusual punishment since it does not exceed the maximum sentence authorized by G.S. 14-87.

APPEAL by defendant from *Blount, Judge,* 27 September 1971 Regular Session of Superior Court held in EDGECOMBE County.

Defendant, an indigent, was charged in a bill of indictment, proper in form, with the felony of armed robbery. He was represented by court-appointed counsel. Without objection, the defendant's case was consolidated for arraignment and trial with the cases of one Paul O'Berry and one Michael Lee Russell who were also charged with participation in the same armed robbery. All three of the defendants entered pleas of nolo contendere. The record on appeal does not contain what disposition was made of the cases against O'Berry and Russell. From judgment of imprisonment, the defendant, Frank Ed Blake, appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Speas for the State.

George M. Britt for defendant appellant.

MALLARD, Chief Judge.

Before entering judgment, the trial judge heard testimony from the victim, Albert Gay, Jr.; Milton McLin, a deputy sheriff of Edgecombe County; and co-defendants O'Berry and Russell. Defendant Blake chose not to testify. There was no material conflict in any of this testimony. The testimony, in substance, tended to show that Albert Gay, Jr., a widower, lived alone in his home in the southwest corner of Edgecombe County, near Sharpsburg. At about 3:00 a.m. on 9 July 1971, he was awakened by the defendant Blake ringing his door bell. After putting on his pants Gay went to the door, and Blake asked him for permission to use his telephone to call an ambulance and to report an automobile wreck which Blake said had occurred near there, severely injuring someone. When Gay opened the door, Blake entered, and as Gay turned, Blake "stuck a .38 automatic" in his back and made him lie down on the floor. At that time Russell came in and Blake directed Russell to get some neckties which, along with electric blanket cords, were used to tie Gay's hands and feet. Then O'Berry came in and while Blake and Russell took turns in holding the pistol on Gay, the other two ransacked the house. They took $170 from Gay's pocketbook. Gay had theretofore welded the top of a milk can and had bolted it to the floor of his house near his bed and had placed in the can between $1,600 and $1,700, mostly in silver money. The three intruders tore this can loose from the floor and took the can and money, which together weighed 133 pounds, put it in their truck and left, leaving Gay tied up. He quickly untied himself, got his shotgun, followed them in his car and attracted the attention of a police officer as they proceeded through Nashville. The officer gave chase and stopped the truck being operated by Blake. The pistol was in the trunk and Gay's milk can with the money still in it was behind the seat.

Blake lived somewhere between Raleigh and Bunn and at the time of this trial was on probation for breaking and entering. O'Berry and Russell were from Atlanta, Georgia, and had known each other previously, but neither of them was acquainted with Blake prior to coming to Raleigh together for the purpose of participating in a robbery. (They had been contacted in Atlanta to come to Raleigh to assist in a robbery.) Blake met them at a motel after they had been in Raleigh two days.

The defendant's first contention is that the trial court erred in that it did not inform him of "all the consequences of his plea of nolo contendere," thereby making his plea not freely, voluntarily and understandingly entered. We do not agree.

The record discloses that the following occurred at the arraignment of the defendant:

"TRANSCRIPT OF PLEA

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions?

Answer: Yes

2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills?

Answer: No

3. Do you understand that you are charged with the felony of Armed Robbery?

Answer: Yes

4. Has the charge been explained to you, and are you ready for trial?

Answer: Yes

5. Do you understand that you have the right to plead not guilty and to be tried by a Jury?

Answer: Yes

6. How do you plead to these charges—Guilty, not Guilty, or nolo contendere?

Answer: Nolo Contendere

7. (a) Are you in fact guilty? (Omit if plea is nolo contendere)

Answer:

(b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere?

Answer: Yes

8. Do you understand that upon your plea of nolo contendere you could be imprisoned for as much as 30 years?

Answer: Yes

9. Have you had time to subpoena witnesses wanted by you?

Answer: Yes

10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services?

Answer: Yes

11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead nolo contendere in this case?

Answer: No

12. Has anyone violated any of your constitutional rights?

Answer: ——

13. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of nolo contendere?

Answer: Yes

14. Do you have any questions or any statement to make about what I have just said to you?

Answer: No"

After thus questioning the defendant, the court made the following adjudication:

"I. That the defendant, Frank Ed Blake, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. That this defendant, was represented by attorney, George M. Britt, who was court appointed; and the defendant through his attorney, in open Court, pled nolo contendere to Armed Robbery as charged in the bill of indictment of

and in open Court, under oath, further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;

2. He is and has been fully advised of the maximum punishment for said offense charged, and for the offense to which he pleads nolo contendere;

3. He is guilty of the offense to which he pleads guilty;

4. He authorizes his attorney to enter a plea of nolo contendere to said charge

5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;

6. He is ready for trial;

7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges that the plea of nolo contendere, by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of nolo contendere be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded."

[1] This acceptance of defendant's plea of nolo contendere and the adjudication that it was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, met all of the requirements in *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969); *State v. Ford,* 281 N.C. 62, 187 S.E. 2d 741 (1972); and *State v. Ford,* 13 N.C. App. 34, 185 S.E. 2d 328 (1971), as well as the provisions of G.S. 7A-457(b) relating to pleas of guilty by indigents. The defendant was told he could be imprisoned for as much as thirty years, but the punishment

imposed was "not less than twenty (20) nor more than twenty-five (25) years." The defendant contends, however, that the court committed error by failing to explain to him that he had to receive a sentence of not less than five years and that this made his plea of guilty not freely, voluntarily and understandingly entered. Upon a plea of guilty or nolo contendere to the felony of armed robbery under the provisions of G.S. 14-87, the punishment is not less than five nor more than thirty years. In *State v. Harris,* 12 N.C. App. 576, 183 S.E. 2d 864 (1971), this court held that it was not prejudicial error, even though the trial judge had incorrectly informed the defendant of the total maximum punishment he could receive for the crimes to which he pleaded guilty and also failed to inform him that he could be fined. On the record before us, we hold that the failure of the trial judge to inform the defendant of the minimum sentence did not vitiate his plea of guilty.

[2] The defendant's only other contention is that the trial court erred in sentencing him to a term of not less than twenty nor more than twenty-five years because such sentence constituted cruel and unusual punishment. This contention is without merit. The punishment imposed did not exceed the maximum of thirty years' imprisonment authorized under G.S. 14-87, and it has been repeatedly held in this State that a prison sentence which does not exceed the maximum authorized by statute is constitutionally valid. *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282 (1971) and *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875 (1967).

The judgment of the superior court is affirmed.

Affirmed.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. DAVID ROBERT BLACK

No. 7227SC184

(Filed 24 May 1972)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— doctrine of recent possession — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on issues of defendant's guilt of felonious breaking and entering and felonious larceny under the doctrine of possession of recently stolen property, where it tended to show that a jewelry store was forcibly broken and entered and a quantity of jewelry was stolen therefrom, and that a few days thereafter defendant exchanged a portion of the stolen jewelry for a used car.

2. **Criminal Law § 163— broadside assignment of error to charge**

An assignment of error to the charge that the court erred "in failing to declare and explain the law arising upon the evidence as required by G.S. 1-180" is broadside and ineffectual, it being required that the assignment of error set forth the part of the charge challenged and point out specifically the error complained of.

3. **Larceny § 9; Criminal Law § 124— acquittal of breaking and entering — conviction of larceny — inconsistency**

Where defendant was charged in a two-count bill of indictment with the felonies of breaking and entering and larceny, and the evidence tended to show that the larceny occurred in connection with the breaking and entering, the acquittal of defendant on the breaking and entering charge did not require the court to set aside the jury's verdict finding defendant guilty of larceny, since consistency between verdicts on several counts is not required.

APPEAL by defendant from *Thornburg, Judge,* 6 September 1971 Session of Superior Court held in GASTON County.

On 14 May 1971, the defendant was arrested on a warrant charging him with the felonious breaking and entering of "Thomas Jewelers" in Cherryville, North Carolina, and with the stealing of personal property valued in excess of $200 from one Henry Thomas. A preliminary examination was thereupon conducted and upon a finding of no probable cause, the defendant was ordered released.

The defendant was subsequently tried upon a bill of indictment, proper in form, charging him with the felonies of breaking and entering and larceny. The jury returned a verdict of "not guilty" of felonious breaking and entering and "guilty" of larceny as charged. From a sentence of two years' imprisonment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Witcover for the State.

Daniel J. Walton for defendant appellant.

MALLARD, Chief Judge.

Defendant's first contention is that the State's evidence was not sufficient to withstand his motion to dismiss made at the close of the State's evidence. Upon the denial of his motion to dismiss, the defendant put on evidence, but the record does not reveal that defendant renewed his motion to dismiss or moved for judgment as of nonsuit at the close of all the evidence. However, G.S. 15-173.1 provides that "(t)he sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court." We therefore have reviewed the evidence against this defendant.

[1] The State adduced evidence at the trial which tended to show that during the night of 26 April 1971, the place of business known as Thomas Jewelry Store in Cherryville, owned and operated by one Henry Thomas, was forcibly broken and entered and that a quantity of watches and rings valued at $3,356.90 was stolen from the display cases therein. Although there was no direct evidence linking the defendant Black with the scene of these criminal offenses, the testimony of State's witness James McDaniel, a used car dealer, and other witnesses, tended to show that on or about 28 April 1971, the defendant approached McDaniel and offered to give him a quantity of jewelry in exchange for a used automobile, to which McDaniel agreed. The defendant and three other persons returned the following day and the sale was consummated, the defendant giving McDaniel some rings and watches and McDaniel making out a bill of sale to one Melvine Moses at the direction of the defendant. (The evidence tends to show that the sale price of the automobile in question was $195.00, and that the defendant, by prior arrangement, bought the automobile for immediate resale to Melvine Moses for $250.00 in cash.) The jewelry that McDaniel received in exchange for the automobile was subsequently identified by the proprietor of Thomas Jewelry Store (and another witness) as being a portion of the property stolen from his store on the night of 26 April 1971.

This evidence, taken in the light most favorable to the State, clearly shows that the defendant Black, a few days thereafter, was in possession of at least some of the jewelry that had been stolen from Henry Thomas after his place of business had been broken into and entered.

> "Chief Justice Parker in *State v. Foster,* 268 N.C. 480, 485, 151 S.E. 2d 62, 66, sets out the conditions for application of the doctrine of possession of recently stolen property as follows:
>
> > '(1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. (Citing cases).'
>
> If these conditions are met, and where, as in the present case, there is sufficient evidence that the building has been broken into and entered and that property has been stolen therefrom by such breaking and entering, then a presumption of fact arises that the possessor of the stolen property is guilty both of the larceny and of the breaking and entering. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369; *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428; *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578.
>
> * * * Where it is shown that a number of articles of property have been stolen at the same time and as a result of the same breaking and entering of the same premises, evidence that a defendant charged with the crimes has possession of one of such articles tends to prove, not only that he stole that particular article, but also that he participated in the breaking and entering and in the larceny of the remaining property. * * *" *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969).

See also, 5 Strong, N. C. Index 2d, Larceny, § 5, and cases cited therein.

We hold that the State's evidence was sufficient to go to the jury and that the defendant's motion to dismiss was properly

denied. The evidence presented by the defendant that tended to show that defendant was at his home on the night of the alleged breaking and entering of Thomas Jewelry Store, that he paid cash for the used automobile and had none of the stolen jewelry in his possession on 28 or 29 April 1971 and that another person (one of the defendant's witnesses) singly committed all of the crimes charged was a matter of defense, and the credibility of defendant and his witnesses was for the jury.

[2] The defendant also assigns as error (Assignment of Error No. 2) that the court erred "in failing to declare and explain the law arising upon the evidence as required by G.S. 1-180." In this record on appeal, there is no exception appearing within the body of Judge Thornburg's charge to the jury and no particular portion of this charge is designated as forming the basis for his exception. The words "Exception No. 2" follow the entire charge to the jury in the record on appeal and constitute a broadside exception. "An assignment of error to the charge on the ground that it failed to explain and apply the law to the evidence as required by statute is a 'broadside' exception and ineffectual, it being required that the assignment of error set forth the part of the charge challenged and point out specifically the error complained of." 3 Strong, N. C. Index 2d, Criminal Law, § 163, pp. 118 and 119. See also, *State v. McCaskill,* 270 N.C. 788, 154 S.E. 2d 907 (1967) and *State v. Jordan,* 8 N.C. App. 203, 174 S.E. 2d 112 (1970), *aff'd.,* 277 N.C. 341.

The defendant's final contention (Assignment of Error No. 3) is that the court erred in failing to set the verdict aside; however, nowhere in this record on appeal does it appear that defendant moved to set aside the verdict. Nevertheless, we will address ourselves to what appears to be the central thread of argument as set forth in defendant's brief.

[3] Defendant contends that the crimes of which he was accused grew out of a single transaction; that all of the evidence tended to show that the larceny occurred at the time of and in connection with the breaking and entering of Thomas Jewelry Store; and therefore that the jury's verdict was inconsistent in that it found him not guilty of the breaking and entering but guilty of the larceny. In short, defendant says that he was either guilty on both counts or not guilty on both counts. From the purely logical standpoint, this may or may not be true, but where the evidence on each separate count was sufficient to

support a conviction, we are not at liberty to speculate as to why a jury may convict on one count and not on another. "In any event, a jury is not required to be consistent and mere inconsistency will not invalidate the verdict." *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104 (1939). See also, *State v. Sigmon,* 190 N.C. 684, 130 S.E. 854 (1925). In *State v. Pierce,* 208 N.C. 47, 179 S.E. 8 (1935), the defendant was charged, in two separate counts of an indictment, with (1) burning a building and (2) burning the personal property inside the building, and was convicted only on the second count. The Court said in that case:

> "We cannot sustain defendant's contention. The two offenses are separate and distinct. The fact that in setting fire to the corn, shingles, and hay with intent to injure the person owning the property cannot be imputed to him for righteousness, because in so doing he was guilty of another and different offense in burning the house.
>
> In *S. v. Nash,* 86 N.C. 650 (651), we find: 'To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense; *the same, both in fact and in law.' S. v. Gibson,* 170 N.C. 697; *S. v. Malpass,* 189 N.C. 349.
>
> In *S. v. Malpass, supra,* at p. 355, it is said: 'If two statutes are violated, even by a single act, and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute. *S. v. Stevens,* 114 N.C. 873; *S. v. Robinson,* 116 N.C. 1046. To the same effect: *S. v. Hankins,* 136 N.C. 621.' "

As in the case before us, the defendant in *State v. Jones,* 3 N.C. App. 455, 165 S.E. 2d 36 (1969), remanded on other grounds in 275 N.C. 432, was charged both with felonious breaking and entering, or housebreaking, and with larceny (also with receiving), and was found not guilty of the breaking and entering and guilty of "the larceny, after breaking and entering" of certain personal property. In that case, this court noted that "the rule with respect to inconsistent verdicts on different counts in a bill of indictment is succintly stated in 3 Strong, N. C. Index 2d, Criminal Law, § 124, as follows:

" 'It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act results in both offenses, will not be disturbed.' "

The contention of the defendant in the case before us that the verdict should be set aside for inconsistency is without merit.

We note that the punishment imposed by Judge Thornburg was not greater than that permitted by statute upon a conviction of misdemeanor larceny. We hold that the defendant has had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

ROBERT E. JOHNSON v. ELIZABETH J. JOHNSON

No. 7226DC185

(Filed 24 May 1972)

1. **Divorce and Alimony § 22— divorce action — motion in the cause — custody and support — nonresident children — jurisdiction**

A court in which a divorce action was tried has jurisdiction to determine a motion in the cause for custody and support of children of the marriage who now reside in another state and who were not present in this State when the motion was filed or at the time it was heard.

2. **Divorce and Alimony § 22— divorce action — child custody and support not determined — motion in the cause — jurisdiction**

A court in which a divorce action was tried has jurisdiction to determine custody and support of children of the marriage even though no custody or support questions were raised prior to, or determined in, the final judgment of divorce. G.S. 50-13.5.

APPEAL by defendant from *Griffin, District Judge*, 16 August 1971 Civil Nonjury Session of District Court held in MECKLENBURG County.

Plaintiff instituted this action for divorce on 4 September 1970. Defendant was served with complaint and summons but

did not file answer or other responsive pleading, and judgment granting an absolute divorce was entered on 23 November 1970. The complaint sets forth the names and ages of the two minor children born of the marriage, as required by G.S. 50-8, but no request is made therein for custody or other order with respect to the children. The children are not mentioned in the divorce judgment.

On 17 September 1971 defendant filed a motion in the cause asking for custody and support of the two minor children. Plaintiff moved to dismiss the motion on two grounds: (1) the children are now domiciled in the State of South Carolina and the court therefore has no subject matter jurisdiction; and (2) the court acquired no jurisdiction over the children in the divorce proceeding since no custody order, or other order respecting the children, was entered therein.

The court allowed plaintiff's motion on both grounds asserted and defendant appeals.

No brief filed by plaintiff appellee.

Hamel & Cannon by Thomas R. Cannon for defendant appellant.

GRAHAM, Judge.

[1] The parties stipulated that the children now reside with defendant in South Carolina and that they were not present in this State when the motion was filed or at the time it was heard.

It was often stated, in custody cases decided before 1 October 1967, that the child should be before the court before an order could be entered "affecting the person of the infant." *Romano v. Romano,* 266 N.C. 551, 146 S.E. 2d 821. The theory was that custody proceedings were *in rem* proceedings. *Cushing v. Cushing,* 263 N.C. 181, 139 S.E. 2d 217. However, it was also recognized that if both parties seeking custody were before the court, an order could be entered binding the parties and enforceable through the court's coercive jurisdiction. *Romano v. Romano, supra; Speck v. Speck,* 5 N.C. App. 296, 168 S.E. 2d 672.

Through legislation effective 1 October 1967, the General Assembly sought to bring together into one act all of the statutes relating to child custody and support. G.S. 50-13.1, *et seq.*

G.S. 50-13.5(c) sets forth the specific requirements for jurisdiction in such cases. Pertinent provisions of that statute are:

> "(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.
>
> (2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:
>
> a. The minor child resides, has his domicile, or is physically present in this State, or
>
> b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control, and custody of the minor child.
>
> (3) The respective rights of persons, agencies, organizations, or institutions claiming the right to custody of a minor child may be adjudicated even though the minor child is not actually before the court."

Under subsection (1) quoted above the court had jurisdiction to determine the matter of support, this type of action being *in personam* in nature. Under subsection (2) (b) and (3) the court likewise had jurisdiction to enter an order granting custody to either of the children's parents, both of whom are subject to the court's jurisdiction. Plenary authority exists to enforce any order entered with respect to custody or support. G.S. 50-13.3; G.S. 50-13.4. We conclude, therefore, that the trial court erred in holding that it was without jurisdiction to proceed for the reason that the children were not within this State.

[2] A second question arises on this appeal. Does a court in which a divorce action is tried retain jurisdiction of custody and support of children of the marriage where no custody or support questions are raised prior to, or determined in, the final judgment of divorce?

Before 1 October 1967, the court in which a divorce action was brought retained exclusive jurisdiction of child custody and support matters. Thus, where a divorce action was pending, actions for custody or support of minor children were required to be determined in that action, even after final judgment had

been entered therein. *In re Custody of Sauls,* 270 N.C. 180, 154 S.E. 2d 327. An exception to this rule was that a court in which an action for alimony without divorce (G.S. 50-16) was pending did not lose its custody jurisdiction to the court of another county in which an action for divorce had been subsequently filed. *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857.

Procedure in actions for custody or support of minor children is now governed by G.S. 50-13.5, effective 1 October 1967.

This statute provides, in pertinent part:

> "(b) Type of Action.—An action brought under the provisions of this section may be maintained as follows:
>
> (1) As a civil action.
>
> (2) By writ of habeas corpus. . . .
>
> * * *
>
> (5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce."

The venue section of the custody and support statute, G.S. 50-13.5(f), provides in part:

> "(f) Venue.—An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action."

We have held that the provisions quoted above, when considered together, now permit questions of custody and support to be determined in independent actions, rather than *only* through a motion in the cause, where a divorce judgment has been entered without a determination of custody and support in that judgment. *Wilson v. Wilson,* 11 N.C. App. 397, 181 S.E. 2d 190; *In re Holt,* 1 N.C. App. 108, 160 S.E. 2d 90.

It does not follow, however, that an independent action is now the *exclusive* procedure to be followed under these circumstances. It has long been the rule in this State that a divorce action is pending for purposes of determining custody and support until the death of one of the parties or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur. *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71.

We see nothing in the provisions of G.S. 50-13.5, *et seq.*, which would alter the above rule and divest a court of jurisdiction to determine custody or support in an action where a divorce judgment was entered without these matters having been determined. In 3 Lee, N. C. Family Law, § 222, p. 10 (Supp. 1972), speaking of the methods now available for determining custody and support, Professor Lee states:

> "(2) If a final judgment has been rendered in an action for annulment, divorce, or alimony without divorce, wherein there has not been a determination of the custody and support of the minor child, those questions may be determined subsequently in a civil action or in a habeas corpus proceeding instituted for this purpose, *or by a motion in the cause in the earlier action.*" (Emphasis added.)

Granting an alternative method for determining custody and support where a final judgment of divorce has been entered was undoubtedly intended to eliminate the often times inconvenient requirement that a parent living in another county go back to the county where a divorce was obtained in order to have custody and support of minor children initially determined. It does not preclude a parent from doing so, however, if the parent so desires. See 3 Lee, N. C. Family Law, § 222, p. 9 (Supp. 1972).

We hold that the court had proper jurisdiction to entertain defendant's motion and the order of the court must therefore be reversed.

Reversed.

Judges CAMPBELL and BRITT concur.

SPARTAN LEASING, INC. v. WILLIAM W. BROWN, JR. AND JAMES M. HOWARD, T/A COASTAL STEEL ERECTORS, A PARTNERSHIP, AND COASTAL STEEL ERECTORS, INC., A CORPORATION

No. 7226SC55

(Filed 24 May 1972)

1. **Appearance § 2— request for extension of time — waiver of jurisdictional defect**

Prior to the adoption of the new Rules of Civil Procedure, an application for an extension of time for responsive pleading, filed before an objection to personal jurisdiction was made, constituted a waiver of any jurisdictional defect due to irregularity in or lack of service of process. [Former] G.S. 1-134.1.

2. **Appearance § 2; Rules of Civil Procedure § 12— lack of jurisdiction over the person — waiver**

Under G.S. 1A-1, Rule 12, the right to assert the defense of lack of jurisdiction over the person is now waived only (1) if omitted from the first motion made under Rule 12, or (2) if it is not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

3. **Appearance § 2— voluntary appearance — jurisdiction over the person**

While G.S. 1-75.7(1) codifies the long-standing rule that a person making a voluntary appearance is subject to the court's jurisdiction irrespective of whether jurisdiction over his person has been acquired previously in the manner prescribed by law, the statute does not set forth the time in which an objection to personal jurisdiction must be made or how the objection is waived.

4. **Appearance § 2; Rules of Civil Procedure § 12— jurisdiction over the person — waiver — request for extension of time**

The defense of lack of jurisdiction over the person was not waived by defendants' request under G.S. 1A-1, Rule 6(b) for an enlargement of time in which to "file answer, motion or other pleadings." G.S. 1A-1, Rule 12.

APPEAL by defendants from order of *Friday, Judge,* denying their motion to dismiss this action for lack of jurisdiction over the person, 20 August 1971 Session of Superior Court held in MECKLENBURG County.

Plaintiff is a North Carolina corporation with its principal office and place of business in Mecklenburg County. On 3 March 1971, plaintiff filed this action seeking damages allegedly due under the provisions of an equipment lease with defendants. Summons issued on the same date and copies of summons and complaint were served on defendants on 11 May 1971 by a deputy sheriff of Berkeley County, South Carolina.

At the request of defendants' counsel, the Clerk of Superior Court of Mecklenburg County executed an order on 7 June 1971 enlarging the time "within which the defendants must file answers, motions or other pleadings."

On 12 July 1971 defendants moved to dismiss this action, alleging that they are residents of South Carolina and that no grounds for personal jurisdiction exist. Plaintiff contested the motion contending that: (1) Defendants made a general appearance in requesting and obtaining an enlargement of time in which to file motions or responsive pleadings and thereby waived any objection to jurisdiction over the person, and (2) grounds for jurisdiction over the person exist under G.S. 55-145(a)(1) and G.S. 1-75.4(5)(a) and (c). The motion was denied on the ground defendants waived the right to object by obtaining the enlargement of time.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage for plaintiff appellee.

Parker Whedon for defendant appellants.

GRAHAM, Judge.

The question on appeal is: Did defendants, by obtaining an enlargement of time in which to "file answer, motion or other pleadings," waive their right under G.S. 1A-1, Rule 12, to move to dismiss the action for lack of jurisdiction over the person? We hold that they did not.

[1] Before the adoption of G.S. 1A-1, Rule 1, *et seq.*, objection to jurisdiction over the person could be presented by motion or answer and the making of other motions or the pleading of other defenses simultaneously did not waive the objection. However, the objection was waived if any motion was made or answer filed *before* the objection to personal jurisdiction was presented. G.S. 1-134.1. Consequently, an application for an extension of time for responsive pleading, filed before an objection to personal jurisdiction was made, constituted a waiver of any jurisdictional defect due to irregularity in or lack of service of process. *Youngblood v. Bright,* 243 N.C. 599, 91 S.E. 2d 559.

[2] G.S. 1-134.1 was repealed by Session Laws 1967, c. 954, s. 4, effective 1 January 1970. The manner of presenting the

defense of lack of jurisdiction over the person is now governed by G.S. 1A-1, Rule 12. Provisions of this rule which are pertinent here are as follows:

> "(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:
>
> * * *
>
> (2) Lack of jurisdiction over the person,
>
> * * *
>
> (g) *Consolidation of defenses in motion.*—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h) (2) hereof on any of the grounds there stated.
>
> (h) *Waiver or preservation of certain defenses.*—
>
> (1) A defense of lack of jurisdiction over the person . . . is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.
>
> (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits."

Under the provisions set out above, the right to assert the defense of lack of jurisdiction over the person is now waived under two circumstances, neither of which are present here. The objection is waived if omitted from the first motion made "under this rule," or if it is not "included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be

made as a matter of course." Defendants' request for an enlargement of time was not a motion made under Rule 12 but was a request permitted by Rule 6(b). Also, no responsive pleading has yet been filed by defendants. Therefore, no waiver to assert the objection has occurred.

While we find no North Carolina decisions on this point, our decision here is consistent with decisions from federal courts interpreting Rule 12 of the Federal Rules of Civil Procedure, which is essentially the same as G.S. 1A-1, Rule 12. *Harrison v. Prather,* 404 F. 2d 267; *Orange Theatre Corp. v. Rayherstz Amusement Corp., infra; Gahagan v. Patterson,* 316 F. Supp. 1099. See also 2A, Moore's Federal Practice, § 12.12, at 2325.

Plaintiff argues that G.S. 1-75.7(1) indicates the General Assembly intended to retain the rule that a general appearance waives an objection to personal jurisdiction. This statute provides:

> *"Personal jurisdiction—grounds for without service of summons.*—A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; or. . . . "

[3] G.S. 1-75.7(1) codifies the long standing rule that a person making a voluntary appearance is subject to the court's jurdiction irrespective of whether jurisdiction over his person has been acquired previously in the manner prescribed by law. This statute does not, however, purport to set forth the time in which an objection to personal jurisdiction must be made, or how the objection is waived. The right to raise the objection is waived only by failing to assert it within the time prescribed by Rule 12. Were the right to assert the objection waived in every instance where there was a general appearance, the provisions of Rule 12 permitting the defense to be raised in a motion in which other defenses available under Rule 12 are asserted, or in the responsive pleading if no previous motion under Rule 12 has been made, would be of no effect.

It can be argued that it is inconsistent for a defendant to submit to the jurisdiction of the court by making a general appearance, and at the same time, or thereafter, deny that the

court has jurisdiction over his person. However, as stated in the case of *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F. 2d 871, 874, "[t]he rule [Rule 12] requires the court to decide without reference to the voluntary appearance the question of jurisdiction thus raised and, if the question is decided in the defendant's favor, to refrain from further exercising over him the power which his appearance has given it."

[4] While we hold that the court erred in holding that the defense of lack of jurisdiction over the person was waived by defendants' request under Rule 6(b) for an enlargement of time, it does not necessarily follow that the case must be dismissed. Plaintiff strenuously contends that defendants are subject to suit in this State by virtue of their various connections with this State in the manner prescribed by G.S. 55-145(a)(1), and G.S. 1-75.4(5)(a) and (c). Plaintiff has filed interrogatories seeking to establish these contacts and the interrogatories have not yet been answered. The case will be remanded to the Superior Court for a determination as to whether jurisdiction exists on these grounds.

Remanded.

Judges CAMPBELL and BRITT concur.

IN THE MATTER OF ROBIN GAY POTTS

No. 7218DC359

(Filed 24 May 1972)

1. Evidence § 31— best evidence — photostatic copy

The admission in a juvenile delinquency proceeding of a photostatic copy of a statement signed by two witnesses did not violate the best evidence rule where the contents of the statement were not in question and the statement was not a vital part of the State's evidence.

2. Witnesses § 4— impeachment of party's own witness

The admission in a juvenile delinquency hearing of a photostatic copy of a statement signed by two State's witnesses did not violate the rule prohibiting a party from impeaching his own witness, where the statement corroborates each of the two witnesses in part and does not specifically contradict any portion of their testimony.

3. Infants § 10— juvenile delinquency hearing — presence of newspaper reporter

No abuse of discretion has been shown by the fact that a newspaper reporter was present during a juvenile delinquency hearing. G.S. 7A-285.

4. Infants § 10— commitment of juvenile — best interest of child — specific finding

Court's order committing a juvenile to the care of the State Board of Youth Development was not fatally defective in failing to contain a specific finding that such disposition was in the best interest of the child.

5. Infants § 10— commitment of juvenile — best interest of child — court's statement

Trial court's statement, in announcing the commitment of a juvenile to the custody of the State Board of Youth Development, that "If the schools are to operate, it is necessary that those in charge be respected. The courts cannot tolerate attacks on public school teachers by students," does not indicate that the court did not consider the best interest of the child in making such disposition.

6. Infants § 10— juvenile hearing — absence of solicitor

Contention by a juvenile who was represented by counsel that the trial court erred in proceeding with a delinquency hearing in the absence of the solicitor in that the court was cast in the role of a prosecutor *is held* without merit where the record shows that someone other than the judge examined witnesses of both the petitioner and the juvenile, and that the questions asked by the court were fair and demonstrated no bias.

APPEAL by Robin Gay Potts from *Gentry, District Judge,* 15 December 1971 Session of District Court held in GUILFORD County.

A summons signed by a deputy clerk of the superior court directed to Mrs. Rebecca Potts, as mother, was properly served on 9 December 1971 giving notice of a hearing in the district court on 15 December 1971. Attached thereto was a petition dated 8 December 1971 and signed by a member of the Youth Division of the Greensboro Police Department, asserting that Robin Gay Potts, a child less than 16 years of age, was "a delinquent child as defined by G.S. 7A-278(2), in that, at and in the county named above, and on or about the 8th day of December, 1971, the child did unlawfully and wilfully assault Judy Ann Wall, teacher at Jackson Junior High School, Greensboro, North Carolina, by striking her about the face and head with

her hands and fist and by biting her in the back, inflicting injury requiring medical attention. This offense charged herein is in violation of G.S. 14-33(a)."

The district court, in the exercise of its juvenile jurisdiction, found upon competent evidence that Robin Gay Potts (child) was under the age of sixteen years and was under the supervision and control of her mother, Mrs. Rebecca Potts; that about 10:30 a.m. on or about 8 December 1971 and while classes were being changed at Jackson Junior High School, the child came up to Mrs. Judy Wall, who was in a hallway and was in the process of correcting two other students, Robert Potts and Duncan McCrae, who were misbehaving (Robert testified that he was not a relative of the child but had visited in her home); and that without any provocation whatsoever, the child began to attack Mrs. Wall, striking her about the face and body with her hands and biting her in the back. As a result of the attack by the child, Mrs. Wall was required to seek medical attention and had to remain away from school for the remainder of the day. Mrs. Wall did not teach the child and had had no previous contact with her. The court further found that the child was a delinquent within the meaning of the law; that she was in need of the discipline and supervision of the State; and that she had been expelled from school on account of this unprovoked assault. The court ordered that the child be committed to the State Board of Youth Development and remain under the custody, control and supervision of the officials thereof until discharged as provided by law.

The child, who had been represented by counsel throughout the hearing, gave notice of appeal, whereupon the court, on 20 December 1971, found that it was for the best interest of the child and her general welfare, as well as for the best interest of the State, that the Order of Commitment should not be stayed and ordered her commitment to be effective immediately. On 22 December 1971, the court conducted another hearing in the matter and under date of 31 December 1971 entered an order rescinding the order of immediate commitment, placing the child in the temporary custody of her mother pending decision of her appeal by the Court of Appeals, and ordering her to attend a designated school.

Attorney General Morgan and Assistant Attorney General Icenhour for the State.

Smith, Patterson, Follin & Curtis by Norman B. Smith and Michael K. Curtis, and Lee, High, Taylor & Dansby by Leon Stanback, Jr., for Robin Gay Potts, appellant.

MALLARD, Chief Judge.

[1] The first question presented by appellant is whether the court erred in admitting into evidence a photostatic copy of a statement signed by two of the witnesses. Appellant contends that the admission thereof contravened both the best evidence rule and the rule prohibiting a party from impeaching his own witness.

"The best evidence rule applies only where the *contents* or *terms* of a document are in question. * * *

Even where the contents of the document are in question, production is not required if the writing is only collaterally involved in the case. * * * " Stansbury, N. C. Evidence 2d, § 191.

In the case before us, Mr. Clyde Tesh testified that he was Principal of the Jackson Junior High School, that Mrs. Wall was one of his teachers, and that Robert Potts (Robert) and Duncan McCrae (Duncan) had told him that they wanted to give him a statement, which, after Tesh had put it in writing, each of them signed. A photostatic copy of the original statement was admitted in evidence. Robert and Duncan each testified with respect thereto that "(t)his photostatic copy of a statement was read to me by Mr. Tesh, and I signed it." Therefore, the contents or terms of the statement were not in question, and in addition were not a vital part of the State's evidence. Under these circumstances, the best evidence rule was not violated and the court did not by reason thereof commit prejudicial error in admitting the photostatic copy into evidence.

[2] "It is well established in this jurisdiction that a party cannot introduce testimony to impeach or discredit the character of his witness . . . . Yet, if the witness testified to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testiifed to by the witness. * * * " *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466

(1969), *cert. denied,* 398 U.S. 959, *reh. denied,* 400 U.S. 857. See also, *State v. Cohoon,* 206 N.C. 388, 174 S.E. 91 (1934).

The testimony of Mrs. Wall, Mr. Clendenin, Duncan, Robert and Mr. Tesh is listed under "Petitioner's Evidence." The photostatic copy of the statement that Robert and Duncan testified they signed does not tend to impeach them; in fact, it tends, in part, to corroborate them. The statement is dated 8 December 1971 and reads as follows:

> "Playing in hall—pushing each other—Duncan ran, Robert chased, Duncan ran into Mrs. Wall.
>
> Mrs. Wall talked to two boys—gave a little tap on shoulder, told to go on to class.
>
> Robin grabbed Robert's arm, said come on. Mrs. Wall removed Robin's arm from Robert, told her that she & Robert were talking, none of Robin's business.
>
> Robin got mad, jumped on Mrs. Wall."

This photostatic statement does not corroborate all of the testimony of Duncan or Robert at the trial; however, it does corroborate each of them in part and does not specifically impeach, contradict or discredit any specific portion of their testimony, with the possible exception of Duncan's testimony, "I did not see what happened after Mrs. Wall told Robin to go on." But even this is not a specific contradiction of his statement that he did not see Robin "jump on" Mrs. Wall. Mrs. Wall's testimony that she did not shove the child into the water cooler is contradicted by the testimony of Robert that she did, yet this does not violate the rule which prohibits impeachment of one's own witness but permits a party to show the facts to be other than as testified to by his witness. *State v. Horton, supra.* Also in cases heard by a judge without a jury, there is a presumption, nothing else appearing, that the judge disregarded incompetent evidence. We hold therefore that the judge did not commit prejudicial error in admitting the photostatic copy of the statement itself in evidence.

[3] The next question presented by appellant is whether the exclusion of the public is mandatory in juvenile proceedings in the district court. The pertinent part of G.S. 7A-285 reads as follows: "The general public *may* be excluded from any juvenile hearing *in the discretion of the judge.*" (Emphasis added.) This

makes it a discretionary matter with the trial judge whether the general public (which includes newspaper reporters) is excluded from the hearing. On the record before us, no abuse of discretion or prejudicial error is shown by the fact that a newspaper reporter was present during the hearing.

[4] Appellant raises the question of whether the court, after having found the child to be delinquent, properly committed her to the custody, control and supervision of the officials of the State Board of Youth Development. The appellant argues that the court failed to find that such disposition was in the best interest of the child and that its order is therefore fatally defective. This contention is without merit because it overlooks the applicable statutes and case law and ignores the finding by the court that the child "is a delinquent child within the meaning of the law and that she is in need of the discipline and supervision of the state." See *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969), *affirmed,* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976; *In re Whichard,* 8 N.C. App. 154, 174 S.E. 2d 281 (1970), *appeal dismissed,* 276 N.C. 727; and G.S. 7A-285 and G.S. 7A-286.

[5] The record reveals that at the conclusion of the adjudicatory part of the hearing, the court proceeded to the disposition of the child as authorized by the provisions of G.S. 7A-285. In announcing the disposition, the court said:

"If the schools are to operate, it is necessary that those in charge be respected. The courts cannot tolerate attacks on public school teachers by students."

The defendant contends that this statement and the order entered indicate that the interest of the child was not considered in the final decision. No law-abiding American citizen can logically argue otherwise than that public school teachers must be protected from attack by unruly, undisciplined and unrestrained students. The judge found, upon competent evidence, that this incident was an unprovoked attack by the child upon the teacher and that the child was a delinquent. The law imposed upon him the duty to make proper disposition of the child. In making such disposition, the statute, G.S. 7A-286, provides that "(t)he judge shall select the disposition which provides for the *protection, treatment, rehabilitation or correction* of the child after considering the factual evidence, the needs of the

child, and the available resources, as may be appropriate in each case." (Emphasis added.) The appellant's argument that the interest of the child was not considered in the final disposition is not supported by the record, the factual evidence, or the demonstrated needs of the child.

[6] The last question presented by appellant is whether the court properly proceeded with the juvenile hearing in the absence of the solicitor.

G.S. 7A-61 reads in part: " . . . (T)he solicitor shall . . . represent the State in juvenile cases in which the juvenile is represented by an attorney." In this case the child was represented by an attorney. It also appears of record that there was present at the hearing " . . . Mr. William Caffrey, private counsel representing Mrs. Wall as legal advisor, but (who) did not participate in the case in the capacity of the prosecuting attorney . . . . " The appellant now argues that because the solicitor did not represent "the State" the judge was cast in the role of prosecutor. We do not think that this record supports this conclusion. The record reveals that someone other than the judge examined the petitioner's, as well as the child's, witnesses and that most of the witnesses were asked some but not many clarifying questions by the judge in that portion of the record entitled, "Cross Examination by the Court."

In *State v. Rush,* 13 N.C. App. 539, 186 S.E. 2d 595 (1972), it is said:

> " * * * The purpose of Article 23 as set out in G.S. 7A-277 is 'to provide procedures and resources for children under the age of sixteen years which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults.' See *In re Whichard,* 8 N.C. App. 154, 174 S.E. 2d 281, *appeal dismissed* 276 N.C. 727 (1970). G.S. 7A-285 provides that '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(1) through (5) which have been alleged to exist, . . . ' We believe the informal procedure contemplated by the statute allows the questioning of witnesses by the trial judge to elicit relevant testimony and to aid in arriving at the truth. * * * "

As in *Rush,* we think the judge in this case (who was the same judge that tried the *Rush* case) was fair and judicious in the asking of questions and that no judicial bias is shown on this record. It further appears to us that the judge performed the duty required of him by G.S. 7A-285 that " . . . the judge shall find the facts and shall protect the rights of the child and his parents in order to assure due process of law. . . . "

We hold that all of the parties were properly before the court, after proper notice and upon a petition invoking the jurisdiction of the court, that all parties offered evidence and participated in the hearing, the child was represented by counsel, that the basic requirements of due process were met, and that no prejudicial error appears on this record.

The judgment of the district court is affirmed.

Affirmed.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. JAMES E. NORMAN

No. 7215SC338

(Filed 24 May 1972)

1. **Rape § 18— assault with intent to rape — sufficiency of evidence of intent**

The State's evidence was sufficient for the jury to find that defendant assaulted the prosecutrix with intent to commit rape where it tended to show that the prosecutrix, wearing a "hot pants" outfit, was walking alone on a city street late at night, that defendant followed her in a car and then intercepted her on foot, asked her for a match, touched her on the breast, grabbed her when she tried to run and choked her until she was unconscious, that the prosecutrix suffered a broken jaw, concussion and ear injury, and that the sleeve of her blouse and her pants were torn.

2. **Rape § 18— assault with intent to rape — failure to submit lesser offenses**

In a prosecution for assault with intent to commit rape, the trial court did not err in failing to submit lesser included offenses where all the evidence tends to show that defendant committed the crime charged in the indictment and there was no conflicting evidence relating to any element of the crime charged.

3. Rape § 18; Criminal Law § 2— intent — proof by circumstantial evidence — instructions

In a prosecution for assault with intent to commit rape, the trial court's instruction that intent is an attitude or emotion of the mind seldom if ever susceptible of proof by direct evidence but ordinarily to be proved by facts and circumstances from which it may be inferred, and that in determining the presence or absence of the element of intent the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged, *held* without error.

APPEAL by defendant from *Hobgood, Judge,* 29 November 1971 Session of Criminal Court held in ALAMANCE County.

The defendant, James E. Norman, was charged in a bill of indictment, proper in form, with assaulting, Sandra Lee Brewer, a female, with intent to commit rape, a violation of G.S. 14-22. The defendant pleaded not guilty.

The State offered evidence tending to show the following: on 3 July 1971 at about 11:30 p.m. Sandra Lee Brewer, a 22 year old third grade school teacher, wearing a new "hot pants" outfit, left the home of some friends on Hedge Street in the town of Burlington to walk the four blocks to the "Putt-putt" golf course on Church Street. When Sandra saw her fiance driving in the opposite direction, she turned around to walk back to the house on Hedge Street. As Sandra walked along Cross Street within one block of her destination on Hedge Street and about three blocks from the "Putt-putt" she heard a horn honking and saw a red convertible with the top down occupied by one person being driven very near the curb coming behind her. She kept her head down to try to ignore the car and cut "catercorner" across a vacant lot to go over to Hedge Street and as she got on the grass and looked up she saw the defendant, a Negro male approximately six feet tall with high cheek bones and a mustache, standing in front of her. She saw the red convertible parked near the corner of Hedge and Cross Streets. Miss Brewer testified:

> " . . . I kept my eye on the car, when I realized it was the same car that had passed me on Church Street that I had noticed too, is when I felt I was in serious trouble."

The defendant asked her for a match, and when she told him she did not have one and started to move, he jumped so "I knew he wasn't going to let me move."

" . . . I said, 'Please go away and leave me alone,' and he reached out and touched me on the breast and said, 'Don't be afraid, baby.'

After that I thought maybe I would try to run and when I tried he grabbed me around the neck and choked me until I was unconscious."

The next thing Miss Brewer recalled was being in the home of a Mr. and Mrs. Johnson.

Donald W. Johnson, who resided at 1426 Cloverdale Drive in the town of Burlington about five blocks from the intersection of Cross and Church Streets, testified:

"After midnight that would be July 4th. When I first saw her, I opened the door for her and she told me to help her, she was crying and hysterical. * * * My wife got a washcloth and put some ice in it and put it on her face . . . . * * *

* * *

* * * . . . I remember one sleeve was torn and her pants were torn . . . .

I observed her face. It was badly swollen and her jaw was to me looked like it was broken, out of place.

* * *

. . . (H)er mouth was bleeding pretty bad."

Miss Brewer was taken to the emergency room of the Alamance County Hospital and later to the Duke University Hospital where she remained until 7 July 1971. She had a broken jaw, concussion, and a slight ear injury.

The defendant did not testify but his girl friend Etrulia Lloyd testified that she was with the defendant all day on 3 July 1971 and that about 10:00 p.m. on that evening she and the defendant left Burlington and arrived at the Ponderosa Club in Greensboro at about 10:30 p.m. where they stayed until approximately 6:00 a.m. on 4 July 1971.

The jury found the defendant guilty and from a judgment on the verdict imposing a prison sentence of 10 years, the defendant appealed.

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

Fred Darlington III for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the Court's denial of his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. The defendant contends the evidence was insufficient to show an intent to commit rape.

The requisites of the crime with which defendant is charged were recently stated by Justice Sharp in *State v. Hudson,* 280 N.C. 74, 185 S.E. 2d 189 (1971):

> ". . . To convict a defendant on the charge of an assault with an intent to commit rape the State must prove not only an assault but that the defendant intended to gratify his passion on the person of the woman, at all events and notwithstanding any resistance on her part. It is not necessary that defendant retain that intent throughout the assault; if he, at any time during the assault, had an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. * * * To convict a defendant of an assault with intent to commit rape 'an actual physical attempt forcibly to have carnal knowledge need not be shown.' 75 C.J.S. Rape § 77, p. 557 (1952)."

Although Miss Brewer was unable to testify as to what occurred from the time she was choked into unconsciousness until she arrived at the Johnson home almost one hour later, we think her testimony as to events leading up to the cruel and brutal assault upon her together with the evidence as to her physical and emotional condition after the assault is sufficient to raise an inference that the assault was sexually motivated and that the defendant intended to gratify his passion upon her notwithstanding any resistance on her part. *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649 (1963). We need not speculate as to why the defendant did not accomplish his purpose. *State v. Hudson, supra; State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968).

When the evidence is considered in the light most favorable to the State, we hold it is sufficient to take the case to the jury and to support the verdict.

[2] Next the defendant assigns as error the Court's failure to instruct the jury on the "lesser included offenses" of assault with a deadly weapon with intent to kill inflicting serious injury; assault with a deadly weapon inflicting serious injury; and assault inflicting serious injury.

G.S. 15-169 provides:

> "*Conviction of assault, when included in charge.*—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

In discussing this statute in *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954), Justice Bobbitt (now Chief Justice) said,

> ". . . The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice."

In the present case all of the evidence tends to show that the defendant committed the crime charged in the bill of indictment and there was no conflicting evidence relating to any element of the crime charged. This assignment of error is overruled.

[3] The defendant's final assignment of error relates to the Court's instructions to the jury as to the use of circumstantial

evidence in proving specific intent. Intent to rape is an essential element of the crime charged, and the judge's instruction that intent is an attitude or emotion of the mind seldom if ever susceptible of proof by direct evidence but ordinarily to be proved by facts and circumstances from which it may be inferred and that in determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged is substantially the same as that approved many times by the appellate courts of this State. *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540 (1943). We find the judge's instructions to the jury to be fair, correct, and free from prejudicial error. In the defendant's trial in the Superior Court, we find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. SPIKE WILSON

No. 7222SC386

(Filed 24 May 1972)

1. **Criminal Law § 73; Homicide § 15— statements by deceased — res gestae**

Testimony by a State's witness in a homicide prosecution that immediately before she heard a shot, she heard the deceased state, "Spike, don't shoot me. I ain't done nothing to you," *held* competent as part of the *res gestae.*

2. **Criminal Law § 75— Miranda warnings — defendant not in custody**

Statements made by defendant to an officer at the scene of a homicide were admissible even though defendant had not been given the *Miranda* warnings, where defendant was not in custody and was not even suspected of having committed a crime when the statements were made.

3. **Criminal Law § 75— Miranda warnings — statements used for impeachment**

Statements made by defendant to a police officer were admissible for the purpose of impeaching defendant's trial testimony even though defendant was not given the *Miranda* warnings before the statements were made.

4. Criminal Law § 42; Homicide § 20— rifle found seven to eight hours after crime — remoteness

In this homicide prosecution, a rifle found behind the apartment where deceased was killed some seven or eight hours after the crime occurred was not inadmissible on the ground of remoteness, defendant having admitted that he had flung the rifle in the backyard of the apartment.

APPEAL by defendant from *Lupton, Judge,* 1 November 1971 Session, DAVIDSON County Superior Court.

The defendant was indicted at the 9 August 1971 Criminal Session of Superior Court for first-degree murder of Shirley Smith. The death occurred 3 July 1971. Upon defendant's arraignment, the Solicitor, on behalf of the State, announced that the State would not try the defendant for the capital felony of murder but instead would try him for the crime of murder in the second degree or whatever verdict the evidence in the case might warrant. The defendant entered a plea of not guilty to this charge.

The evidence on behalf of the State was susceptible of a finding that on 2 July 1971 the defendant and the deceased, Shirley Smith, a thirty-one-year-old woman, were living together in Apartment No. 9 on Parker Street in Lexington. The stepmother of Shirley, Mrs. Brent Smith, lived next door in Apartment No. 8. About 10:30 p.m. on that night Mrs. Brent Smith was sitting in her yard. She observed the defendant, in the vicinity of a nearby apartment, beating Shirley, hitting and kicking her. He brought Shirley to their Apartment No. 9 and said, "Shirley, I am tired of fooling with you. I am going to fix you tonight. Get on in this house. You have been in the street all evening." Mrs. Brent Smith further testified that she observed the defendant hit and kick Shirley into the apartment. About five minutes after the defendant and Shirley entered the apartment, she testified that she heard Shirley holler, "Spike, don't shoot me. I ain't done nothing to you—don't shoot me, I ain't done nothing to you!" At that time she testified that she heard a shot go off and observed through the window the defendant walk in the front room from the kitchen area and sit down in a chair. He sat there for about five minutes and went back towards the kitchen. She later saw the defendant come out of the apartment, and go down the street to her daughter's house. The defendant then returned to his apart-

ment and came back out with a rifle and went around to the back of the apartment carrying the rifle. He returned without the rifle and in a very short while the ambulance arrived. Mrs. Smith further testified that she went to Winston-Salem to the hospital where Shirley died the next evening. She testified that Shirley's eyes were swollen as big as her fist and were black as soot. Shirley was shot in the middle of the forehead. It was stipulated that Shirley died as a result of a .22 bullet wound through the forehead.

Police Officer Wheless testified that he went to Apartment No. 9 on Parker Street arriving about 10:35 p.m. after receiving a radio notification of a shooting at that location. He found a two-room apartment with a living room in front and a kitchen behind the living room. When he arrived, there were four people in the apartment—the defendant, Shirley and two ambulance attendants. The ambulance attendants were bringing Shirley from the kitchen area and placing her on a stretcher in the front room. There was a wound in the center of her forehead between her eyes. Her eyes were bulging and she was breathing rather heavily at the time.

The officer asked the defendant what had happened. Upon objection by the defendant to any statement made by the defendant to the officer, the trial judge conducted a voir dire, but after the voir dire reserved his ruling on the admissibility of the statement.

The defendant testified in his own behalf and claimed that the deceased was making an attack upon him with a bread knife when he picked up the rifle to defend himself and prevent himself from being stabbed by the deceased. He stated that he did not intend to shoot the deceased and that the rifle fired accidentally and at a time when he was trying to prevent himself from being stabbed. The defendant further testified that after the shot was fired he went down the street to have an ambulance called. He was unsuccessful, so he returned, got in his automobile and went to a neighborhood store where he called the ambulance. He then returned to his apartment, took the rifle and went out into the backyard where he flung the rifle away. After flinging the rifle away, he returned to his apartment. The ambulance and the police officers arrived. That night he denied to the police officers that he had shot the deceased and told them she must have been shot from outside and that he had

come to the apartment and found her lying on the floor. He stated that he was not telling the truth that night but that the next day he did make a truthful statement. He further testified that the rifle which was exhibited to him at the police department was his rifle and he knew there had been a bullet in it when he picked it up.

Attorney General Robert Morgan by Assistant Attorney General Rafford E. Jones for the State.

Robert C. Hedrick for defendant appellant.

CAMPBELL, Judge.

[1] The first assignment of error presented by the defendant is that it was error to permit the testimony of Mrs. Brent Smith that she heard the deceased state, "Spike, don't shoot me. I ain't done nothing to you—don't shoot me. . . ." immediately before she heard a shot. We think this evidence was competent as part of the *res gestae. State v. Spivey,* 151 N.C. 676, 65 S.E. 995 (1909); Stansbury, N. C. Evidence, 2d Ed., § 164; 3 Strong, N. C. Index 2d, Evidence, § 35.

[2, 3] The defendant's second assignment of error pertains to the testimony of Police Officer Wheless as to what the defendant told him on the night of the shooting when Officer Wheless first arrived at the apartment. There is no merit in this assignment of error for that the statement does not come within the *Miranda* doctrine *(Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966)) as contended by the defendant. The statement was made by the defendant to Officer Wheless at a time when the defendant was not in custody and was not even suspected of having committed a crime. It was a part of the on-scene investigation, and this was clearly brought out on the voir dire examination. Furthermore, this statement was not admitted in evidence at that time, and the Court reserved its ruling on the admissibility thereof. After the defendant went on the witness stand and testified in his own behalf and admitted that he had made a statement to Officer Wheless on the night of the shooting, which was an incorrect and untruthful statement, Officer Wheless was recalled, and his testimony as to what the defendant told him on the night of the shooting was introduced in evidence in rebuttal. This evidence was competent even if the statement had been taken in an in-custodial

situation (which it was not) as a prior inconsistent statement on the question of credibility. *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972).

[4] The defendant in his third assignment of error asserts that the rifle was improperly admitted into evidence as an exhibit. The defendant asserts that the rifle was not found until the next day, which was some seven or eight hours after the shooting, and that this was entirely too remote. This assignment of error is without merit for that the defendant himself admitted that he flung the rifle into the backyard. A rifle was found in the backyard the next day some seven or eight hours after the shooting. The rifle was exhibited to the defendant at the police station and he testified that the rifle which he saw at the police station was his rifle and the one he had used. While he denied the rifle admitted in evidence at the trial was the same rifle, he did state that his rifle was similar to it, and the officers on behalf of the State testified that it was the same rifle they had found in the backyard. This evidence was competent.

The remaining assignments of error have all been considered, and we find them to be without merit.

There was ample evidence of the defendant's guilt to go to the jury. The jury found the facts against the defendant after instructions from the trial judge, to which instructions no exception has been taken.

The defendant had a fair trial, and we find

No error.

Chief Judge MALLARD and Judge BROCK concur.

DIANE THOMAS RHODES v. ANN R. HENDERSON AND MARK J. HENDERSON

No. 7226DC265

(Filed 24 May 1972)

1. **Infants § 9; Parent and Child § 6— child custody — right of parent**

An order depriving a parent of the custody of a child in favor of third persons must be supported by substantial reasons.

2. **Infants § 9; Parent and Child § 6— child custody — right of parent — financial ability**

The fact that parents of a child may not be as able financially to take care of the child as the party seeking to defeat their custody is not a sufficient ground for awarding custody to a third person.

3. **Adoption § 5; Parent and Child § 1— adoption — natural parents**

A final decree of adoption for life terminates the relationship between the natural parents and the child, and the natural parents are divested of all rights with respect to the child. G.S. 48-23.

4. **Infants § 9; Parents and Child § 6— adoption — child custody — natural mother**

After the natural mother has permitted a child to be adopted by others, her right to custody of the child is no greater than that of a stranger to the child.

5. **Infants § 9; Parent and Child § 6— use of profane language — fitness for child custody**

Evidence that the adoptive parent of a child uses profane and vulgar language is insufficient to support a finding that such parent is not a fit and proper person to have custody of the child.

6. **Infants § 9; Parent and Child § 6— custody of adopted child — right of adoptive parents — findings by court**

In an action by the natural mother of a child to obtain custody of the child from the adoptive parents, findings by the court that alcoholic beverages are frequently consumed in the home of the adoptive parents, that house cleaning and food preparation are not reasonably done in the home, that there is frequently no heat, that the adoptive parents move frequently, that the child is frequently found dirty and with dirt caked on him which is difficult to remove, and that the natural mother now lives in a good neighborhood in a three bedroom brick house, has no other children, is physically competent, loves the child and has a husband who earns $25,000 per year, *are held* insufficient to justify the court's order removing the child from the custody of its adoptive parents and granting custody to the natural mother.

7. **Trial § 49; Rules of Civil Procedure § 60— perjury — motion for new trial — appellate court**

Motion under G.S. 1A-1, Rule 60, to set aside the judgment and for a new trial on the ground that a witness for plaintiff had perjured

himself, filed after the appeal had been calendared for argument, was properly made in the Court of Appeals.

APPEAL by defendants from *Stukes, Judge,* 1 November 1971 Civil Nonjury Session, District Court, MECKLENBURG County.

Plaintiff is the natural mother of Joseph David Thomas Henderson who was born to her out of wedlock on 23 March 1967. The child was adopted by defendants on 9 December 1968. Defendant Ann R. Henderson is plaintiff's mother and defendant Mark J. Henderson is her stepfather. This action was brought seeking custody of the minor child upon allegations that defendants are not fit and proper persons to have custody of the child, and that the interests and welfare of the child will not be best promoted by his continued custody in defendants. Defendants, by answer, denied the material allegations of the complaint.

The matter was heard upon oral evidence, and the court entered an order awarding custody of the child to plaintiff. Defendants appealed.

Bailey and Davis, by Thomas D. Windsor, for plaintiff appellee.

Hamel and Cannon, by Thomas R. Cannon, for defendant appellants.

MORRIS, Judge.

At the trial of this matter, the court heard testimony from the parties, from the two sons and daughter of defendants, and from an employee of the Protective Services of Child Welfare, Mecklenburg Department of Social Services. The evidence was quite conflicting.

The court found facts as follows: (Those omitted are not pertinent to this appeal.)

1. "That the plaintiff is the natural or biological mother of Joseph David Thomas Henderson; that the defendants are the adoptive parents of said child; and that the defendant, Ann R. Henderson is the mother of the plaintiff."

2. "That the defendant, Mark J. Henderson is the stepfather of the plaintiff, is a disabled person of 44 years

of age, has not worked for several years, and is receiving Social Security for his disability."

3. "That the defendant, Ann R. Henderson, works in a grocery store during the day time and that the minor child is left at home with his 15-year-old sister."

4. "That alcoholic beverages are consumed in the home to the extent whereby profane and indecent language is used in the presesnce of the child; that alcoholic beverages are frequently consumed in the home during the week in the presence of the minor child; that the household duties of cleaning and preparation of food are not reasonably done; that the home is frequently without heat; that the home is not cleaned regularly; that over the past two years the defendants have moved from one dwelling to the next 9 or 10 times; that such language as s.o.b., bastard, and m.f. are used in the presence of the minor child; that the child is frequently found in an unclean condition due to not having necessary baths; and that dirt is allowed to cake on the child and is difficult to remove."

5. "That the minor child is in need of better care, protection and discipline than he is now receiving; and that said child is a neglected child and in need of more suitable guardianship."

6. "That the plaintiff is married to Rufus Robert Rhodes; that they reside in a brick home in a new subdivision in Greenville, South Carolina; that the home has three bedrooms and is in a good neighborhood; that the plaintiff is physically competent to have custody of the minor child; that she has no other children and is able to devote her full time to the care and discipline of the minor child; that the plaintiff's husband is a building contractor and earns approximately $25,000 per annum and that the plaintiff loves the minor child and is able to provide the necessities for his care."

On these findings the court made the following conclusions:

"THE COURT CONCLUDES AS A MATTER OF LAW that Joseph David Thomas Henderson is in need of better care, protection and discipline than he is now receiving; that

> said child is a neglected child and is in need of more suitable guardianship; that the defendants are not fit and proper persons to have said child's custody and control; that it would not best promote the interests and welfare of said child to remain in the defendant's custody; that the plaintiff, the natural mother, is a fit and proper person to have the custody of said minor child; that it would best promote the interest and welfare of the said child if plaintiff had his custody and control; and that the best interests and welfare of said child would be best promoted by removing said child from the custody of the defendants and placing him in the custody of the plaintiff."

and ordered that custody be vested in plaintiff until further orders of the court; that plaintiff have the right to take the child to her home in South Carolina and keep him there; and that defendants have the right to visit with the child at reasonable times.

[1, 2] The "polar star" in determining custody of children is their welfare. " ' . . . Even parental love must yield to the claims of another, if, after judicial investigation it is found that the best interest of the children is subserved thereby.' " *James v. Pretlow,* 242 N.C. 102, 105, 86 S.E. 2d 759 (1955), quoting from *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144 (1934). However, " '[i]n order to justify depriving a parent of the custody of a child in favor of third persons there must be substantial reasons or, as various courts have put it, the reasons must be real, cogent, weighty, strong, powerful, serious, or grave.' 67 C.J.S., Parent and Child, p. 651." *James v. Pretlow, supra.* Nor is the fact that a parent or parents seeking to retain custody of their child, or to obtain custody of their child, may not be as able financially to take care of the child as the party seeking to defeat their custody sufficient to justify the court's depriving the parents of custody and awarding it to some third person. 2 Nelson, Divorce & Annulment, § 15.15, p. 245 (2d ed. rev. 1961).

[3, 4] A final decree of adoption for life terminates the relationship between the natural parents and the child, and the natural parents are divested of all rights with respect to the child. G.S. 48-23. See *In re Osborne,* 205 N.C. 716, 172 S.E. 491 (1934). *A fortiori,* defendants are the parents of the child whose custody is at issue, and the right of the plaintiff (his nat-

ural mother) after she has permitted the child's adoption by others, is no greater than that of a stranger to the child. In this case, the "stranger" seeking custody does not live in North Carolina, and there is no finding that removal of the child from the State of North Carolina would be in his best interest as required in *Wall v. Hardee,* 240 N.C. 465, 82 S.E. 2d 370 (1954).

[5, 6] The court found (labeled as a conclusion) that "the defendants are not fit and proper persons to have said child's custody and control." We find no evidence in the record, even from plaintiff, that Mrs. Henderson uses alcoholic beverages to any extent at all. There is evidence that she at times participates in the use of profane and vulgar language. Although we certainly do not condone such conduct, particularly in the presence of children, we are not willing to say that this is sufficiently powerful to support a finding of unfitness of the parent to have the custody of the child. The findings summarized are then that this is a home in which alcoholic beverages are frequently consumed; house cleaning and food preparation are "not reasonably done"; there is frequently no heat; the parents move frequently; the house is not cleaned "regularly"; and in which a four-year-old boy is frequently found dirty and with dirt caked on him which is difficult to remove. If these findings are sufficient to justify removing children from the custody of their parents, we fear that many well regarded parents whose children are loved and well adjusted should stand in fear of having their children taken from them and given to a third person who is found to be fit only upon findings that she lives in a good neighborhood in a three bedroom brick house, has no other children, is physically competent, loves the child, and whose husband earns $25,000 per year.

We are of the opinion that the evidence is not sufficient to support some of the material findings and that the facts found are not sufficient to support the judgment and that defendants are entitled to a new trial.

[7] After this appeal has been calendared for argument in this Court, appellants moved that the judgment rendered in this case be set aside and a new trial granted on the grounds that a witness for plaintiff, to wit plaintiff's brother, perjured himself and testified falsely as to conditions in the home because of offers of bribes and threats of physical harm made by plain-

tiff's husband. The motion was supported by affidavits of witnesses. The motion, under G.S. 1A-1, Rule 60, is properly made in this Court. *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971).

However, in view of the result on appeal, the motion is rendered moot and is, therefore, dismissed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. RONALD GIBSON

No. 7226SC351

(Filed 24 May 1972)

1. **Constitutional Law § 32— indigent defendant — acceptance of appointed counsel**

An indigent must accept counsel appointed by the court unless he desires to present his own defense.

2. **Constitutional Law § 32— dissatisfaction with appointed counsel**

An expression of unfounded dissatisfaction with court-appointed counsel does not entitle a defendant to the services of another court-appointed counsel.

3. **Constitutional Law § 32— refusal to dismiss appointed counsel**

The trial court did not err in the denial of defendant's motion made before trial that his court-appointed counsel be discharged and another attorney appointed to represent him or that he be given the opportunity to hire an attorney, where the motion was based only on defendant's assertion that he thought another attorney would do more for him, and there was no showing defendant was financially able to employ counsel.

4. **Forgery § 1— elements of uttering**

The offense of uttering a forged instrument consists of offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud.

5. **Forgery § 2— changing amount of check — uttering**

The State's evidence was sufficient for the jury in a prosecution for uttering a forged check where it tended to show that a check was made payable to defendant in the amount of $1.64, that defendant altered the check and made it appear to be payable in the amount of $11.64, and that defendant cashed the altered check at a grocery store.

State v. Gibson

APPEAL by defendant from *Friday, Judge,* 29 November 1971 Schedule "A" Criminal Session of Superior Court held in MECKLENBURG County.

The defendant was charged in two bills of indictment, 71 Cr 22996 and 71 Cr 22997, with forging and uttering two checks written by Wachovia Services, Inc., for Neighborhood Youth Corps, Charlotte, N. C., to Ronald Gibson. The defendant pleaded not guilty.

The State offered evidence tending to show that on 26 March 1971 at about 1:00 p.m. the defendant went into the Eighth Street Market and gave a check to an employee Mr. Williams, who testified:

> " * * * I checked his identification and had him sign the check and cashed it. * * * "
>
> " * * *When he gave me State's Exhibit No. 1, I know I gave him $11.00. I'm not sure about the change."

Ernie Small, the owner of the market, deposited this check, and it was returned by the bank.

On 23 April 1971 at about 1:00 p.m. the defendant returned to the market and gave Mr. Williams another check. Mr. Williams recognized the defendant and immediately gave the check to Mr. Small who called the police. Before the police arrived the defendant fled, leaving the check. The two checks were identified and introduced into evidence as State's exhibits #1 and #2. During the months of March and April 1971 the defendant was receiving remedial education, skilled training, and counseling at the Neighborhood Youth Corps approximately one block from the Eighth Street Market for which he received a "stipend" of $.86719 per hour. For the period ending 21 March 1971, a check, No. 1209, dated 26 March 1971, in the amount of $1.64, was issued to Ronald Gibson. For the period ending 18 April 1971 a check, No. 1214, dated 23 April 1971, in the amount of $9.29, was issued to Ronald Gibson.

Albert T. Hoxie, director of the Neighborhood Youth Corps, testified that State's exhibits #1 and #2 were the checks No. 1209 and No. 1214, respectively, which were issued to the defendant. State's exhibits #1 and #2, when introduced into

evidence at the trial, were made payable to the defendant in the amount of $11.64 and $19.29 respectively.

The defendant offered no evidence.

The jury found the defendant guilty on both counts in each bill of indictment. Prayer for judgment was continued on the count charging forgery in case number 71 Cr 22996 and on the counts charging forgery and uttering in case number 71 Cr 22997. From a judgment imposing prison sentence of five to seven years on the count charging uttering the check dated 26 March 1971 in case number 71 Cr 22996, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney George W. Boylan for the State.

William J. Eaker for defendant appellant.

HEDRICK, Judge.

Since prayer for judgment was continued on the count charging forgery in case number 71 Cr 22996 and on the counts charging forgery and uttering in case number 71 Cr 22997, our consideration is limited in this opinion to the count charging uttering in case number 71 Cr 22996.

[3] The defendant first contends the court erred in not allowing his motion to discharge his court-appointed counsel and in not affording him an opportunity to employ "private counsel" or represent himself.

When this case was called for trial at the 29 November 1971 Session of Criminal Court, the defendant, an indigent, appeared for trial with his court-appointed counsel, Frank B. Aycock, III, and moved " . . . to have his Court appointed counsel discharged and another attorney appointed for him, or be given the opportunity to hire a lawyer." When the judge inquired of the defendant the reasons for his motion, the defendant stated, "I just figure that I can get another lawyer to do more for me than this one right here." There was no showing that defendant was financially able to employ counsel.

[1] It is well settled that an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. *State v. Scott,* 8 N.C. App. 281, 174 S.E. 2d

80 (1970); *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568 (1969); *State v. Alston,* 272 N.C. 278, 158 S.E. 2d 52 (1967); *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667 (1965).

[2] An expression of an unfounded dissatisfaction with his court-apppointed counsel does not entitle defendant to the services of another court-appointed attorney. *State v. Moore, supra.* In *State v. McNeil, supra,* we find the following:

> "In 157 A.L.R. 1225 *et seq.,* there is an annotation entitled 'Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney appointed by court to represent him.' Therein it is said:
>
> > 'The right to such discharge or substitution is to this extent relative, and the authorities seem united in the view that if there is fair representation by competent assigned counsel, proceeding according to his best judgment and the usually accepted canons of criminal trial practice, no right of the defendant is violated by refusal to accede to his personal desire in the matter.' "

[3] In the record before us there is nothing to indicate that the defendant ever expressed any desire not to be represented or to represent himself, nor is there anything to indicate that Mr. Aycock, appointed in April 1971, had failed to provide him with fair and proper representation. The bare assertion in the record, first made when the case was called for trial, that the defendant wished to discharge his court-appointed counsel and to have another appointed for him or be given an opportunity to hire one because he thought another would do more for him is not sufficient to show that any of the defendant's rights were violated or that the court committed prejudicial error in denying the motion. This assignment of error is not sustained.

[4] The defendant assigns as error the court's denial of his timely motions for judgment as of nonsuit. The offense of uttering a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud. G.S. 14-120; *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22 (1968).

[5] We think the evidence in the present case, when considered in the light most favorable to the State as we are bound

to do, would permit the jury to find that when State's exhibit #1, the check dated 26 March 1971, No. 1209, was issued and given to the defendant, it was made payable to the defendant in the amount of $1.64 and that the defendant altered the check and made it appear to be payable in the amount of $11.64 and that, as altered, the check was capable of defrauding and that the defendant with fraudulent intent did, in fact, utter and publish the altered check by having it cashed by Mr. Williams at the Eighth Street Market. We hold the evidence was sufficient to require the submission of the case to the jury and to support the verdict.

Based on exception number 4, the defendant contends the court expressed an opinion on the evidence in violation of G.S. 1-180. This exception reveals that when the solicitor asked Mr. Williams if he remembered how much he cashed the check for, the trial judge said, "Well, the check speaks for itself."

In his brief, defendant states:

> " . . . (H)is comment necessarily conveyed an opinion to the jury and established the fact that the check (State's Exhibit No. 1) bore the alleged alteration of $11.64 at the time it was presented to the cashier by the defendant."

We think the comment by the judge was error but not prejudicial. In *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950) we find:

> "* * * The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless."

There is nothing in this record to indicate that the comment of the judge could have prejudiced the defendant in any way. We hold the remark made by the judge was harmless beyond a reasonable doubt.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. CLAUDE SANFORD WADE

No. 723SC334

(Filed 24 May 1972)

1. **Burglary and Unlawful Breakings § 5— nonfelonious breaking or entering**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of nonfelonious breaking or entering where it tended to show that defendant was discovered in the kitchen of an occupied dwelling at 2:30 a.m., that defendant stated he was drunk and thought he was in his own house, that the back door to the house was locked but the front door had been left unlocked, that defendant was not authorized to enter the house and his own house was two blocks away on a different street, that in the opinion of the police officers defendant was not under the influence of alcohol or drugs when they saw him immediately after the occurrence, and that the result of a breathalyzer test performed on defendant was negative.

2. **Burglary and Unlawful Breakings § 6— wrongful breaking or entering — instructions — "unlawful" entry**

In a prosecution for wrongful breaking or entering in violation of G.S. 14-54(b), the trial court did not err in failing to instruct the jury that defendant's entry must have been "unlawful" where the court instructed that the entry must have been without the owner's consent and wrongful.

3. **Burglary and Unlawful Breakings § 4; Criminal Law § 64— breathalyzer result — inadmissibility in breaking or entering case — harmless error**

In this prosecution for wrongful breaking and entering wherein defendant's primary defense was that he was drunk and thought he was in his own house, the trial court erred in the admission of evidence of the result of a breathalyzer test performed on defendant, since the statute providing for the admission of breathalyzer test results relates only to criminal actions arising out of acts committed while operating a vehicle, G.S. 20-139.1(a); however, the admission of such evidence was harmless error in the light of other evidence that defendant was not intoxicated when arrested at the crime scene.

4. **Criminal Law §§ 76, 169— in-custody statements — indigency — written waiver of counsel — harmless error**

The trial court in a prosecution for nonfelonious breaking or entering erred in finding that defendant was not indigent at the time of his in-custody interrogation and in admitting in-custody statements made by defendant without a written waiver of counsel while former G.S. 7A-457 was in effect; however, the admission of such statements was harmless error where they were not prejudicial to defendant but supported his contention that he was drunk and thought he had entered his own house.

State v. Wade

APPEAL by defendant from *Seay, Judge,* 13 December 1971 Session of CARTERET Superior Court.

Defendant was indicted for first-degree burglary but the State announced at trial that it would prosecute for felonious breaking and entering. At the close of the State's evidence the court allowed defendant's motion for judgment as of nonsuit on the charge of felonious breaking and entering but submitted the case to the jury on the lesser charge of wrongful breaking and entering. The jury returned a verdict of guilty and the court entered judgment sentencing defendant to prison for not less than twelve months nor more than eighteen months with recommendation for work release.

From this judgment, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Ernest L. Evans for the State.

Bennett and McConkey, P.A., by Thomas S. Bennett for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to grant his timely made motions for judgment as of nonsuit.

[1] The State's evidence viewed in the light most favorable to it tends to show: On the night of August 13-14, 1971, Mr. and Mrs. Howard Gebeaux and their two-year-old son were occupying their home in Morehead City. They went to bed around 11:00 p.m., Mr. and Mrs. Gebeaux occupying an upstairs bedroom and their son occupying a downstairs bedroom. Around 2:30 a.m. Mr. and Mrs. Gebeaux were awakened by a noise and went downstairs to investigate. After checking several rooms Mr. Gebeaux went into the kitchen, turned on the light and saw defendant in the kitchen kneeling behind the stove. The back door to the house was locked but the front door had been left unlocked that night. Mr. Gebeaux was not personally acquainted with defendant but had seen him mowing lawns for neighbors. He asked defendant what he was doing there and defendant "put his hand to his head and started moaning and groaning." Defendant told Mr. Gebeaux and police who were called that he was drunk and thought he was in his own house. Defendant was not authorized to enter the house and his own house was approximately two blocks away on a different street. Police

officers testified that in their opinion defendant was not under the influence of any alcoholic beverage or narcotic drug when they saw him immediately after the occurrence. They testified that while in custody defendant agreed to submit to a breathalyzer test and that the result of the test was negative.

When viewed in the traditional rule of considering the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference which may be legitimately drawn therefrom, the evidence was plenary to go to the jury on a charge of wrongful breaking and entering. "And, when so considered, if there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. *State v. Mayo,* 9 N.C. App. 49, 175 S.E. 2d 297." *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971).

[2] Defendant contends that the court erred in defining the crime submitted to the jury; that the court at no time instructed the jury that the entry of defendant must have been "unlawful." The court did instruct that the entry must have been without the owner's permission or consent and wrongful. Defendant cites as authority for his contention *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27 (1965) and *State v. Green,* 2 N.C. App. 221, 162 S.E. 2d 513 (1968). Both of the cited cases were decided prior to the 1969 amendment to G.S. 14-54. This amendment sets forth a statutory offense. G.S. 14-54(b) provides: "Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a)." The court charged in the words of the statute and we hold that the instruction was free from prejudicial error.

[3] Defendant contends that the court erred in allowing police officers to testify as to in-custody statements made by him and as to results of the breathalyzer test. Defendant's primary defense was that he was drunk at the time of entering the house.

As to admitting evidence regarding results of the breathalyzer test, we hold this to be error, but not prejudicial to the defendant in this case. G.S. 20-139.1(a) states: "In any criminal action arising out of acts alleged to have been committed by any person while *driving or operating a vehicle* while under the influence of intoxicating liquor, the amount of alcohol in the

person's blood at the time alleged as shown by chemical analysis of the person's breath or blood shall be admissible in evidence and shall give rise to the following presumptions." (Emphasis ours.) In view of the quoted provision we do not think the breathalyzer test results are admissible in this breaking and entering case. However, the record is replete with testimony that the defendant was not intoxicated when arrested at the scene. In light of this evidence the error is harmless beyond a reasonable doubt. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972).

[4] We also hold that the court erred in permitting the police to relate in-custody statements made by defendant. On the date of the alleged offense G.S. 7A-457 was in effect and at that time the only way an indigent could waive his right to counsel at an interrogation was to waive it in writing. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971). There was no written waiver in this case. Four days after his interrogation defendant was adjudged indigent and counsel appointed to represent him in subsequent proceedings. Following a voir dire hearing the trial court found that at the time defendant made the statements he was "not indigent for the purpose of retaining counsel to represent him during his interrogation." We find nothing in this case to distinguish it from the facts in *State v. Wright,* 281 N.C. 38, 187 S.E. 2d 761 (1972), in which a similar finding was declared invalid.

While we think the court erred in admitting the evidence, the statements made by defendant would have to be prejudicial to him to warrant a new trial. *State v. Bass, supra; State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. McClain,* 4 N.C. App. 265, 166 S.E. 2d 451 (1969). We do not think they were prejudicial.

The statements were to the effect that defendant had been on the beach drinking from twelve noon to one a.m.; that he did not know why he was in the house; that he was simply drunk and wandered into the wrong house by mistake; that he had never been in the house before and did not know the occupants. In view of defendant's contentions as to why he was in the house we find nothing in the statements prejudicial to him. In addition, defendant testified to all of these facts when he took the stand except for the statement that he entered by mistake and did not know the occupants. At trial he testified he knew

Mrs. Gebeaux and at some prior time had been asked to visit her. We cannot see how the statement that he entered the house by mistake could be considered prejudicial. If anything it was beneficial to him and could have been a factor in the court's granting the motion for judgment as of nonsuit to felonious breaking and entering. Therefore, we conclude that while the admission of the statements was technically incorrect, they did not prejudice the defendant.

For the reasons stated, we find

No error.

Judges PARKER and HEDRICK concur.

ERNEST M. TAYLOR v. BANKERS LIFE AND CASUALTY COMPANY

No. 7226SC73

(Filed 24 May 1972)

Insurance § 44— disability insurance — inability to perform duties of occupation — insufficiency of evidence

The evidence was insufficient to support a jury finding that plaintiff's heart disease prevented him "from performing each and every duty of his occupation" within the meaning of a disability insurance policy, where it showed that after plaintiff suffered a heart attack he was given the job of tire service manager, that plaintiff suffered chest pains while at work but was not prevented from keeping tire records and answering the telephone, that the specified cause of plaintiff's discharge was his failure to keep proper inventories and violation of other company procedures, and that plaintiff was in fact performing all or substantially all of the duties of his job at the time of his discharge.

APPEAL by plaintiff from *Snepp, Judge,* at the 14 June 1971 Schedule "B" Session of MECKLENBURG Superior Court.

This civil action was instituted by plaintiff to recover benefits allegedly due under an insurance policy issued by the defendant.

The case was tried before a jury. The defendant moved for a directed verdict at the close of the plaintiff's evidence and at

the close of all the evidence. The jury returned a verdict in favor of the plaintiff. The defendant moved for judgment notwithstanding the verdict and the motion was granted.

From this judgment, plaintiff appeals.

The facts are set out in the opinion.

Sanders, Walker & London by James E. Walker; and Edward T. Cook for plaintiff appellant.

Craighill, Rendleman & Clarkson by J. B. Craighill for defendant appellee.

CAMPBELL, Judge.

The sole question presented by this appeal is whether it was error to grant defendant's motion for judgment notwithstanding the verdict.

The evidence in this case may be summarized as follows:

In June of 1967 the plaintiff was, and had been for approximately ten years, an employee of Ryder Truck Rentals. At that time he was employed as the service manager. In June 1967 the plaintiff suffered a heart attack. He was out of work for a period of several months following the heart attack. Although the record is somewhat confusing on this point, it appears that plaintiff returned to work in the Fall of 1967. He did not return to the position of service manager because that job required him to do mechanical repairs and it was felt that the job was too strenuous for plaintiff. He was instead given the newly created job of tire manager. His duties in this capacity required him to keep and file mileage records and inventories on the tires, insure that tires were sent to the recapping shop and returned, and purchase new tires. An assistant was assigned to plaintiff to lift tires and perform any physical labor required in managing the tire service. The plaintiff testified, however, that even with the assistant he sometimes had to lift tires to inspect them. He also testified that at times he was required to walk to the back lot of Ryder's facilities, a distance of approximately 150 yards.

On October 15, 1967, the plaintiff became an insured on a certificate of insurance under an income protection policy issued

by the defendant to the Ryder System, Inc. The policy provided for payment of indemnity when,

> " . . . as the result of sickness, the Insured Individual is wholly and continuously disabled and prevented from performing *each* and *every* duty of his occupation . . . . " (emphasis added).

Coverage for an insured under the policy was to terminate on the date the insured's employment terminated.

After returning to work plaintiff continued to suffer chest pains associated with angina pectoris. He was placed on medication for these pains.

In March 1968, plaintiff underwent a surgical procedure to improve circulation to his heart and hopefully alleviate the chest pains he was suffering. He returned to work in June 1968. He continued to perform his duties as tire manager until 9 September 1968. On that date plaintiff's employment was terminated for cause. The specified cause for his discharge was his failure to keep proper inventories and violation of other company procedures. There was no evidence that plaintiff was unable to or was prevented by his heart condition from performing his duties. The evidence was that he did in fact perform all his duties until the date of his discharge. He thereafter sought employment as a mechanic but was unsuccessful.

Plaintiff testified that he has suffered chest pains since the date of his heart attack and that he continues to suffer such pains. He testified that he frequently experienced chest pains during his last year of employment with Ryder.

The plaintiff presented the expert testimony of two physicians, Dr. L. E. Brittain and Dr. Harry K. Daugherty. Both experts testified that in their opinion the plaintiff was wholly disabled and prevented from performing each and every duty of his occupation. On cross-examination, however, Dr. Brittain testified that he would not say that plaintiff was unable to answer the phone or maintain tire inventories and that if plaintiff was satisfactorily performing his duties it was evidence that he was able to do so. On cross-examination Dr. Daugherty testified that his opinion that plaintiff was unable to do each and every duty of his occupation was based on an understanding that plaintiff was doing heavy physical labor. He testified that plaintiff was able to answer the telephone and maintain tire records. Dr. Daugherty testified that

the fact that plaintiff was actually performing his duties spoke for itself.

The case was submitted to the jury on the following stipulated issue:

> "Was the plaintiff wholly and continuously disabled and prevented from performing each and every duty of his occupation on the 9th day of September, 1968, as alleged in the Complaint?"

The jury answered this issue in favor of the plaintiff. Defendant then moved for judgment notwithstanding the verdict and the motion was allowed.

The motion for judgment notwithstanding the verdict brings into question the sufficiency of the evidence upon which the jury based its verdict.

A review of the evidence in this case reveals that the policy under which plaintiff was insured required that he be, "prevented from performing each and every duty of his occupation." His occupation at the time of his discharge was that of tire programmer or tire service manager. There was testimony that plaintiff suffered chest pains while at work and there was testimony by two physicians that in their opinion plaintiff was disabled.

There was, however, uncontroverted evidence that the plaintiff was in fact performing his duties up until the date of discharge. Furthermore, the plaintiff's experts testified that plaintiff was not prevented from keeping the records on the tires and answering the telephone.

The experts also testified on cross-examination that the fact plaintiff was performing his duties was evidence that he was able to do so. They therefore negated to an extent their testimony on direct examination. *Andrews v. Assurance Society,* 250 N.C. 476, 108 S.E. 2d 921 (1959).

The insurance policy limits recovery to those who are prevented from performing "*each* and *every* duty" of their occupation. There is no construction of the evidence in this case which would permit a jury to find that plaintiff's heart disease prevented him from performing "each and every duty" of his job. In fact the evidence leads us to the conclusion that plaintiff was performing all or substantially all of the

duties of his occupation. Recovery under the policy cannot be allowed under these facts.

There is a strong line of cases in North Carolina holding that where a plaintiff is actually working and performing his duties, he is not entitled to benefits under disability insurance and this applies even where there is expert testimony to the effect that plaintiff is disabled. *Boozer v. Assurance Society,* 206 N.C. 848, 175 S.E. 175 (1934); *Carter v. Insurance Co.,* 208 N.C. 665, 182 S.E. 106 (1935); *Ford v. Insurance Co.,* 222 N.C. 154, 22 S.E. 2d 235 (1942); *Fair v. Assurance Society,* 247 N.C. 135, 100 S.E. 2d 373 (1957).

> "[I]t would seem manifest that a plain, everyday fact, uncontroverted and established, ought not to be overthrown by the vagarties of opinion or by scientific speculation." *Thigpen v. Insurance Co.,* 204 N.C. 551, 168 S.E. 845 (1933).

The above cited decisions are controlling in the case at bar.

The trial court was correct in granting defendant's motion for judgment notwithstanding the verdict.

Affirmed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL SUTTON

No. 723SC287

(Filed 24 May 1972)

1. Forgery § 2— uttering — indictment — description of forged instrument

The second count of a bill of indictment was insufficient to charge the offense of uttering a forged money order where it referred only to "a certain false, forged and counterfeited money order is as follows, that is to say: And did present and cash said money order," but contained no further description of the particular counterfeited money order which defendant is charged with having uttered.

2. Indictment and Warrant § 8— completeness of each count

Each count in an indictment containing several counts must be complete in itself.

3. Forgery § 2— forgery of endorsement — proof

To convict defendant of the felony of forging the endorsement of a money order with intent to defraud in violation of the second sentence of G.S. 14-120, it was not necessary to allege or prove forgery of the face of the money order, which would have been a separate felony under G.S. 14-119.

APPEAL by defendant from *Rouse, Judge*, 6 December 1971 Session of Superior Court held in PITT County.

In the first count in each of two separate bills of indictment, one being returned as a true bill in Case No. 71-Cr-7986 and the other as a true bill in Case No. 71-Cr-7987, defendant was charged with forging the endorsement of a money order with intent to defraud. In each case the first count in the bill of indictment particularly described the money order involved in that case. In Case No. 71-Cr-7986 the second count in the bill of indictment is as follows:

> "AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT, that the said William Earl Sutton afterward, to wit, on the day and year aforesaid, at and in the County aforesaid, wittingly and unlawfully and feloniously did utter and publish as true a certain false, forged and counterfeited money order is as follows, that is to say: And did present and cash said money order at Edwards Pharmacy, 207 S. Lee Street, Ayden, N. C., with intent to defraud, he, the said Edwards Pharmacy at the time he so uttered and published the said false, forged and counterfeited money order then and there well knowing the same to be false, forged and counterfeited against the form of the statute in such case made and provided, and against the peace and dignity of the State."

In Case No. 71-Cr-7987 the second count in the bill was substantially similar, except that it alleged defendant cashed "said money order at Braxton's Grocery (Dorothy Braxton), Grifton, N. C." The two cases were consolidated for trial and defendant pleaded not guilty to all charges.

Evidence for the State indicated that certain blank money orders were missing from Johnson's Drug Company, Inc., in Jacksonville, N. C. The State's witnesses identified defendant as the person who cashed at separate stores in Pitt County two money orders bearing the same serial numbers as those missing

from the Jacksonville store. These witnesses also testified that at the time defendant cashed each money order he represented himself to be the payee named in the money order, William O. Marley, and endorsed the name "William O. Marley" on each money order. An F.B.I. handwriting expert testified that the endorsement on each money order was in defendant's handwriting. The defendant did not introduce evidence.

The jury found defendant guilty of all charges. Upon the verdicts on the forgery counts in each case, judgments were entered sentencing defendant to prison for not less than four nor more than five years in each case, the two sentences to run concurrently. Prayer for judgment was continued as to the uttering charge in each case. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney Charles A. Lloyd for the State.

Laurence S. Graham for defendant appellant.

PARKER, Judge.

[1, 2] While the money order involved in each case is sufficiently described in the first count in each bill of indictment, the second count in each bill refers only to "a certain false, forged and counterfeited money order is as follows, that is to say: And did present and cash said money order. . . . " No further description of the particular "counterfeited money order" which defendant is charged with having uttered is contained in the second count in either bill. One may speculate that the reference to "said money order" was intended to refer to the particular money order as described in the first count in each bill, but it is not even entirely clear that this is so. In any event "[i]n an indictment containing several counts, each count should be complete in itself." *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46; *State v. Hackney,* 12 N.C. App. 558, 183 S.E. 2d 785.

"In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation. . . . " Art. I, § 23, Constitution of North Carolina. To implement this basic constitutional right, our Supreme Court has many times held that an indictment "to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is:

(1) such certainty in the statement as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770, and cases cited therein; *State v. Able,* 11 N.C. App. 141, 180 S.E. 2d 333.

Tested by these long established standards, we find the allegations contained in the second count in each bill of indictment insufficient. Since "[i]t is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment," *State v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781, defendant's motion in arrest of judgment on the verdicts rendered on the second count in each bill of indictment must be allowed.

As to the charges contained in the first count in each bill of indictment, defendant's contention that there was a fatal variance between the charge and the State's proof is without merit. The first count in each bill expressly alleged that defendant, with intent to defraud, committed forgery by endorsing the name of William O. Marley on the money order involved. This charged an offense under the second sentence of G.S. 14-120, which provides in part as follows.

> "If any person . . . with intent to defraud . . . shall falsely make, forge or counterfeit any endorsement on any instrument described in the preceding section, *whether such instrument be genuine or false,* . . . the person so offending shall be guilty of a felony. . . . " (Emphasis added.)

[3] The money orders here involved were instruments as described in G.S. 14-119. To convict of the felony of forging the endorsements thereon under the second sentence of G.S. 14-120, it was not necessary to allege or to prove forgery of the face of the money orders, which would have been separate felonies under G.S. 14-119. There was no variance between the allegations in the first count in each bill and the State's proof in support thereof. The State's proof was ample to support the verdicts.

Appellant's assignments of error directed to the court's charge to the jury, most of which are based on his mistaken assumption that in the first count in each bill he was being charged under G.S. 14-119 rather than under the second sentence of G.S. 14-120, are also without merit. When the charge is considered as a whole, we find no prejudicial error.

The result is:

As to the charges attempted to be alleged in the second count in each bill of indictment, the judgment is

Arrested.

As to the judgments imposed on the verdicts finding defendant guilty of the charge contained in the first count in each bill of indictment, we find

No error.

Judges BRITT and HEDRICK concur.

IN THE MATTER OF: IRVIN EDWARD PETERS, JR.

No. 7217DC362

(Filed 24 May 1972)

Infants § 10— juvenile delinquency — absence from school

A finding that a fifteen-year-old juvenile missed twelve out of the first twenty-six days of the school term is insufficient to support the court's order committing the juvenile to the custody of the Board of Youth Development for placement in a school or institution.

DEFENDANT appealed from *Harris, District Judge,* 16 December 1971 Session of District Court, ROCKINGHAM County.

This case was instituted by a petition filed 12 October 1971 by a Mrs. Alice Y. Loftis of Reidsville, North Carolina. In the petition it is recited that Irvin Eddie Peters (Eddie) is less than sixteen years of age and resides in the district; that his parents are Mr. and Mrs. Irvin E. Peters; that Eddie is a ninth grade student in the Reidsville City Schools and is an undisciplined child.

"During the 1971-1972 school year he has been suspended from school four times. When he is in school he is constantly in the office of the principal due to problems with teachers and students. He has been absent from school 12 days out of 26 belonging [*sic*] as of October 11, 1971. Eddie was a problem during the 1970-1971 school year also.

Petitioner prays the court to hear the case to determine whether the allegations are true and whether the child is in need of the care, protection or discipline of the State."

The record discloses that pursuant to this petition a juvenile summons was issued December 6, 1971, which was duly served on Eddie and Mr. & Mrs. Irvin Peters.

Upon affidavit of indigency, Judge Harris, on 11 November 1971, appointed W. Edward Deaton as attorney to represent Eddie.

At the hearing Mrs. Loftis testified on examination by the court,

"According to school records Eddie Peters was absent from school 12 out of the first 26 days of school without excuse."

On cross-examination Mrs. Loftis testified,

"Based on the normal 20 day monthly school period Eddie Peters was absent 8 days during the first 20 day period and then was absent for 4 days during the second 20 day period. He has been absent 10 out of 17 days since he was first cited into court, but part of this was due to pneumonia. I have no personal firsthand knowledge of his conduct in school."

The record also reveals a Juvenile Disposition Order entered by Judge van Noppen dated 11 March 1971. The order of Judge van Noppen shows that Eddie was not represented by an attorney but that counsel had been waived. This order of Judge van Noppen then shows the following:

"The Court finds that Irvin Edward Peters, Jr. had furnished a knife to Phillip Wayne Grubbs which was later used in an Assault, and this Juvenile has had some previous trouble at school, but that it is not necessary for him

to be under the supervision of the Juvenile Court Authorities.

It is therefore ordered that Irvin Edward Peters, Jr. be placed in care of and under the supervision of his parents, and that he obey them at all times, and that he attend school regularly."

This is all the evidence that was presented to the Court in support of the petition.

The evidence on behalf of Eddie is to the effect that he missed school as he was under a doctor's care; that he is fifteen years old and in the ninth grade; that he does better in some subjects than in others; and that he is pretty sure he was failing some subjects but that he was doing good in shop and science and part of physical education; that he is physically larger than most of the children in school; that he likes to work with his hands and would rather be out working than going to school. He testified,

". . . I work afternoons from 4:00 until 9:00 at night during the week, and on Saturdays and Sundays at Jarrell and Sons Kenco Station. I use the money that I earn to buy my clothes and what other needs arise. If I do not have anything that I need that week I give the money to my mother for whatever she needs to do with it. At present I am living at home with my mother and my two (2) sisters who are 20 years old and 16 years old. . . . My mother works, and leaves home at 6:30 in the morning. She usually gets me up for school and then comes home around 5:00. I see my father every day or so.

I feel a responsibility about being the man of the household now. I have felt this way for a long time.

I have worked at different places before. Sometimes I have worked for nothing just because I like to work, and it keeps me out of trouble. I have not been in any other trouble other than that which has occurred at school."

Leona Epperson Peters, the mother of Eddie, testified that she and her husband had been separated since March of 1970, and that Eddie's school problems had gotten worse since the separation; that Eddie resented his father having left

home; that what he testified to about working and helping is true; that she had had no trouble with Eddie other than school-related problems; that Eddie had had a lot of trouble with his health and had had pneumonia every year and that last year he had been in the hospital three weeks with a chest problem.

The court, of its own motion, amended the petition to allege that the juvenile is a delinquent child within the meaning of the statute.

The following judgment was entered by the Court:

"The Court finds as a fact that said child has committed the acts alleged in the petition, to wit: Being unlawfully absent from school twelve out of the first twenty-six days of the 1971-72 school term. The Court further finds that said child has wilfully violated his probation, or the Order of the Honorable L. H. van Noppen at the March 11, 1971, term, wherein he was ordered to attend school regularly.

It is therefore ordered that said child be committed to the Board of Youth Development to be placed in such school or institution as said Board deems necessary and fit.

This the 16th day of December, 1971.

G. M. HARRIS
Judge Presiding"

Attorney General Robert Morgan by Associate Attorney Edwin M. Speas, Jr., for the State.

McMichael, Griffin & Post by W. Edward Deaton for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the judgment entered for that same is not supported by the evidence and that the order of Judge van Noppen entered 11 March 1971, is not a probationary sentence within the meaning of the statute and the order therein was not one that could be modified by another district court judge.

With regard to the order of 11 March 1971, entered by Judge van Noppen, it is noted that he specifically found,

> "[I]t is not necessary for him to be under the supervision of the Juvenile Court Authorities."

There were no conditions attached to the order of Judge van Noppen.

In the present hearing the only evidence before the Court and the facts found by the Court were that the juvenile had missed twelve out of the first twenty-six days of the school term. All of the evidence was to the effect that Eddie was a good worker, liked to work, and used his earnings for worthwhile purposes. He missed considerable school because of poor health, and it can be assumed this was due to the fact that he did not like to go to school. Is this sufficient evidence to justify putting this fifteen-year-old boy in an institution for delinquents?

We note that the North Carolina Penal System Study Committee organized by the North Carolina Bar Association at the request of Governor Robert W. Scott has filed a preliminary report dated May 1, 1972, entitled "As the Twig Is Bent, A Report on the North Carolina Juvenile Correction System."

In this Report the following appears:

> "The Committee is of the opinion that approximately fifty percent of the children in our training schools should never have been sent there. This opinion is shared by staff personnel of the training schools, child psychiatrists and psychologists who are professionally involved with these students. . . . The only offense that many of the students have committed is that they do not like or cannot adjust to school."

The instant case is a good example of this situation. Eddie obviously is a child who should be afforded some technical training where he can use his hands and develop his aptitudes along that line and have some motivation. He obviously does not take to book learning. Forcing him into a classical schoolroom introduces a disruptive element which is not good for the school, the teachers, the other students and likewise is not good for Eddie.

Suffice it to say that in the instant case the findings entered by the judge do not support the judgment ordering Eddie into the custody of the Board of Youth Development to be placed in a school or institution.

Reversed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. AGNEW MOTT WILLIAMS III

No. 723SC66

(Filed 24 May 1972)

1. **Criminal Law § 7— entrapment — invitation to sell drugs**

In this prosecution for selling phenobarbital tablets to an S.B.I. agent, the trial court did not err in refusing to rule as a matter of law that defendant was entrapped by the agent when the agent invited defendant to sell drugs to him "if defendant wanted to find drugs to sell."

2. **Narcotics § 4— sale of barbiturates — sufficiency of evidence**

Evidence tending to show that defendant sold tablets containing phenobarbital and that phenobarbital is a derivative of barbituric acid was sufficient to be submitted to the jury in a prosecution for selling barbiturates in violation of former G.S. 90-113.2(5), it not being incumbent on the State to negative the proviso of G.S. 90-113.1(1) exempting from the definition of "barbiturate drug" compounds containing a sufficient quantity of another drug or drugs to cause the resultant product to produce an action other than its hypnotic or somnifacient action.

3. **Narcotics § 5— sale of barbiturates — punishment — offense prior to Controlled Substances Act**

A defendant convicted of an offense of selling barbiturates committed prior to 1 January 1972, the effective date of the North Carolina Controlled Substances Act, is subject to punishment under the former law and is not entitled to the more lenient punishment provisions of the Controlled Substances Act.

APPEAL by defendant from *Rouse, Judge,* 30 August 1971 Session of Superior Court held in CRAVEN County.

The defendant was tried on a bill of indictment, proper in form, charging him with the felony of selling a quantity of

phenobarbital tablets to S.B.I. Agent William H. Thompson on 14 August 1970.

The evidence for the State tended to show that on 7 August 1970, William H. Thompson (Thompson), an agent of the State Bureau of Investigation, contacted the defendant at a filling station where the defendant was employed. At that time Thompson informed the defendant that his name was "Bill," that he was from Wilmington and that he wanted to buy drugs. The defendant stated that he had a mescaline tablet with him but Thompson did not offer to purchase it. (Mescaline is a type of hallucinogenic drug.) On 14 August 1970, Thompson returned to the station and, after arguing about the price, purchased from the defendant for $15.00 some phenobarbital tablets which the defendant called "speed." Phenobarbital is a derivative of barbituate (sic) acid."

From a verdict of guilty as charged and judgment of commitment as a youthful offender, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Witcover for the State.

Ward & Ward by Kennedy W. Ward for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant contends that the trial judge should have ruled as a matter of law that the defendant was entrapped by Thompson. In this case the fact that Thompson left the impression that, if defendant wanted to procure drugs to sell, he would buy them did not result in the entrapment of the defendant. This was a mere exposure to temptation to sell drugs, a temptation which the defendant did not resist. Thompson invited the defendant to sell drugs to him "if defendant wanted to find drugs to sell." The evidence showed that defendant offered to obtain heroin, mescaline and LSD, and when Thompson first approached the defendant about drugs, the defendant stated he had a mescaline tablet with him, the implication being that he would have sold it at that time had Thompson offered to buy. It is incumbent upon a defendant to establish his defense of entrapment to the satisfaction of the jury, and the trial

judge correctly instructed the jury on this issue. *State v. Fletcher* and *State v. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965). Nor did the trial judge err in refusing to find as a matter of law that the defendant was entrapped by Thompson. 2 Strong, N. C. Index 2d, Criminal Law, § 7.

We do not deem it necessary to discuss defendant's assignments of error relating to the admission of evidence, the failure to strike some of the testimony, the refusal to require Thompson to give further answers to questions propounded by defendant, the alleged expression of opinion by the trial judge, the qualification of State's witness Pearce as an expert witness, and the fact that the trial judge permitted Pearce to state his opinion that the plastic vial was crushed in mailing. These assignments of error are all without merit and are overruled.

Defendant also contends, however, that the trial judge committed error in overruling his motion for nonsuit and for a directed verdict of not guilty at the close of all the evidence. The statute under which the defendant was charged and tried made it a violation of the law for any person to sell any barbiturate or stimulant drug. See G.S. 90-113.2(5) prior to amendment effective 1 January 1972. Under G.S. 90-113.1(1), prior to amendment effective 1 January 1972, it was provided in pertinent part:

"The term 'barbiturate drug' means:

a. Barbituric acid, the salts and derivatives of barbituric acid, or compounds, preparations or mixtures thereof . . . .

* * *

. . . Provided, however, that the term 'barbiturate drug' shall not include compounds, mixtures, or preparations containing barbituric acid, salts or derivatives of barbituric acid, when such compounds, mixtures, or preparations contain a sufficient quantity of another drug or drugs, in addition to such acid, salts or derivatives, to cause the resultant product to produce an action other than its hypnotic or somnifacient action."

The State's evidence tended to show that the defendant sold tablets containing phenobarbital and that phenobarbital

is a derivative of barbituric acid. The defendant contends, however, that this evidence was insufficient to require its submission to the jury because the State's witness Pearce also testified that "I do not know whether or not the filler or the other contents of this capsule contained a sufficient quantity of another drug or drugs in addition to such acid, salts or derivatives to cause the resultant product to produce an action other than hypnotic or some other actions. I did not check that. I do not know whether it contained somnifacient or sufficient quantities of other drug or drugs. I do not know if it could have, for I did not run any tests."

In *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104 (1939), Justice Barnhill (later Chief Justice) said:

> " * * * (I)t has long been settled in this State that although the burden of establishing the *corpus delicti* is upon the State, when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matter is upon the defendant. *S. v. Arnold,* 35 N.C., 184; *S. v. McNair,* 93 N.C., 628; *S. v. Buchanan,* 130 N.C., 660; *S. v. Smith,* 157 N.C., 578. * * * "

See also, *State v. Brown,* 250 N.C. 209, 108 S.E. 2d 233 (1959); *State v. Johnson,* 229 N.C. 701, 51 S.E. 2d 186 (1949); *State v. Holbrook,* 228 N.C. 582, 46 S.E. 2d 842 (1948); 7 Strong, N. C. Index 2d, Statutes, § 5; 22A C.J.S., Criminal Law, § 572.

[2] Nothing else appearing, phenobarbital, a barbituric acid derivative, is a barbiturate drug within the meaning of the statutes. [G.S. 90-113.1(1) prior to amendment effective 1 January 1972.] The sale of a barbiturate drug is one of the precise acts prohibited by G.S. 90-113.2(5) prior to the amendment effective 1 January 1972. The State's evidence tended to show that the defendant sold tablets containing phenobarbital, which is a barbiturate drug. When the State offered this evidence, it was sufficient to require submission of the case to the jury. It was not incumbent upon the State to negative the proviso then contained in G.S. 90-113.1(1) by allegation or proof. [See G.S. 90-113.4 prior to amendment effective 1 January 1972.] *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970). If the defendant, under the proviso then contained in

the statute, wished to refute the evidence of the State that phenobarbital was a barbiturate drug, it was incumbent upon him to offer evidence to show to the satisfaction of the jury that these tablets he sold to Thompson contained, in addition to phenobarbital, a sufficient quantity of another drug or drugs to cause the resultant product to produce an action other than its hypnotic or somnifacient action. There was no evidence of the presence of any such drug in these tablets; hence, the trial judge correctly denied the defendant's motion for nonsuit and for a directed verdict of not guilty.

The defendant also assigns as error certain portions of the instructions given by the judge to the jury and the failure to charge on the effect of the defendant failing to testify. No request was made to instruct the jury on the effect of the failure of the defendant to testify, and when the charge is considered as a whole, no prejudicial error is made to appear therein.

The trial court did not, as defendant contends, commit error in the denial of his motions to set the verdict aside and for a new trial.

[3] The defendant filed a separate motion in arrest of judgment. The State contends this was not an appropriate way to bring to the court's attention the matters stated therein. In *State v. Fletcher* and *State v. Arnold, supra,* it is said: "(A) motion in arrest of judgment is one generally made after verdict to prevent entry of judgment based upon insufficiency of the indictment or some other fatal defect appearing on the face of the record." The defendant contends that the North Carolina Controlled Substances Act, which became effective 1 January 1972, repealed the former law and therefore that he could not be properly sentenced.

Under G.S. 90-113.7 of the new Act, effective 1 January 1972, it is stated that "Prosecutions for any violations of law occurring prior to January 1, 1972 shall not be affected by these repealers, or amendments, or abated by reason thereof." The word "prosecution" has been interpreted by this Court in *State v. McIntyre,* 13 N.C. App. 479, 186 S.E. 2d 207 (1972). This Court's decision in *McIntyre* was reversed by the Supreme Court on 10 May 1972. In light of the ruling by the Supreme Court in *McIntyre* and in view of the definition of the word

"prosecution" adopted by the Supreme Court of North Carolina in the case of *State v. Jesse Harvey, Jr.*, 281 N.C. 1, 187 S.E. 2d 706 (1972), as the "correct definition and . . . consistent with the legislative intent expressed in the Controlled Substances Act" and the holding therein that "(t)hus, the pre-exisiting law as to prosecution and *punishment* as set forth in Articles 5 and 5A, Chapter 90 of the General Statutes as written prior to 1 January 1972, remains in full force and effect as to offenses committed prior to 1 January 1972" (Emphasis added), we are of the opinion and so hold that defendant's motion in arrest of judgment, even if properly presented, should be and is hereby denied.

We have considered all of the defendant's assignments of error and, in the light of what we apprehend to be the interpretations of the applicable statutes by the Supreme Court of North Carolina, we are of the opinion that the defendant has had a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

FRED H. LANE, JR., D/B/A LANE'S OUTBOARD v. JIMMY HONEYCUTT

No. 723DC206

(Filed 24 May 1972)

1. **Uniform Commercial Code § 16— dishonored check —delivery under contract of purchase — transfer of good title — good faith purchaser**

Although the purchaser of a boat, motor and trailer took possession of the goods in exchange for a check which was thereafter dishonored, the goods were delivered under a contract of purchase and the purchaser could transfer good title to a "good faith purchaser for value." G.S. 25-2-403.

2. **Uniform Commercial Code § 16— recovery of merchandise from third party — good faith purchaser**

In an action by a boat dealer to recover from defendant a boat, motor and trailer which a third party had purchased from plaintiff with a check that was dishonored, the trial court's finding that defendant was not a good faith purchaser of the boat, motor and trailer was supported by evidence that they were sold new for $6,285, that

defendant purchased them six months later for $2,500 from a person selling them for the purported owner, that defendant knew he was getting a good deal, that the seller was not in the business of selling boats, that defendant never saw the purported owner, that defendant did not receive a title to the boat but received only a boat "certificate of number" issued by the Wildlife Resources Commission, to which defendant saw the seller counterfeit the signature of the purported owner, and that defendant received the title to a trailer other than the one he purchased.

APPEAL by defendant from *Whedbee, District Judge,* 27 September 1971 Session of District Court held in CARTERET County.

Action to recover possession of a boat, motor and trailer together with damages for their detention. The case was heard by the court without a jury. From judgment which, among other things, determined that plaintiff was the owner of and entitled to the immediate possession of the property, defendant appealed.

Taylor and Marquardt by Dennis M. Marquardt and Nelson W. Taylor for plaintiff appellee.

Perry C. Henson and Daniel W. Donahue for defendant appellant.

VAUGHN, Judge.

[1] Plaintiff has been engaged in the business of selling boats, motors and trailers in Carteret County for a number of years. On 21 February 1970, he sold a new 20-foot Critchfield boat, a new 120 hp motor and a new 1970 Cox boat trailer to a person who represented himself as John W. Willis. The purchaser took possession of the goods in exchange for a check in the amount of $6,285.00. The check was later dishonored. Contrary to the contentions of plaintiff, we hold that the goods were delivered under a transaction of purchase and that the consequences of this purchase are governed by G.S. 25-2-403, which, in part, is as follows:

> *"Power to transfer; good faith purchase of goods; 'entrusting.'*—(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of interest purchased. A person with voidable title has

power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a 'cash sale,' or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law."

We do not discuss the evidence and questions raised as to whether the check was a forgery, the transaction a cash sale or whether delivery was procured through fraud punishable as larcenous under the criminal law. Contrary to the law of this State as it may have been prior to the enactment of G.S. 25-2-403, that statute now allows the vendee in such a transaction to transfer a good title to a "good faith purchaser for value."

[2] The question, therefore, which we consider to be determinative of this appeal is whether there is any evidence to support the following findings of fact by the court. "(2) The Defendant, Jimmy Honeycutt, did not purchase the boat, motor and trailer in good faith."

It is well settled that:

"When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Knutton v. Cofield,* 273 N.C. 355, 359, 160 S.E. 2d 29, 33, and cases cited. There is no difference in this respect in the trial of an action upon the facts without a jury under Rule 52(a) (1) and a trial upon waiver of jury trial under former G.S. 1-185. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts." *Blackwell v. Butts,* 278 N.C. 615, 180 S.E. 2d 835.

We now review some of the evidence as it relates to how defendant came into possession of the property in order to determine whether there was evidence to support the court's finding that defendant was not a purchaser in good faith.

In the summer of 1970, defendant, a resident of Asheboro, North Carolina, rented a beach house from John R. Garrett in Garden City, South Carolina. Defendant had known Garrett for several years. Defendant's version of his transaction with Garrett with reference to the boat was, in part, as follows:

> "Mr. Garrett first approached me about buying his house on the beach that I was staying in, and he told me he wanted $50,000.00 for it, and I told him I couldn't afford anything like that. He said, 'Well, let me sell you a boat out there.' And I said, 'Well, I couldn't afford that, either.'
>
> * * *
>
> * * *
>
> * * * As to whether or not, in other words, this boat looked like it was fairly expensive, well, I thought it would be a little more than it was. He told me the price and I was very pleasantly surprised. . . . * * * . . . (H)e sells fishing tackle and stuff of that nature, and beer. He also sells gasoline for boats. Yes, sir, that is about all he sells down there. He rents small fishing boats and motors too. No, he doesn't sell them, he doesn't sell boats as far as I know . . . . * * *
>
> * * *
>
> . . . (H)e's a pretty sly businessman. I've bought stuff from him before, and he would make you think you were getting a steal. . . * * *
>
> I did not know John Willis and did not know him by one of his aliases. I never met him under the alias of John Patterson or any other alias, and I have never met him since that date. I don't know from whom Mr. Garrett got the boat, he didn't tell me the man's name. * * *
>
> * * *
>
> * * * I first knew that the boat was stolen when the F.B.I. came to see me. * * * He (Agent Madden) told me who the true owner of the boat was at that time and he told me it was a stolen boat and Mr. Patterson was wanted by the F.B.I. * * * His real name is John William Willis.

> The F.B.I. told me that one of his aliases was John Patterson . . . ."

Garrett told defendant he would let defendant have the boat for $2500. Defendant then paid Garrett a deposit of $100. Garrett had nothing to indicate that he was the owner of the boat, motor or trailer. Garrett told defendant he was selling the boat for someone else. "This guy comes down, you know, and does some fishing."

Two weeks later defendant returned to Garden City, South Carolina, with $2400, the balance due (on a boat, motor and trailer which had been sold new less than six months earlier for $6,285.00). On this occasion,

> "Mr. Garrett had told me—well, he always called him, 'this guy' see, so I really didn't know of any name or anything, but he told me, 'this guy does a lot of fishing around here, but I can't seem to get ahold of him.' He said, 'I've called him, but I can't get ahold of him, so since you have the money and you're here after the boat' . . . ; '(s)ince you have the money and I can't seem to find him,' he said, 'I don't believe he would object, so I'll just go ahead and sign this title for you so you can go on and get everything made out to you.' He then signed the purported owner's name on the documents and he signed the title over to me then."

The so-called "document" and "title," introduced as defendant's exhibit No. 8, was nothing more than the "certificate of number" required by G.S. 75A-5 and issued by the North Carolina Wildlife Resources Commission. This "certificate of number" is not a "certificate of title" to be compared with that required by G.S. 20-50 for vehicles intended to be operated on the highways of this State. Upon the change of ownership of a motor boat, G.S. 75A-5(c) authorizes the issuance of a new "certificate of number" to the transferee upon propor application. The application for transfer of the number, among other things, requires the seller's *signature*. A signature is "the name of a person written with his own hand." Webster's Third New International Dictionary (1968). Defendant observed Garrett counterfeit the signature of the purported owner, John P. Patterson, on the exhibit. Following the falsified signature on defendant's exhibit No. 8, the "date sold" is set out as "June 12, 1970" and the buy-

er's "signature" is set out as "George (illegible) Williams." There was no testimony as to who affixed the "signature" of the purported buyer, George Williams, and there is no further reference to him in the record.

Defendant's exhibit No. 9 is a temporary registration certificate from the North Carolina Department of Motor Vehicles. The temporary certificate was dated 19 February 1970 (two days prior to the sale by plaintiff to "Willis" alias "Patterson"). It describes the vehicle as "trailer, homemade, 1970" and was issued to "John Palmer Patterson." The vehicle registration license number which appears on the temporary certificate is 7567KH. Defendant received this certificate from Garrett. The trailer defendant received from Garrett was a 1970 Cox trailer. It bore the same registration plate number, 7567KH. Defendant did not receive a certificate of title to the Cox trailer that he obtained from Garrett which plaintiff now seeks to recover. Plaintiff retained possession of the manufacturer's certificate of origin for the Cox trailer and, apparently no certificate of title has been issued for that vehicle.

We hold that the evidence was sufficient to support the court's finding that defendant was not a good faith purchaser. Defendant brings forward other assignments of error which have been carefully considered. We hold, however, that all essential findings of fact are supported by competent evidence and are sufficient to sustain the judgment.

Affirmed.

Judges MORRIS and GRAHAM concur.

CLAUDE McMICHAEL v. BOROUGH MOTORS, INC.

No. 7226SC30

(Filed 24 May 1972)

1. **Contracts § 5; Master and Servant § 8— employment contract — requisites**

While a contract for service must be certain and definite as to the nature and extent of the service to be performed, the place of performance, the person to whom it is to be rendered and the compensation to be paid, it is not necessary that all of the terms of such contract be reduced to writing.

2. **Contracts § 27; Master and Servant § 8— employment contract — letter — oral testimony**

Testimony by plaintiff that defendant's president offered him $700 a month salary with a guarantee of $1000 and 5% of the vehicle selling gross to be manager of defendant's used car department and in charge of all employees of that department, that plaintiff told defendant's president that he was unwilling to accept defendant's offer without a two-year contract, and that defendant's president told the sales manager to handle the matter any way he wanted, when considered with a letter from the sales manager to plaintiff stating, "Effective this date April 24, 1967 and for the next two consecutive years, you are to be placed on the payroll at $700 per month, plus 5 percent of vehicle selling gross—with a guarantee of $1,000 per month," *held* sufficient to establish all of the essential elements of a two-year employment contract.

3. **Contracts § 27; Master and Servant § 9— employment contract — breach by employer**

Plaintiff's evidence was sufficient to support a finding that defendant employer breached an employment contract where it tended to show that plaintiff terminated his employment with defendant because his pay was substantially reduced and he was advised by defendant's president that defendant would not abide by the terms of the contract under which plaintiff was employed.

4. **Appeal and Error § 57— nonjury trial — review of court's findings**

Where issues of fact are tried by the court without a jury, the trial judge becomes both judge and jury, and his findings of fact, if supported by competent evidence, are as conclusive on appeal as the verdict of a jury.

APPEAL by defendant from *Blount, Special Judge,* 19 April 1971 Schedule "A" Session of Superior Court held in MECKLENBURG County.

Action to recover for breach of employment contract tried by the court without a jury.

Both parties presented evidence and the court made findings of fact, which are summarized:

(1) Defendant, an automobile dealership, employed plaintiff to be its used car manager in Charlotte for the two-year period of 24 April 1967 to 24 April 1969.

(2) The following terms of the employment contract were reduced to writing and signed by William Scott, General Sales Manager of defendant:

"April 24, 1967

To—Mr. Claude McMichael

Effective this date *April 24, 1967,* and for the next two consescutive years, you are to be placed on the payroll at $700 per month, plus 5 percent of vehicle selling gross—with a guarantee of $1,000 per month. Also, you may have the privilege of two Company cars; one for your home and one for your personal use while employed at Borough Lincoln-Mercury, Inc., Charlotte, North Carolina.

Signed: William Scott
General Sales Manager"

(3) Other essential terms of the contract, including the nature of the services to be performed by plaintiff, were oral.

(4) Plaintiff performed services in accordance with the contract from 24 April 1967 until 14 February 1968 and defendant paid plaintiff in full for services during this period.

(5) On 14 February 1968, defendant, through its president R. B. Borough, advised plaintiff that he was making too much money and that the decision had been made to reduce his pay, eliminate the guaranty from his contract, and to pay him in a different manner from that provided by his contract. When plaintiff stated that he expected defendant to live up to its contract respecting his pay, Borough replied that the contract was not worth the paper it was written on and ordered plaintiff to leave if he didn't like it. Plaintiff left and did not thereafter work for defendant.

(6) The total amount that would have been payable to plaintiff under the terms of the contract for the period of 24 April 1967 to 24 April 1969 had plaintiff remained in defendant's employment would have been $34,990.56. Plaintiff was paid by defendant during this period $9,810.57 and earned through other employment the net amount of $12,695.93.

(7) Defendant required plaintiff to relinquish the use of one of the two company cars furnished under the contract for plaintiff's personal use in September, 1967. (The court concluded, however, that plaintiff waived this violation of the contract by continuing his employment.)

Conclusions of law arising on the foregoing findings were made by the court and judgment that plaintiff recover $12,484.06, plus interest from 24 April 1969, was entered.

Ray Rankin for plaintiff appellee.

Wade and Carmichael by J. J. Wade, Jr., and Wardlow, Knox, Caudle & Knox by Charles E. Knox for defendant appellant.

GRAHAM, Judge.

Defendant contends the evidence was insufficient to show the nature and extent of the services to be performed by plaintiff as consideration for the compensation promised in the letter from defendant's sales manager, dated 24 April 1967 and introduced in evidence as plaintiff's Exhibit 1.

[1] "A contract for service must be certain and definite as to the nature and extent of the service to be performed, the place where, and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced." *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735. It is not necessary, however, that all of the terms of a contract for services be reduced to writing. "Except when forbidden by the Statute of Frauds, a contract may be oral, or partly written and partly oral." 2 Strong, N. C. Index 2d, Contracts, § 5, p. 298.

Plaintiff testified that in March of 1967 he came from his home in Florida to Charlotte to discuss employment with defendant's president, R. B. Borough, and William Scott, defendant's General Sales Manager. Borough showed plaintiff around the city and where defendant's "new" dealership would be located. Plaintiff testified: "He (Borough) made me a proposition of $700.00 a month salary with guarantee of $1,000.00 and 5% of the vehicle selling gross, in return for which I would be his used car manager in charge of the used car department and all the employees of that department." Plaintiff told Borough and Scott that because of the expense of moving from Florida to Charlotte he was unwilling to accept defendant's offer without a two-year contract. At this point Borough left the meeting, telling Scott to handle the matter any way he wanted to as Borough had to go to a golf game. Plaintiff returned to Florida and about three weeks later received the letter (plaintiff's Exhibit 1) from Scott. The letter was dated

24 April, the date plaintiff was to report for work, but was actually received by plaintiff sometime before that date. Plaintiff went to work for defendant as its used car manager on 24 April 1967 and worked in this capacity for the compensation outlined in Scott's letter until his employment was terminated 10 months later.

[2] When the oral testimony of plaintiff is considered, together with plaintiff's Exhibit 1, the evidence is sufficient to establish every essential element of the contract under which plaintiff seeks recovery. Actually defendant does not contest any of the terms of the contract except the provision in the letter setting forth the duration of employment as two years. Defendant's evidence was that the letter from Scott was never authorized and that plaintiff was never offered a specific period of employment. However, the evidence on this question was conflicting and it therefore became a matter for the judge to determine.

[3] Defendant also contends that the evidence does not support the court's finding that defendant breached the contract. Defendant's evidence tended to show that plaintiff voluntarily terminated his employment for personal reasons. On the other hand, plaintiff's evidence tended to show that the termination came about because his pay was substantially reduced and he was advised by defendant's president that defendant would not abide by the terms of the contract under which plaintiff was employed. This conflicting evidence presented an issue of fact for the court.

[4] Where issues of fact are tried by the court without a jury, the trial judge becomes both judge and jury, and his findings of fact, if supported by competent evidence, are as conclusive on appeal as the verdict of a jury. *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149; *Laughter v. Lambert,* 11 N.C. App. 133, 180 S.E. 2d 450.

Here there is evidence to support each of the court's findings of fact. We are bound by these findings even though there is also evidence which would support contrary findings. *Laughter v. Lambert, supra.*

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LEROY KILLIAN

No. 7226SC177

(Filed 24 May 1972)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering — larceny — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious larceny where it tended to show that the State's witness left two women in his extra apartment along with his wife's wedding rings, that when officers went to the apartment the back door was locked, a glass panel in the door was broken and broken glass and a broken bottle were lying outside the door, that blood and defendant's fingerprints were on the broken glass and bottle, that when an officer entered the apartment defendant jumped out a window and fled, that the two women left in the apartment were found in the apartment nude, that when apprehended defendant had the wedding rings on his person, that defendant did not have permission of the State's witness to enter his apartment, and that defendant's arm was cut.

2. **Larceny § 7; Indictment and Warrant § 17—variance — ownership of stolen property — person in lawful possession**

There is no fatal variance where an indictment charges larceny of property from a specified person and the evidence discloses that such person was not the owner but was in lawful possession at the time of the offense.

Judge BROCK dissenting.

APPEAL by defendant from *Friday, Judge,* 4 October 1971 "A" Criminal Session of Superior Court held in MECKLENBURG County.

The defendant was charged in a two count bill of indictment proper in form with feloniously breaking and entering and larceny from the apartment of John Crowell, 2322-B Horne Drive, Charlotte, North Carolina.

The State offered evidence tending to show that on 1 April 1971 John Crowell lived with his wife at 3320 Barfield Drive, Charlotte, North Carolina, and in addition to his residence rented an apartment, 2322-B Horne Drive, Charlotte, North Carolina. At about 5 p.m. he went to the Horne Drive apartment with two women who stayed at the apartment when he left at 5:45 p.m. Earlier that day he had loaned his wife's wedding rings to one Nathaniel Phifer, and when he left, the rings were in the apartment. Crowell returned to the apartment at about 6:15 p.m. and

found "four or five cars of police," and the defendant was in their custody. Crowell testified:

> "* * * Detective Miller took me out to the car and asked me did I know this fellow and I told them 'No' and they searched him and they come out with my wife's rings.
>
> * * *"

Crowell had not given the defendant permission to enter his apartment.

At about 6:00 p.m. on 1 April 1971, Officers Miller and Swain went to John Crowell's apartment at 2322-B Horne Drive. When they arrived they first talked to a neighbor at 2322-A Horne Drive. The back door of Crowell's apartment was locked. A glass panel in the door was broken and broken glass and a broken bottle were lying outside the door. What appeared to the officer to be blood was on the broken glass and bottle. Officer Miller testified:

> "After I observed the bottle I reached and turned the knob and started to open the door. The door was kicked shut or slammed shut by someone. I stepped back and kicked the door open with my foot. * * * "

When the Officer went inside he saw the defendant walking away from the door. The defendant ran into a bedroom, jumped on a bed, and leaped out a window. Officers Miller and Swain pursued the defendant for 25-30 minutes before he was apprehended. When the defendant was searched, the rings, identified by John Crowell, were found. The defendant's arm was cut.

The defendant's fingerprints were on the bottle and glass found at the back door. The two women taken to and left in the apartment by John Crowell were found in the apartment nude.

The defendant offered no evidence. The jury found the defendant guilty, and from a judgment of imprisonment the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Robert G. Webb for the State.

James J. Caldwell for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the Court's denial of his timely motion for judgment as of nonsuit. Although the evidence in this case reveals a rather bizarre situation, we think it sufficient to require the submission of the case to the jury and to support the verdict.

[2] The defendant contends:

> ". . . (T)he Court erred in denying defendant's motion in arrest of judgment as pronounced in this case because of a material variance in the bill of indictment and the proof of ownership of property alleged stolen."

In *State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100 (1968), it is said:

> "The fact that an indictment charges a defendant with larceny of property from a specified person and the evidence discloses that such person is not the owner but is in lawful possession at the time of the offense, does not render the indictment invalid. There is no fatal variance, since the unlawful taking from the person in lawful custody and control of the property is sufficient to support the charge of larceny. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165."

This assignment of error is not sustained.

We hold the defendant had a fair trial free from prejudicial error.

Judge VAUGHN concurs.

Judge BROCK dissents.

Judge BROCK dissenting.

The State's witness John Crowell left two women in his extra apartment along with his wife's wedding rings. Ostensibly he left them in charge of the apartment and its contents, including his wife's wedding rings. After that he does not know what happened and the State's evidence does not enlighten us. The broken glass bottle and door pane are suspicious circumstances particularly when defendant's prints were found on the

neck of the broken bottle. The legitimate inference from that evidence is that defendant was apparently holding the bottle at the time when it was broken. When viewed with the other circumstances, it seems significant that the glass from the door pane and the bottle were lying on the outside of the door instead of having fallen inward.

It seems significant that the two nude women in the apartment with defendant were making no outcry or protest so far as the evidence discloses. It seems significant that the wedding rings were not picked up by defendant when he ran through the bedroom in an effort to elude the police. The inference from the evidence is that he was in the bedrom with the two nude women at some time before the police arrived and that he acquired possession of the rings in a manner and for a reason not explained. The State did not see fit to call as witnesses the two women who were in position to know what happened.

It seems to me that the more reasonable inference from this evidence is that the two women for some reason invited defendant into the apartment and for some reason allowed defendant to obtain possession of the rings.

The bizarre circumstances created by the extra activities of State's witness John Crowell led one to believe that all was not well with the use of his extra apartment at 2322-B Horne Drive. However, I feel that the State fell short of establishing a *prima facie* case of breaking or unlawfully entering, or of larceny against defendant. It seems to me that defendant's flight through the top sash of the bedroom window and his extended footrace with the police are the most damaging evidence against him. But, they prove nothing except that defendant was up to something that he did not want to discuss with the police.

STATE OF NORTH CAROLINA v. JAMES LEON HARRISON

No. 723SC197

(Filed 24 May 1972)

1. **Criminal Law § 99— questions by trial judge**

The trial judge did not commit prejudicial error in asking that certain questions and answers be repeated because he did not understand them or in questioning witnesses during a *voir dire* hearing in the absence of the jury to determine the admissibility of evidence.

2. **Criminal Law § 84; Searches and Seizures § 2— automobile passenger — standing to object to search**

An automobile passenger had no standing to object to a search of the automobile where the owner and operator of the automobile consented to the search.

3. **Narcotics § 4— possession of heroin — automobile passenger**

The State's evidence was sufficient for the jury in a prosecution for possession of heroin where it tended to show that defendant was riding as a passenger in the back seat of an automobile, that an officer saw defendant's hand partially concealing a brown envelope, that capsules in the envelope contained heroin, that the name of a bank in Richmond, Virginia, was printed on the envelope, that defendant lived in Kinston and in Richmond, Virginia, and that defendant had $750 in his pockets.

APPEAL by defendant from *Rouse, Judge,* 30 August 1971 Session of Superior Court held in CRAVEN County.

Defendant, jointly with Larry D. Atkinson and George Batiste, Jr., was charged in a bill of indictment, proper in form, with the felonious possession of a quantity of heroin. Each of the defendants entered a plea of not guilty and the charges against them were consolidated for trial over the objection of Harrison.

The State's evidence tended to show the following: At about 11:30 p.m. on 8 December 1969, a police officer of the City of New Bern stopped an automobile to make a routine driver's license inspection. The three defendants were in the automobile. Atkinson was driving; Batiste was riding in the right front passenger seat; and defendant Harrison was seated in the right rear seat behind Batiste. Atkinson did not have a driver's license and he was placed under arrest. When the officer observed defendant Harrison, moving about in the back seat, he saw his hand partially concealing a brown en-

velope. The officer told all three men to get out of the car. Defendant Harrison left his coat lying on the back seat and stood at the rear of the car with Atkinson and Batiste. The vehicle was registered in Atkinson's name.

The officer asked Atkinson if he could search the automobile and Atkinson gave his consent. As the officer opened the back door, defendant Harrison said, "Wait, let me get my coat." The officer told Harrison to stand right where he was and that he would get Harrison's coat. When the officer picked up Harrison's coat, he also picked up the brown envelope. The brown envelope contained 95 capsules filled with a white powder substance which upon analysis was found to consist of three to five percent heroin. Each of the defendants denied knowledge of the envelope or its contents.

Printed on the envelope was the wording "Southern Bank and Trust Company, Richmond, Virginia." Atkinson and Batiste lived in Goldsboro; Harrison lived in Kinston and in Richmond, Virginia.

The three defendants were carried to the police station where they were searched. Atkinson and Batiste had "only routine things that one would normally carry in his pockets and a very insignificant amount of money." Harrison had seven hundred and fifty dollars in his pockets; Harrison told the officer that he had won the money gambling.

At the close of the State's evidence, nonsuit was entered as to Batiste and the charges against him were dismissed. Similar motions as to Atkinson and Harrison were denied.

Defendants, Atkinson and Harrison, offered evidence in their own behalf which tended to show the following: During the morning of 8 December 1969, Harrison had approximately one hundred dollars plus another six hundred dollars that his father had sent him in cash to help buy a used car. Harrison went with his uncle and a friend to High Point to buy a car, but was unable to find a suitable one. That night Harrison went to Goldsboro where he shot pool. Atkinson went to the pool room in Goldsboro, as did Batiste, where he saw Harrison shooting pool. Later Harrison offered to buy Atkinson a tank of gas if he would take him home to Kinston. After Batiste agreed to ride along in order that Atkinson would have company on the return trip, Atkinson agreed to take Harrison home. Atkinson drove, Batiste rode in right front

seat, and Harrison rode in the back seat. Before they reached Kinston, Harrison asked Atkinson to take him to New Bern. They stopped in Kinston, where Harrison got out of the car for a few minutes, and then they continued on to New Bern. They had been in New Bern only a short time when they were stopped by the police officer. Neither Atkinson nor Harrison knew anything about the envelope lying on the back seat.

From a verdict of guilty as charged and a judgment imposing an active prison sentence, defendant Harrison appealed. As noted above, the charge against Batiste was dismissed at the close of the State's evidence. The record before us does not reflect the disposition of the charge against Atkinson.

Attorney General Morgan, by Assistant Attorney General Mitchell, for the State.

Robert G. Bowers for the defendant.

BROCK, Judge.

Defendant Harrison objected to the joint trial of the three jointly charged defendants. Defendant concedes that the court has discretionary authority to consolidate or sever cases for trial. In this case, defendant has failed to show an abuse of discretion.

[1] Defendant next assigns as error that the trial judge asked that certain answers and certain questions be repeated because he did not understand them. He also assigns as error that the trial judge questioned the witnesses during the *voir dire* hearing in the absence of the jury to determine the admissibility of evidence. Defendant argues that this testimony was damaging to him and that the repetition tended to accentuate it. We repeat here what was said in *State v. Case,* 11 N.C. App. 203, 180 S.E. 2d 460: "We might concede that it is desirable that no occasion arise which would prompt the trial judge to ask questions of a witness for clarification and understanding of the testimony." Nevertheless, questions by the trial judge do become necessary at times. Defendant has failed to show prejudicial error by the questions asked by the trial judge in this case.

[2] Defendant further assigns as error that the trial court allowed the State to introduce into evidence the envelope found in the automobile and its contents (the capsules containing

heroin). The argument is that defendant Harrison never consented to a search of the car area in which he was seated. The cases cited by defendant are distinguishable because in each of those the accused had standing to object to the search. In this case the accused was merely a passenger in a vehicle which was being operated by its owner. In this case the owner and operator of the automobile consented to the search, and defendant has no standing to object. The envelope and its contents were clearly admissible into evidence.

[3] Finally, defendant assigns as error the failure of the trial judge to grant his motion for nonsuit. In our opinion, the evidence for the State made out a case which was properly submitted to the jury.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. GARFIELD JORDAN

No. 727SC366

(Filed 24 May 1972)

1. Narcotics § 3; Criminal Law § 50— expert testimony — heroin — chain of possession

In this prosecution for selling heroin to an S.B.I. undercover agent, the State's evidence established a sufficient "chain of identity" between the substance the undercover agent testified defendant sold him and the substance which the State's chemist testified he found to contain heroin for the chemist's testimony to be admitted in evidence, notwithstanding there was no showing as to what post office employees may have handled the package while it was in the mails, there being evidence that the package was sealed when placed in the mails and sealed when received by the chemist, and there being no evidence that its contents had in any way been tampered with while in transit.

2. Criminal Law § 51— qualification of experts — finding by court

The qualification of a witness to testify as an expert in a particular field is a matter addressed initially to the sound discretion of the trial court, and the trial court's finding as to whether a witness is qualified as an expert is ordinarily conclusive, and will not be reviewed on appeal unless there is no evidence to support the finding or unless the trial court abused its discretion.

3. Criminal Law § 51— expert witness — findings — supporting evidence

There was ample evidence in this prosecution for unlawful sale of heroin to support the trial court's finding that a State's witness was an expert in the field of chemistry and the identification of narcotic drugs.

APPEAL by defendant from *Cooper, Judge,* November 1971 Criminal Session of Superior Court held in NASH County.

Defendant was indicted for unlawfully selling a narcotic drug, heroin, to an S.B.I. agent. He pleaded not guilty, was found guilty by the jury, and from judgment imposing a prison sentence, appealed.

Attorney General Robert Morgan by Associate Attorney General Henry E. Poole for the State.

Narron, Holdford & Babb by William H. Holdford for defendant appellant.

PARKER, Judge.

[1] Appellant contends that evidence of the result of chemical tests made by the State's chemist in the Raleigh laboratory of the S.B.I. should have been excluded because there was not a sufficient showing of a "chain of identity" between the substance tested and the substance which the S.B.I. undercover agent testified he purchased from defendant in Nash County. The undercover agent testified that on the night of 31 January 1971 he paid defendant $120.00 and received in exchange a Marlboro cigarette pack containing thirty tinfoil packets, each of which contained a white powder which defendant told the agent was a high quality of heroin. The undercover agent testified that on the night he made the purchase he examined the contents of one of the tinfoil packets and observed it was a white powder. He placed his identification mark and the date and time of the purchase on the cigarette pack, and then delivered the marked cigarette pack with the packets inside to S.B.I. Agent Dowdy. Agent Dowdy testified he received the pack from the undercover agent, examined the thirty tinfoil packets with the white powder, placed his initials, the date, and the case file number on the pack, and then placed the pack with its contents in a small brown envelope, which he sealed with tape on which he also put his initials and file number. He then locked the envelope in the trunk of his car.

On the following day he placed the envelope with its contents in a second, larger, envelope, which he sealed with tape on which he also placed his initials and file number, and again locked the entire package in the trunk of his car. Three days later, on 4 February 1971, he mailed the package at the Rocky Mount Post Office by first-class mail to the State Bureau of Investigation, Raleigh, North Carolina and put on the outside of the larger envelope, "Attention: Chemical Laboratory—Evidence." J. M. Dismukes, a chemist employed in the Raleigh laboratory of the S.B.I., testified he received the sealed envelope in the laboratory on 5 February and placed it in a metal file cabinet, to which he had the only key, until he had an opportunity to examine its contents. On examining the contents of the larger envelope he found therein a smaller, sealed, envelope, which contained a cigarette box having thirty foil wrapped packets inside of it. He opened six of these foil packets and performed certain tests on the white powder found therein. These tests showed that the white powder contained the narcotic drug, heroin. He then put all of the packets back into the cigarette box, after marking the six which he had examined to distinguish them from those which he had not looked at. He placed his initials and file number on the box and put it back into the smaller envelope. He sealed the end of the smaller envelope with his initials, the date, and the file number of this case, and returned it to the larger envelope in which he had received it. He also sealed the larger envelope with his initials, the date, and the file number, and gave it to the secretary to return by first-class mail to Agent Dowdy. Agent Dowdy testified he received the sealed package at his post office box in Rocky Mount on 17 February 1971 and that it remained sealed from that date until it was opened in court on the day of the trial. The cigarette pack, the smaller envelope in which it was first placed, and the larger envelope in which it was mailed to Raleigh, were all introduced in evidence.

The State's evidence established a clear "chain of identity" between the substance which the undercover agent testified defendant sold him and the substance which the State's chemist testified he tested and found to contain heroin. Appellant's contention to the contrary, based primarily on the fact that there was no showing as to what post office employees may have handled the package while it was in the mails, is feckless. There was evidence that the package was sealed when placed

in the mails in Rocky Mount and sealed when received by the chemist in Raleigh, and there was no evidence indicating that its contents had been in any way tampered with while in transit.

[2, 3] Appellant's contention that the trial court erred in finding the State's witness, Dismukes, to be an expert in the field of chemistry and the identification of narcotic drugs is also without merit. The qualification of a witness to testify as an expert in a particular field is a matter addressed initially to the sound discretion of the trial court, and the trial court's finding that the witness is, or is not, qualified to testify as an expert is ordinarily conclusive and will not be reviewed on appeal, unless there be no evidence to support the finding or unless the trial court abused its discretion. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; Stansbury, N. C. Evidence 2d, § 133. In the present case there was ample evidence to support the trial court's finding that the witness, Dismukes, was an expert in the field of chemistry and the identification of narcotic drugs.

In the trial and judgment appealed from we find

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE BEE SIMPSON

No. 7226SC329

(Filed 24 May 1972)

1. **Criminal Law § 155.5— failure to docket record in apt time**

Appeal is subject to dismissal where the record on appeal was not docketed within 90 days after the date of the judgment appealed from and no order extending the time for docketing the record on appeal appears in the record. Court of Appeals Rule 5.

2. **Criminal Law § 124— inconsistency in verdict**

It is not required that the verdict be consistent; therefore, a verdict of guilty of a lessor degree of the crime when all the evidence points to the graver crime, or a verdict of guilty of one count and not guilty on another when the same act results in both offenses, will not be disturbed.

3. Larceny § 8— value of stolen property — submission of misdemeanor larceny

Although the only evidence in this larceny prosecution as to the value of the property stolen was the opinion of its owner that it had a fair market value of "about $325.00," the trial court did not err in submitting to the jury an issue of the misdemeanor of larceny of personal property of the value of less than $200.00, since the jury was required to make its own determination as to whether the stolen property had a value of more than $200.00, and in making that determination could properly weigh and consider all of the evidence, including evidence as to the nature of the property stolen.

4. Criminal Law § 115— submission of lesser crime — harmless error

Any error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged is prejudicial to the State and not to the defendant.

APPEAL by defendant from *Copeland, Judge,* 15 November 1971 Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a two-count bill of indictment with (1) the felonious breaking and entering of the dwelling of one Linda Freeman on Sargeant Drive in Charlotte, N. C., and (2) the felonious larceny after having broken into and entered said dwelling of a television set, radio and other particularly described articles of personal property of the value of $350.00. Defendant pleaded not guilty to both charges. The State's evidence showed the following: At some time between 7:30 a.m. and 3:45 p.m. on 24 November 1970, the Freeman dwelling was broken into and the articles of personal property described in the indictment were removed therefrom. At approximately 2:00 p.m. on the same date a Charlotte City Police Officer in a patrol car observed defendant and four other persons get out of an automobile at a parking lot of a shopping center. Defendant opened the trunk of the car and one of the other persons removed what appeared to be a radio from the trunk and took it into a nearby shop. As the patrol car drove up, the defendant closed the trunk, got back in the car, and drove away alone. The other four persons ran. The patrol car followed defendant, stopped him, and arrested him for operating a vehicle with improper equipment. The vehicle was taken to the police station, where defendant consented to its search. The TV set and certain other articles described in the second count of the indictment were found in the trunk and in other parts of the automobile. Linda Freeman

testified that the fair market value of the items missing from her home on 24 November 1970 was about $325.00.

Defendant testified that he had never been to the Freeman dwelling on Sargeant Drive and did not know where it was; that on the morning of 24 November 1970 one Milton McAfee had employed him to transport the articles from an apartment on Dalton Drive; that he understood the apartment was McAfee's sister's and that she was moving; and that he did not suspect the articles had been stolen until just before the police stopped him.

On the charge contained in the first count of the bill of indictment, the jury found defendant not guilty. On the charge contained in the second count, the jury found defendant guilty of larceny of personal property of the value of less than $200.00. Judgment was entered sentencing defendant to prison for a term of two years as a committed youthful offender under Article 3A, Chapter 148, of the General Statutes. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

W. B. Nivens for defendant appellant.

PARKER, Judge.

[1] The judgment appealed from is dated 23 November 1971. The record on appeal was docketed in this Court on 29 February 1972, which was more than ninety days after the date of the judgment. No order extending the time for docketing the record on appeal appears in the record. For failure of appellant to docket the record on appeal within the time allowed by the rules of this Court, this appeal is subject to dismissal. Rule 5, Rules of Practice in the Court of Appeals. *State v. Bennett,* 13 N.C. App. 251, 185 S.E. 2d 7; *State v. Squires,* 1 N.C. App. 199, 160 S.E. 2d 550.

[2-4] Nevertheless, we have carefully examined the record, particularly with reference to the questions raised in appellant's brief, and find no prejudicial error. "It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act

results in both offenses, will not be disturbed." 3 Strong, N. C. Index 2d, Criminal Law, § 124, p. 39. Appellant, nevertheless, strongly contends that the trial court committed prejudicial error in this case when it submitted the issue of misdemeanor larceny to the jury, since the only evidence presented as to the value of the property stolen was the opinion of its owner that it had a fair market value of "about $325.00." However, the jury was required to make its own determination as to whether the stolen property had a value of more than $200.00, *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91, and in making that determination the jury could properly weigh and consider all of the evidence, including the evidence as to the nature of the property stolen. In this case the property involved consisted of ordinary household goods and appliances, and as to such property a jury might properly make a determination of value contrary to the uncontradicted testimony of the State's witness as to her opinion of its value. On the evidence presented in this case, we do not think it was error for the trial court to submit an issue as to misdemeanor larceny. Even if it be considered that the trial court erred in submitting such an issue, the error was prejudicial to the State and not to the defendant. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525; *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364.

Appeal dismissed.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. HOMER BEAVER

No. 7219SC301

(Filed 24 May 1972)

1. Indictment and Warrant § 8— duplicity

Ordinarily an indictment which charges two separate offenses in a single count is bad for duplicity.

2. Indictment and Warrant § 8— duplicity — motion to quash — election by solicitor

When a defendant moves in apt time to quash a warrant on the ground of duplicity, the solicitor may take a *nol pros* as to all the charges except one and then proceed to trial on the one charge, or he may upon motion and leave of the court amend the warrant and state

in separate counts the charges upon which he desires to proceed, provided they were originally set out in the warrant.

3. **Indictment and Warrant § 8— duplicity — refusal to quash — prejudicial error**

The trial court committed prejudicial error in the denial of defendant's motion to quash on the ground of duplicity a warrant charging that defendant assaulted the prosecuting witness by shooting at him with a shotgun and by hitting him with a rock, notwithstanding the court in ruling on the motion indicated that the allegations concerning the rock assault would be treated as surplusage, where the evidence showed two separate assaults and the court charged the jury that it could find defendant guilty if it found that he assaulted the prosecuting witness with a rock and the rock was a deadly weapon, or if it found defendant assaulted the prosecuting witness with a shotgun.

4. **Assault and Battery § 15— refusal to instruct on self-defense**

The trial court erred in refusing to instruct the jury on self-defense in a prosecution for assault with a deadly weapon, a rock, where there was evidence tending to show that at the time defendant threw the rock, he was backing up as the prosecuting witness came toward him swinging a tree limb.

5. **Assault and Battery § 8— self-defense**

In the absence of an intent to kill, a person may fight in his own self-defense to protect himself from bodily harm or offensive physical contact, even though he is not put in actual or apparent danger of death or great bodily harm.

APPEAL by defendant from *Collier, Judge,* 1 November 1971 Session of Superior Court held in RANDOLPH County.

Defendant was convicted in District Court under a warrant charging him with unlawfully and wilfully assaulting Nathan Amos Hunt, Jr. with a deadly weapon, an automatic shotgun, by pointing at the victim and shooting toward him six times scattering shot over the victim's house and premises "and struck left hand with three pound rock injuring left hand."

Defendant appealed to Superior Court.

Prior to entering a plea in Superior Court, defendant moved to quash the warrant contending, among other things, that he could not determine from the wording whether he was being charged with an assault in which he used a rock or an assault in which he used a gun.

The record indicates: "The motion was DENIED, the court ruling that the matters in the warrant with the exception of

the initial charge of assault with a deadly weapon were surplusage." Defendant excepted to this ruling.

Defendant then moved to strike the surplusage from the warrant. This motion was denied and defendant excepted.

Defendant entered a plea of not guilty and the jury returned a verdict of guilty as charged. Defendant appeals from judgment entered upon the verdict imposing an active prison sentence.

Attorney General Morgan by Assistant Attorney General Costen for the State.

H. Wade Yates for defendant appellant.

GRAHAM, Judge.

Defendant contends the court erred in denying his motion to quash the warrant.

At the time the court ruled on defendant's motion to quash, it was impossible to know whether defendant was being charged with a single assault in which he allegedly used both a gun and a rock or two separate assaults. The State's evidence, however, tended to show two separate and distinct assaults.

The first purported assault arose out of an argument that occurred when defendant and a companion exchanged words with the prosecuting witness as they walked along a public road in front of the prosecuting witness's home. At that time, defendant threw a rock which struck and broke the prosecuting witness's thumb as the witness, brandishing a tree limb, started into the street toward defendant and his companion. Defendant left the scene, went to his house, and several minutes later returned with a shotgun. It was at this time that the alleged shooting took place.

[1, 2] Ordinarily an indictment which charges two separate offenses in a single count is bad for duplicity. *State v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; *State v. Lewis,* 185 N.C. 640, 116 S.E. 259. When a defendant moves in apt time to quash the warrant on the ground of duplicity, the solicitor is faced with an election. He may take a *nol pros* as to all of the charges except one and then proceed to trial on the one charge, *State v. Williamson,* 250 N.C. 204, 108 S.E. 2d 443; *State v. Cooper,* 101 N.C.

684, 8 S.E. 134, or he may upon motion and leave of court amend the warrant and state in separate counts the charges upon which he desires to proceed, provided they were originally set out in the warrant. *State v. Williamson, supra.* We are of the opinion that defendant in this case was entitled to have the solicitor elect.

[3] The record indicates that, in ruling on defendant's motion to quash, the court regarded the allegations concerning the rock assault as surplusage. If these allegations had been treated as surplusage throughout the trial, prejudicial error would not likely have occurred. However, the court charged the jury that it could find the defendant guilty if it found that he assaulted the prosecuting witness with a rock and the rock was a deadly weapon, or if it found defendant assaulted the prosecuting witness with a shotgun. The State argues that defendant has not been prejudiced because he was tried and convicted for only one assault; whereas, he could have been tried and convicted for two separate assaults if the charges had been stated in separate counts in the warrant. Assuming for purposes of argument that this is true, we find that prejudicial error nevertheless appears in the charge.

[4] The jury verdict may represent a finding that defendant committed no assault in firing the shotgun, but that he did commit an assault in throwing the rock. (Defendant's evidence tended to indicate that he fired the gun into the air while standing near his own home and that he did not aim the gun in the direction of the prosecuting witness.) While there was no evidence from which the jury could find that defendant was acting in self-defense when he fired the shotgun, there was evidence tending to show that he was legitimately defending himself when he threw the rock. Defendant requested the court to instruct the jury relating to self-defense "in the charge of assault with a deadly weapon, to wit: a rock." This request was refused.

We summarize some of the evidence pertinent to defendant's plea of self-defense with respect to the charge of assault with a rock.

At the time the rock was thrown, defendant was on a public street and was being chased by the prosecuting witness who had a tree limb two and a half feet long. The prosecuting wit-

ness stated: "Yes, I did start chasing him with that limb. Yes, he started running, his feet wouldn't hold him. . . . As to what I was saying to Homer Beaver as I was going after him with that limb in my hand, I told him to hold up. I told him I was going to slap him right up the side of the head with that limb. I would have done it and I will still do it. . . . As to what I meant when I said I was going to put him out of his misery I was not going to kill him. I probably would have knocked him unconscious with that limb, if I had got hold of him. My intentions was shutting up that big mouth of his. In answer to your question 'And you were going to shut it up if you had to kill him or knock him unconscious with that big limb and anything it took to do it?' my answer is 'Anything it took to do it.' "

Defendant's companion testified: "Homer and myself picked up a rock in front of Mrs. Carrico's and we both threw the rock. Whichever one of us hit him, I'd say I threw one as well as he did. At the time we threw the rocks Mr. Hunt was swinging the stick. He was going up the center of the road swinging that stick. Yes sir, he was going in the direction of Homer and me, and swinging the stick."

While there was no specific evidence indicating how close the prosecuting witness got to defendant before defendant threw the rock, there was evidence tending to show that at the time defendant threw the rock, he was backing up as the prosecuting witness came toward him swinging the tree limb.

[5] In the absence of an intent to kill, a person may fight in his own self-defense to protect himself from bodily harm or offensive physical contact, even though he is not put in actual or apparent danger of death or great bodily harm. *State v. Chaney,* 9 N.C. App. 731, 177 S.E. 2d 309. We hold that the evidence required an instruction as to this principle with respect to the charge that defendant committed an assault by use of a rock.

New trial.

Judges MORRIS and VAUGHN concur.

W. G. CLARK, SHERIFF OF CUMBERLAND COUNTY, NORTH CAROLINA; L. E. CUMBEE, JR., WILLIAM J. BARNES, ERNEST W. SHAW, LESLIE C. FLOWERS AND PERRY SMITH v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, W. C. COHOON, CHAIRMAN; HAROLD M. EDWARDS, MEMBER AND LAWRENCE C. ROSE, MEMBER

No. 7210SC176

(Filed 24 May 1972)

Intoxicating Liquor § 2— permit to sell fortified wine — territories which voted against sale of beer and wine

G.S. 18A-57(b) prohibits the issuance under G.S. 18A-38(f) of permits for the sale of fortified wines in certain retail establishments in a territory having ABC stores where the electorate voted against the sale of beer and wine in the territory in a local option election held pursuant to [former] G.S. 18-124 *et seq.*, notwithstanding at the time of the election fortified wines were sold only in ABC stores.

APPEAL by defendant from *Brewer, Judge,* 13 December 1971 Session of Superior Court, held in WAKE County.

Action for injunction to restrain defendant from issuing permits for the sale of wine in Cumberland County. Among other things, plaintiffs alleged, in substance as follows:

On 31 August 1948 an election with respect to the sale of beer and wine was held in Cumberland County pursuant to former G.S. 18-124 *et seq.* The majority of the voters in that election voted against the sale of beer and wine and the sale of beer and wine is therefore unlawful. Despite the vote of the people in that election, defendant has issued permits for the sale of fortified wine to numerous retail outlets in Cumberland County located out of the corporate limits of the City of Fayetteville and is about to issue others. The sale of beer and wine is lawful within the City of Fayetteville by virtue of a special election held on 4 January 1949. Alcoholic Beverage Control Stores are operated in Cumberland County.

Defendant filed a motion to dismiss on the grounds that (1) the court lacks jurisdiction over the subject matter and, (2) the complaint fails to state a claim upon which relief can be granted. The court denied defendant's motion to dismiss and directed defendant to cease and desist from issuing additional permits for the sale of wine in Cumberland County until the cause could be heard on its merits. Defendant appealed.

Clark, Clark, Shaw & Clark by Heman R. Clark and Williford, Person & Canady by N. H. Person for plaintiff appellees.

Attorney General Robert Morgan by Christine Y. Denson, Assistant Attorney General, for defendant appellant.

VAUGHN, Judge.

Effective 1 October 1971, Chapter 18 of the General Statutes was repealed and replaced by Chapter 18A. Reference will be made to sections of former Chapter 18 without repetitiously designating them as "former" sections.

If in the election conducted in Cumberland County in 1948, the vote on the sale of wine had been favorable, the sale of wines as described in the following sections would have been lawful:

"G.S. 18-64. *Definitions.*

* * *

(b) Unfortified wines, as used in this article, shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar and having an alcoholic content of not less than five per centum (5%) and not more than fourteen per centum (14%) of absolute alcohol, the per centum of alcohol to be reckoned by volume, which wine has been approved as to identity, quality and purity by the State Board of Alcoholic Control as provided in this chapter."

* * *

"G.S. 18-99. *Application of other laws; sale of sweet wines; licensing of wholesale distributors.* The provisions of article 3 of this chapter shall apply to fortified wines: Provided, in any county in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell sweet wines for consumption on the premises in hotels and restaurants which have a Grade A rating from the State Board of Health, and it shall be legal to sell said wines in drugstores and grocery stores for off premises consumption; such sales however shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board. For the purpose of this section, sweet wines shall be any wine made by fermentation from grapes, fruits or berries,

to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry, which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume, and approved by the State Board of Alcoholic Control as to identity, quality and purity as provided in this chapter. * * * "

The vote, however, was against the sale of wine. The result of the vote against the sale of wine was that " . . . it shall be unlawful to sell or possess for the purpose of sale . . . any wine of more than three per cent (3%) of alcohol by volume. . . . " G.S. 18-126(b).

Defendant contends that, despite the results of the local option election, it may, as of the effective date of Chapter 18A, issue the permits by virtue of the following:

"G.S. 18A-38(f). In any county or municipality in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell fortified wines for consumption on the premises in hotels and restaurants that have a Grade A rating from the State Board of Health, and it shall be legal to sell said wines in drugstores and grocery stores for off-premises consumption; such sales, however, shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board."

Plaintiffs contend that the above section cannot be held to disturb the result of the local election because Chapter 18A also contains the following:

"G.S. 18A-57(b). Nothing in this Chapter shall require a permit to be issued for any territory where the sale of malt beverages or wine (fortified or unfortified) is prohibited by special legislative act or for any area where the sale or possession for the purpose of sale of malt beverages or wine (fortified or unfortified) is unlawful as a result of a local option election; and this Chapter shall not repeal any special, public-local, or private act prohibiting or regulating the sale of these beverages in any county in this State, or any act authorizing the board of commissioners of any county of this State, or the governing body of any

municipality, in its discretion, to prohibit the sale of malt beverages or wine (fortified or unfortified)."

The thrust of defendant's argument is that under Chapter 18, "fortified" wine was treated as a liquor and could only be sold in Alcoholics Beverage Control Stores and that, since "fortified" wines came in and went out with the vote on liquor stores, G.S. 18A-57(b) does not prohibit the sale of "fortified" wine in a territory where the sale of wine is unlawful as the result of a local option election. We do not agree. The "fortified" wine referred to in that legal decoupage codified as Chapter 18 was defined in the Fortified Wine Control Act of 1941 as " . . . any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume . . . ." G.S. 18-96. Such "fortified" wines could only be sold in Alcoholic Beverage Control Stores. In counties where Alcohol Beverage Control Stores were authorized, "sweet" wines could be sold in certain private establishments. We have hereinbefore set out G.S. 18-99 which defined "sweet wines." Licenses for the sale of such "sweet" wines were, however, not permitted in any area where the sale of wine was unlawful as a result of a local option election.

It is to be observed that to qualify as a "sweet" wine the wine must have been fortified with pure brandy from the same type of grape, fruit or berry contained in the base wine. The required alcoholic content could not be less than 14% nor more than 20%. A "fortified" wine, on the other hand, had no restrictions on the kind of alcoholic fortification and no stated maximum limitation on the alcoholic content.

Chapter 18A redefined "fortified wine" and omits any reference to "sweet wines." In the *Report of the Alcoholic Beverage Study Commission*, p. 5(n. 4), 1 December 1970, to the Governor and the General Assembly, it is said that the proposed act "has combined the terms 'fortified wine' and 'sweet wine' into one term." An examination of the new definition for "fortified wine" discloses little, if any, "combination" of the terms. Instead, the term "sweet wines" was removed from the statute and, as a practical matter, those wines formerly called "sweet wines" are now called "fortified wines." Compare G.S. 18A-2(2) with G.S. 18-99. Moreover, the exclusionary section relied on by plaintiffs,

G.S. 18A-57(b), specifically refers to "fortified or unfortified" wines. The comparable exclusionary section of Chapter 18, G.S. 18-139 made no reference to "fortified" wines.

For the reasons stated the Order from which defendant appealed is affirmed.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. EURSTON IVAN SNEED

No. 722SC217

(Filed 24 May 1972)

1. **Criminal Law §§ 66, 175— identification testimony — voir dire — hearsay — presumption**

   It will be presumed that the trial judge disregarded incompetent hearsay testimony given during a *voir dire* hearing to determine the admissibility of the in-court identification of defendant.

2. **Criminal Law § 66— pre-trial identification — in-court identification — independent origin**

   There was competent, clear and convincing evidence on *voir dire* to support the trial court's findings that the in-court identifications of defendant by a robbery victim and another witness were each of independent origin, based on what they observed during and immediately after the robbery, and did not result from any out-of-court confrontation or from any pre-trial procedure suggestive and conducive to mistaken identification.

3. **Criminal Law § 71— shorthand statement of fact**

   Testimony by a witness who pursued and caught defendant after a robbery, "He was trying to get in a house. When he saw me, he turned around and ran through the yard," *held* competent as a shorthand statement of what he observed as he pursued defendant.

APPEAL by defendant from *Peel, Judge,* 1 November 1971 Session of Superior Court held in BEAUFORT County.

The defendant, Eurston Ivan Sneed, was charged in a bill of indictment, proper in form, with common law robbery. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following: On 11 October 1971 at

approximately 3:30 p.m., Brenda Joyce Boyd was taking a money bag containing $4,401.81 in currency and checks from her place of employment at the Washington Daily News to the North Carolina National Bank in Washington, North Carolina. As Miss Boyd was passing through an alley, the defendant came from behind, knocked her down, grabbed the money bag, and ran.

Hobson Lewis, driving along the street near the alley described by Miss Boyd, heard a woman screaming and saw the defendant running along the street carrying a money bag. Lewis stopped his truck and followed the defendant on foot into the backyard of a house where he saw the defendant crouching in some bushes. When Lewis shouted at him, the defendant ran and Lewis lost sight of him. Seven or eight minutes later he saw the defendant at the police station where he had gone to leave his name as witness.

Theron Hill, working in a warehouse beside the alley where the robbery occurred, heard the screams of Miss Boyd, saw her standing at the edge of the alley and saw the defendant running west on Second Street near the Cottage Service Station. After a chase, he and another man caught the defendant. Later, Hill returned to the area and found the money bag in some bushes near a place where he had seen the defendant during the chase.

About 10 minutes after the robbery, while Miss Boyd was at the Police Station with her employer, Ashley Futrell, reporting the robbery, she saw the defendant and told Mr. Futrell that he was the one who had robbed her.

The defendant testified that on 11 October 1971 after 3:00 p.m., he was walking along Van Norden Street in Washington, North Carolina, when he saw a man approaching with whom he had had some difficulty and who had reportedly said, "He was looking for me." The defendant ran from the man toward Third Street and up Gladden Street and while he was walking along Gladden Street, he was caught and held by Mr. Hill and another man.

Edward Frazier, a witness for the defendant, testified he heard a woman screaming and saw Hill and another man chasing someone other than the defendant.

The jury found the defendant guilty as charged and from a judgment sentencing the defendant as a committed youthful offender for a maximum period of five years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and William B. Ray for the State.

LeRoy Scott for defendant appellant.

HEDRICK, Judge.

[1] The defendant first contends the trial court erred in admitting hearsay evidence in the trial of the case. An examination of the exception upon which this assignment of error is based reveals that the testimony complained of occurred on *voir dire* hearing to determine the admissibility of the in-court identification of the defendant. In a hearing before a judge without a jury the ordinary rules as to the competency of evidence which are applicable in a jury trial are to some extent relaxed, but if incompetent evidence is submitted, the presumption arises that it was disregarded and did not influence the judge's findings. 7 Strong, N. C. Index 2d, Trial § 57. This assignment of error has no merit.

[2] The defendant next contends the Court erred by finding and concluding "that the defendant's constitutional rights were not violated and that the in-court identification was made through and by the out of court identification." The fourteen exceptions upon which this assignment of error is based relate to the findings and conclusions of the trial judge made after a *voir dire* hearing to determine the admissibility of the testimony of Brenda Joyce Boyd and Hobson Lewis identifying the defendant as the perpetrator of the crime charged in the bill of indictment. When the defendant challenged the testimony of Boyd and Lewis, the able trial judge followed precisely the procedure set out by Chief Justice Bobbitt in *State v. Moore* and *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970) by having a *voir dire* hearing in the absence of the jury, where, after hearing the testimony of seven witnesses, including Boyd, Lewis, and the defendant, the Court made detailed findings of fact as to the out of court confrontation between the witnesses and the defendant, and as to what the witnesses observed

during and immediately after the robbery. There was competent, clear, and convincing evidence to support the Court's positive findings that the in-court identification of the defendant Sneed by the witnesses Boyd and Lewis was each of independent origin, based solely on what they observed during and immediately after the robbery, and did not result from any out of court confrontation or from any pre-trial identification procedure suggestive and conducive to mistaken identification. Such findings when supported by competent evidence are conclusive on appellate courts, both State and Federal. *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 183 S.E. 2d 652 (1971); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970). This assignment of error is overruled.

[3] The defendant contends that the Court erred in denying his motion to strike a portion of the testimony of the witness Theron Hill. The testimony complained of was: "He was trying to get in a house. When he saw me, he turned around and ran back through the yard." This testimony came while the witness Hill, who was working in a building next to the alley where the robbery occurred, was describing how he, after hearing the screams of the witness Boyd, pursued and caught the defendant. In his brief defendant asserts: "This certainly appears to be a conclusion on the part of the witness. The witness could not assert with certainty whether the defendant saw him or not and he could only guess that he saw him and he could only speculate that he ran back through the yard because he did see him."

Although the testimony complained of may be in the nature of a conclusion, it is competent as a shorthand statement of what the witness observed as he pursued the defendant. *State v. Bailey*, 4 N.C. App. 407, 167 S.E. 2d 24 (1969); *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21 (1966).

We have reviewed the record and find there was sufficient competent evidence to require the submission of the case to the jury.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

DOYLE P. COOPER v. C. C. MASON, D/B/A C. C. MASON CHRYSLER PLYMOUTH AND PLYMOUTH DIVISION, CHRYSLER MOTORS CORPORATION

No. 7230DC90

(Filed 24 May 1972)

1. **Sales § 13— rescission of contract of sale — privity**

Plaintiff was not entitled to recover from an automobile manufacturer on the theory of rescission of the contract of sale of an automobile purchased from a dealer because there was no privity of contract between plaintiff and the manufacturer.

2. **Sales § 13; Uniform Commercial Code § 20— sale of automobile — rescission — revocation of acceptance — reasonable time**

Plaintiff is not entitled to recover from an automobile dealer under a theory of rescission of the contract of sale of an automobile where plaintiff's evidence establishes that he accepted and used the automobile for seventeen months and 30,000 miles until it was wrecked and at no time rejected it or tendered it to the dealer, the use of an automobile for such time and distance exceeding a reasonable time for revocation of its acceptance. G.S. 25-2-608(2).

3. **Sales § 17; Uniform Commercial Code § 15— breach of warrant of fitness — automobile — insufficiency of evidence**

Plaintiff's evidence was insufficient to support recovery against an automobile manufacturer and an automobile dealer on the theory of breach of implied warranty of fitness where it tended to show that the automobile left the road while rounding a curve at 40 mph and wrecked, that after the accident the left front wheel was off and a cracked wheel bearing retaining ring was found 75 feet from the wrecked automobile, that the automobile had been used for seventeen months and had been driven over 30,000 miles, and that the tires wore out evenly in less than 8,000 miles, there being no evidence that a defect existed at the time of the sale to plaintiff.

APPEAL by defendants from *Alley, District Judge,* 26 October 1970 Civil Session of SWAIN District Court. (Judgment filed 6 August 1971.)

In this action plaintiff seeks to recover for losses allegedly sustained by him on account of a Plymouth automobile manufactured by defendant Chrysler and purchased by plaintiff from defendant Mason. Allegations of the complaint and evidence presented at the nonjury trial are summarized as follows:

On 5 August 1967 plaintiff purchased from defendant Mason a new Plymouth manufactured by defendant Chrysler.

Plaintiff was never satisfied with the performance of the car and on numerous occasions returned the car to defendant Mason for service and correction of certain defects including defective wheel alignment, springs protruding through seat fabric, and leaky carburetor. Plaintiff had to replace the tires several times, never getting more than 8,000 miles per set of tires. On 19 January 1969, seventeen months and over 30,000 miles after the purchase date, the automobile was involved in a single car accident. The automobile was being driven at a speed of about 40 miles per hour going into a right-hand curve and left the road, going off the right side. It was raining and nighttime when the accident occurred. After the accident the left front wheel was off and the next day some 75 feet from the accident plaintiff found a wheel retaining ring that was cracked.

Plaintiff proceeded under two theories—rescission of the contract of sale and breach of warranty of witness for use. In his prayer for relief he asked for $3,175.98 restitution, or, in the alternative, for breach of warranty said amount plus $530.54 for damages resulting from the wrecking of the automobile.

The court found facts as contended by plaintiff and concluded as a matter of law that there were warranties from both defendants running to plaintiff; that any disclaimer of implied warranty for fitness (pleaded by defendants) was unilateral and inconsistent with other warranties made by both defendants; that there was a total failure of consideration running to the plaintiff and that he was entitled to the following: $4,069.36, the purchase price of the car with interest and carrying charges, less its present cash value of $750.00; $760.00 for tires, the entire amount spent on tires by plaintiff; and $920.64 for repairs and storage of the vehicle. From the findings and conclusions of law, and judgment in favor of plaintiff for $5,000.00, the defendants appeal.

Stedman Hines for plaintiff appellee.

Jones, Jones & Key by R. S. Jones, Jr., for defendant appellant Mason.

Hudson, Petree, Stockton, Stockton & Robinson by James H. Kelly and J. Robert Elster for defendant appellant Chrysler Motors Corporation.

BRITT, Judge.

Did the court err in entering judgment in favor of plaintiff? We hold that it did.

[1] First, we discuss plaintiff's theory of rescission of contract. Clearly, plaintiff was not entitled to recover of defendant Chrysler on this theory because there was no privity of contract between plaintiff and defendant Chrysler. Nor do we think plaintiff was entitled to recover of defendant Mason on this theory.

[2] G.S. 25-2-608(2) provides: "Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it." Plaintiff's evidence establishes that he accepted and used the vehicle until it was wrecked and at no time rejected it or tendered it to the seller to effect a rescission. The purchaser waives his right to rescind if, after discovery of the defect or fraud, he ratifies the sale by continuing to use the chattel for his own purposes. *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780 (1960). It would seem that seventeen months and 30,000 miles exceed a *reasonable time for revocation* of the purchase of the automobile under the most liberal interpretations of the term. *Burkhimer v. Furniture Co.*, 12 N.C. App. 254, 182 S.E. 2d 834 (1971); cert. den., 279 N.C. 511, 183 S.E. 2d 686 (1971).

[3] As to plaintiff's warranty action, we need not decide if the written warranty pleaded by defendants and established by the evidence acted as a disclaimer of the implied warranty of fitness pleaded by plaintiff. Suffice to say, plaintiff's warranty action fails for lack of evidence of damages proximately resulting from defects at the time of sale. The evidence showed that after the wreck the left front wheel was broken; that the car had been driven over 30,000 miles; that a wheel bearing retaining ring was found 75 feet from the wrecked car; that tires wore out evenly in less than 8,000 miles and that defendant Mason made several adjustments to the car. In the absence of evidence sufficient to support a finding that a defect existed at the time of sale some seventeen months and 30,000 miles before, defendants were entitled to a dismissal. *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392 (1955). See *Coakley*

v. Motor Co., 11 N.C. App. 636, 182 S.E. 2d 260 (1971), cert. denied, 279 N.C. 393, 183 S.E. 2d 244 (1971) for proximate cause under theory of negligence.

For the reasons stated, the judgment appealed from is

Reversed.

Judges CAMPBELL and GRAHAM concur.

HOBSON CONSTRUCTION COMPANY, INC. v. HOLIDAY INNS, INC.

No. 7228DC269

(Filed 24 May 1972)

1. **Negligence § 2— performance of a contract**

An omission to perform a contractual obligation is not a tort unless such omission is also the omission of a legal duty.

2. **Negligence § 2— performance of contract — insufficiency of evidence of negligence**

Plaintiff's evidence was insufficient to show actionable negligence on the part of defendant in the performance of a contract with a third party where it tended to show that defendant had a contract with a motel to construct a gravity sewer line on the motel's property, that plaintiff had a separate contract with the motel to construct a sewage lift station which would connect with the sewer line constructed by defendant, that defendant did not locate the end of the sewer line at the place and elevation called for in the plans, that the difference in elevation between the sewer line and the lift station prevented their connection in a manner that would allow the gravity sewer line to operate properly, that defendant failed to correct the defects after notice of them, and that plaintiff incurred additional expense in rerouting the sewer line as authorized by the motel's engineer, defendant's duty to plaintiff, arising indirectly out of the contract, being only to keep the premises under its control in a safe condition.

APPEAL by plaintiff from *Allen, District Judge,* 18 October 1971 Non-Jury Civil Session of District Court held in BUNCOMBE County.

Plaintiff and defendant each had a separate contract with West Side Motels, Inc. (hereinafter called Motel) to construct certain improvements on Motel's property. Defendant's con-

tract called for the construction of a gravity sewer line consisting of some 455 feet of eight inch clay pipe. This sewer line was to begin at a manhole on the east side of Motel's property and run in a westerly direction for 355 feet to another manhole. From this manhole the sewer line ran 100 feet in a northwesterly direction. In order for the sewer line to operate properly, the construction plans call for the beginning of the pipe to be at a certain elevation and for the end to be at a specified elevation approximately two feet lower than the beginning. The plans call for this decrease in elevation to be carried out at a constant rate of approximately five inches per 100 feet.

Plaintiff's contract called for the construction of a lift station to receive the sewage and pump it to a pre-existing receiving sewer. Defendant's contract called for his pipeline to end 18 feet from where the lift station would be located and, upon completion of the lift station, plaintiff would connect the two by installing an 18 foot section of eight inch cast iron pipe. At the time plaintiff began work defendant had completed construction of the sewer line. When plaintiff attempted to locate the end of defendant's pipe in order to connect it with the lift station he discovered that the pipe was not where the plans specified that it should be. Instead of being 18 feet from the lift station, plaintiff located the end of the pipe 45 feet from the lift station and 2.28 feet below the elevation called for in the plans. The difference in elevation between the lift station and the sewer line prevented their being joined in a manner which would allow for the proper operation of the gravity sewer line.

According to plaintiff's evidence, he informed defendant of the error in construction of the sewer line but defendant never made any effort to correct the defects. Robert Turner, engineer for Motel who had prepared the plans, was informed of the problem by plaintiff. Shortly thereafter Turner prepared a change order rerouting the sewer line and authorizing plaintiff to carry out the new plan. Plaintiff completed work on the project and, according to his records incurred additional expenses in the amount of $1,981.43 in relocating the sewer line.

Plaintiff instituted this action to recover $1,981.43, plus interest, alleging that this amount represents the damages he

incurred due to defendant's negligence in laying the sewer line. At the close of plaintiff's evidence defendant moved for a directed verdict pursuant to Rule 50, North Carolina Rules of Civil Procedure, for the reason that plaintiff had failed to establish actionable negligence on the part of the defendant. The trial court granted the motion and plaintiff appealed.

Uzzell and DuMont by William E. Greene for plaintiff appellant.

Clarence N. Gilbert for defendant appellee.

VAUGHN, Judge.

[1, 2] Plaintiff contends that the trial court erred in granting defendant's motion for a directed verdict in that the evidence presented was sufficient to show actionable negligence on the part of defendant resulting in damage to the plaintiff. The following language appears in 57 Am. Jur. 2d, Negligence § 32, p. 378:

> "The primary wrong upon which a cause of action for negligence is based consists in the breach of a duty on the part of one person to protect another against injury, the proximate result of which is an injury to the person to whom the duty is owed. These elements of duty, breach, and injury are essentials of actionable negligence. In the absence of any one of them, no cause of action for negligence will lie."

See also, *Mercer v. R.R.*, 154 N.C. 399, 70 S.E. 742. Our Supreme Court has stated that " . . . an omission to perform a contractual obligation is never a tort unless such omission is also the omission of a legal duty." *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82; see also, *Toone v. Adams*, 262 N.C. 403, 137 S.E. 2d 132; *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551. In the instant case, plaintiff and defendant each had a separate and distinct contract with West Side Motel, Inc. There was no contract between plaintiff and defendant, nor can plaintiff assume the status of third party beneficiary to the contract between defendant and West Side. Any duty arising directly out of the contract was owed by defendant to West Side. The duty owed by defendant to plaintiff, arising indirectly out of the contract, was the same duty owed by defendant to all others in the area

of construction, that is, to use due care to keep the premises under his control in a safe condition. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816. The cases cited by plaintiff in support of his contention that defendant's duty was greater than is stated above are readily distinguishable from the case at hand. Under the circumstances of this case, plaintiff's evidence is insufficient to support an action for negligence, and the trial court's judgment allowing defendant's motion for a directed verdict was free from prejudicial error.

Plaintiff further contends that the trial court erred in granting defendant's motion for a directed verdict made pursuant to Rule 50, North Carolina Rules of Civil Procedure, in that the proper motion to challenge the sufficiency of plaintiff's evidence in a non-jury trial is made pursuant to Rule 41(b). Even though defendant's motion was incorrectly designated, the court, in granting the motion, complied with the provisions set forth in Rule 52(a). *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E. 2d 113 (Reversed and remanded on other grounds in 279 N.C. 123, 181 S.E. 2d 438). The trial court's findings of fact, made in compliance with Rule 52(a), were amply supported by the evidence.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES LEE HARRIS

No. 7226SC383

(Filed 24 May 1972)

1. **Criminal Law § 86— cross-examination — prior offenses**

In this prosecution for common law robbery, the solicitor was properly allowed to ask certain questions of the defendant on cross-examination for the purpose of impeaching defendant by showing prior offenses for which defendant had been tried and convicted, there being no indication that the solicitor did not have a legitimate basis for asking the questions excepted to.

2. **Robbery § 5— common law robbery — instructions**

The trial court's instructions on force as an element of common law robbery were sufficient.

State v. Harris

APPEAL by defendant from *McLean, Judge,* 25 January 1972 Schedule "C," Criminal Session, MECKLENBURG County Superior Court.

The defendant was tried under a bill of indictment, proper in form, charging him with the felony of common law robbery of William Neal Cathey on 5 February 1971.

The defendant entered a plea of not guilty. The evidence on behalf of the State would sustain a finding that on 5 February 1971 about 10:30 in the morning, Cathey was a seventy-five-year-old bank messenger employed by First Federal Savings and Loan of Charlotte. He had been employed by First Federal for about thirty-five years. On this morning he was delivering messages to different banks and was on his way back to the First Federal. Just as Cathey reached the First Federal building on South Tryon Street in Charlotte, the defendant came up behind him and grabbed the bank pouch which was under his arm saying, "Hand me the money. Give me the money." Cathey was holding on to the pouch tightly. In the ensuing struggle over the pouch the defendant got in front of Cathey and the pouch or some object struck Cathey in the nose causing it to bleed. Cathey had an opportunity to observe the defendant closely during the struggle. When his nose started bleeding, Cathey turned the pouch loose and the defendant ran across South Tryon Street nearly being hit by an automobile and reached the second block from where the pouch had been snatched. At this point the defendant was apprehended by being tripped and falling to the sidewalk. The defendant got up and started to run again but was again apprehended. Mr. Charles Black, who was parking his automobile at the time, saw the defendant grab the pouch from Cathey, and he and Cathey identified the defendant in court.

The money pouch contained a deposit slip and a $10.00 bill.

The defendant testified in his own behalf and denied that he had ever seen Cathey or had taken anything from him; that he was walking down the street when "two guys" grabbed him and Cathey came down the street and accused him of taking his money which he had not done.

From a verdict of guilty and a prison sentence of ten years, the defendant appealed.

Attorney General Robert Morgan by Staff Attorney Ernest L. Evans for the State.

Jerry W. Whitley for defendant appellant.

CAMPBELL, Judge.

[1] The defendant assigns as error several questions asked the defendant by the Solicitor on cross-examination. The questions asked were for the purpose of impeaching the defendant by showing prior offenses for which the defendant had been tried and convicted. The defendant's answers to these questions indicated that the defendant had been convicted for flimflamming, gambling, larceny by trick, three or four times for possession of heroin, possession of a needle and syringe, and carrying a concealed weapon. The defendant denied having been convicted of other offenses but stated that he had been in jail on several occasions having been mistaken for another James Harris.

The defendant in support of his assignment of error relies upon the case of *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954). The instant case is readily distinguishable from *State v. Phillips.* In the instant case the defendant was being cross-examined with respect to previous convictions. There is no indication that the Solicitor did not have a legitimate basis for asking the questions excepted to. The defendant answered several of those questions affirmatively, and there is nothing to indicate that the Solicitor violated the rules of practice covering cross-examination. The Solicitor was entitled to probe the defendant's past criminal record for the purpose of impeachment. *State v. Jenkins,* 8 N.C. App. 532, 174 S.E. 2d 690 (1970); *State v. Ward,* 9 N.C. App. 684, 177 S.E. 2d 317 (1970), *cert. denied,* 277 N.C. 459 (1971).

[2] The defendant further assigns as error a portion of the Judge's Charge to the jury. The defendant asserts that the trial judge, in instructing the jury concerning the crime of common law robbery, did not require the jury to find that the taking "must be accompanied by violence, intimidation or putting in fear."

When read contextually, we find that the court's instructions to the jury were complete and adequate. The court defined robbery to the jury as "the forcible taking and carrying away

of personal property of another from his person or in his presence without his consent and against his will by fear, force or intimidation with intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it." And again, the court instructed the jury that before the jury would be entitled to return a verdict of guilty, the State was required to prove, "six things beyond a reasonable doubt: (1) That the defendant took the property from the person of Cathey or in his presence, that is, in Cathey's presence; (2) that the defendant carried the property away; (3) that Cathey did not voluntarily consent to the taking and carrying away of the property; (4) that at the time the defendant intended to deprive Cathey of its use permanently; (5) that the defendant knew he was not entitled to take the property; and (6) that the defendant used force or threatened immediate force or the use of force to obtain the property." We think the charge was adequate and sufficient and this assignment of error is overruled.

In the trial of this case we find

No error.

Chief Judge MALLARD and Judge BROCK concur.

AETNA INSURANCE COMPANY v. CARROLL'S TRANSFER, INC., AND WEBSTER R. DANIELS

No. 726SC387

(Filed 24 May 1972)

1. **Rules of Civil Procedure § 20; Parties § 8; Insurance § 75— collision insurer — subrogation — alternate claims against insured and tort-feasor**

Plaintiff collision insurer properly joined in one action alternate claims against the insured and the alleged tort-feasor to recover an amount paid to the insured for damage to his vehicle, where plaintiff alleged that it became subrogated to insured's right of recovery against the tort-feasor, that the tort-feasor or someone in his behalf made payment and full settlement with insured, and that neither the insured nor the tort-feasor has delivered any of the proceeds of settlement to plaintiff or reimbursed plaintiff for the amount paid to the insured. G.S. 1A-1, Rule 20(a).

2. Rules of Civil Procedure §§ 20, 42— motion to sever claims — discretion of court

A motion to sever alternate claims against two defendants is addressed to the discretion of the trial court, and the court's determination thereof is not reviewable on appeal in the absence of abuse of discretion or a showing that the order affects a substantial right of the moving party. G.S. 1A-1, Rules 20(b) and 42(b).

APPEAL by defendant, Carroll's Transfer, Inc., from *Martin (Perry), Judge,* 7 February 1972 Session of Superior Court held in BERTIE County.

Plaintiff, Aetna Insurance Company (Aetna), instituted this civil action in Bertie County against defendant, Webster R. Daniels (Daniels), and against defendant, Carroll's Transfer, Inc., (Carroll). Aetna is a Connecticut corporation authorized to transact business in North Carolina and has its principal North Carolina offices in Mecklenburg County; Carroll is a North Carolina corporation with its registered offices in Bladen County; and Daniels is a citizen and resident of Bertie County, North Carolina.

In its complaint, filed 20 August 1971, Aetna alleges that there was an accident between Daniels (insured under Aetna's collision policy issued to Daniels) and a vehicle owned by Carroll (alleged tort-feasor in the accident); that Aetna paid $8,196.10 to Daniels for the damages to his vehicle under the collision coverage of the policy and that Aetna became subrogated to all of Daniels' rights of recovery against Carroll; that Carroll or someone on its or its agent's behalf made payment and full settlement with Daniels, and that neither Daniels nor Carroll have delivered any of the proceeds of settlement to plaintiff or reimbursed plaintiff for the $8,196.10 paid to Daniels. Therefore, plaintiff, Aetna, seeks to recover $8,196.10 from Carroll as damages to Daniels' vehicle, because of Aetna's payment pursuant to the subrogation clause of its policy with Daniels, or, in the alternative, plaintiff seeks to recover $8,196.10 from Daniels, which holds said sum as trustee for Aetna under the subrogation terms of the policy, if Carroll or someone on its behalf paid Daniels.

On 13 September 1971, prior to the expiration of time for answering, Carroll filed a motion entitled "Motion to Sever and Remove." This motion was heard before Judge Martin on 14 February 1972 and the motion was denied. Carroll gave notice of appeal from the order denying the motion.

Biggs, Meadows and Batts, by Charles B. Winberry, for defendant-appellant.

Battle, Winslow, Scott and Wiley, by Robert L. Spencer, for plaintiff-appellee.

BROCK, Judge.

This is an attempted appeal by defendant-appellant Carroll from a denial of its motion entitled "Motion to Sever and Remove." Carroll contends that the trial court erred in denying its motion to sever because Aetna's two claims, one claim asserted against Carroll and the alternative claim against Daniels, cannot be joined in one civil action. However, Carroll admits that if joinder of the alternative claim is proper, then there is no question that the venue in Bertie County is proper.

G.S. 1A-1, Rule 20(a) specifically allows alternative joinder of defendants. "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and of any question of law or fact common to all parties will arise in the action." G.S. 1A-1, Rule 20(a).

[1] Alternative claims may be joined under G.S. 1A-1, Rule 20(a) if two tests are met. First, each claim must arise out of the same transaction, the same occurrence, or a series of either. In this case, Aetna's alternative claim against the defendants arises out of the alleged transaction between Carroll and Daniels, in that Carroll or someone on its behalf paid a sum of money to Daniels in full settlement of a claim to which Aetna was subrogated. The second test is that each claim must contain a question of law or fact, which will arise, common to all parties. The second test is satisfied in this case, because Aetna's claim for relief arises from a common question of fact—which of the defendants owes plaintiff the $8,196.10. If Carroll or someone on its behalf paid a sum of money to Daniels in full settlement, Daniels has delivered none of the proceeds of the settlement to Aetna. Nor has Carroll paid any money directly to Aetna for the damages to the vehicle of its insured to which claim Aetna is subrogated by its payment to Daniels.

Therefore, the facts alleged in Aetna's complaint support alternative joinder. "The practical occasion for alternative joinder is that created by uncertainty as to which of several parties is entitled to recover or is liable. Obviously uncertainty more frequently exists with respect to the person liable than to the person entitled, hence alternative joinder of defendants is more frequent." 1 McIntosh, N. Car. Pract. & Proc. 2d, § 661.

Although the basic philosophy of the party joinder provisions is to allow relatively unrestricted initial joinder, there are provisions in G.S. 1A-1, Rule 20(b) and G.S. 1A-1, Rule 42(b) for the trial judge to sever and order separate trials.

"Rule 20(b) gives this power [separate trial] to the judge, by authorizing him to order separate trials, or make other orders to prevent a party from being embarrassed, delayed, or put to expense by the joinder of a party . . . . This may be done on motion of either party, and the decision whether to do so rests in the discretion of the trial judge." 1 McIntosh, N. Car. Pract. & Proc. 2d, § 662.

[2] G.S. 1A-1, Rule 42(b) which gives to the trial judge general power to sever, undoubtedly confers the same power contemplated by G.S. 1A-1, Rule 20(b). Whether or not there should be severance rests in the sound discretion of the trial judge. See comment to G.S. 1A-1, Rule 42(b); and 1 McIntosh, N. Car. Pract. & Proc. 2d, § 1341.

The motion to sever was addressed to the discretion of the trial court, and its determination thereof is not reviewable on appeal in the absence of abuse of discretion or of a showing that the order affects a substantial right of the moving party.

In this case, the moving party Carroll has not shown an abuse of discretion nor has it claimed the loss of a substantial right.

Dismissed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. BRUCE LEE ALLEN (CASE NO. 71CR832); BRUCE LEE ALLEN (CASE NO. 71CR833); AND WALTER ALLEN, JR., (CASE NO. 71CR834)

No. 721SC162

(Filed 24 May 1972)

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

Questions which the trial court asked the State's witnesses were for the purpose of clarification and did not constitute an expression of opinion.

2. **Criminal Law § 87— leading questions**

The trial court did not abuse its discretion in permitting the State to ask its witness leading questions where the questions sought to elicit elaboration about matters already mentioned.

3. **Automobiles § 126; Criminal Law § 64; Constitutional Law § 33— breathalyzer test — failure to advise of right to refuse**

Failure of officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evidence, defendant having impliedly consented to the test by operating a motor vehicle on the public highways of the State. G.S. 20-16.2.

4. **Criminal Law § 73— hearsay evidence**

Written or oral evidence is 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 be produced.

5. **Automobiles § 126; Criminal Law §§ 73, 169— hearsay evidence — harmless error**

While the trial court erred in the admission of hearsay testimony by a breathalyzer operator that ampules containing an alcohol sensitive solution used in the breathalyzer test were tested by the S.B.I. laboratory, the admission of such testimony was harmless error where there was extensive testimony on both the procedure for administering the breathalyzer test and on the operator's test of the equipment.

6. **Automobiles § 127— drunken driving — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for drunken driving where it tended to show that when an automobile driven by defendant was stopped by an officer, defendant had a strong odor of alcohol about him and walked with a weave, and that a breathalyzer test indicated a blood alcohol content of .16 percent.

7. **Assault and Battery § 14; Indictment and Warrant § 17— assault on police officer — fatal variance**

There was a fatal variance where an indictment charged that defendant assaulted a police officer while the officer was attempting to arrest defendant for drunken driving, and all the evidence was to the effect that defendant had submitted to the arrest without

resistance some 15 minutes prior to the alleged assault and that the assault occurred while the officer was attempting to arrest a passenger in the vehicle driven by defendant.

8. **Obstructing Justice — arguing with an officer**

The State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt of obstructing an officer while the officer was attempting to arrest defendant's companion for drunken driving, where it tended to show only that defendant was arguing with the officer and protesting the seizure of an unopened bottle of liquor which defendant claimed was his.

9. **Arrest and Bail § 6— resistance of unlawful arrest**

Every person has the right to resist an unlawful arrest and may use such force as reasonably appears to be necessary to prevent the unlawful arrest.

10. **Arrest and Bail § 6— resistance of unlawful arrest**

Defendant did not use an unreasonable amount of force in resisting an unlawful arrest by grabbing the officer's shirt pocket after the officer "took hold" of him.

APPEAL by defendants from *Cohoon, Judge,* at the 27 September 1971 Session of PASQUOTANK Superior Court.

Defendants were tried together on three bills of indictment. The first indictment charged Bruce Lee Allen with driving under the influence of intoxicating liquor (Indictment No. 832). Bruce Lee Allen was charged in a second indictment with assaulting a police officer while the officer was attempting to discharge his duty by arresting Bruce Lee Allen for driving under the influence of intoxicating liquor. (Indictment No. 833). The third indictment contained two counts. The first count charged Walter Allen, Jr., with obstructing a public officer while the officer was attempting to discharge his duty by arresting Bruce Lee Allen. The second count charged Walter Allen, Jr., with assaulting the officer while the officer was attempting to discharge his duty by arresting Bruce Lee Allen for driving under the influence of intoxicating liquor (Indictment No. 834).

The facts disclose that on 8 April 1971 Highway Patrolman Y. Z. Newberry observed an automobile being driven backwards on a city street in Elizabeth City. He stopped the vehicle which was being driven by Bruce Allen. He placed Bruce Allen under arrest, took him to the patrol car and charged him with driving a motor vehicle under the influence of an intoxicating liquor. He asked for the registration of the automobile. Bruce Allen

told him that the passenger in the right rear seat was the owner of the automobile and had the registration for it. The officer went back to the automobile, talked to the passenger on the right rear seat and saw the registration card. The officer then went back to the patrol car to radio headquarters about getting a breathalyzer test. He then made a third trip back to the vehicle in question. This time he was looking for evidence. He found three unopened cans of beer in the front seat. In the rear seat he found two or three cans of beer and an opened, partially consumed, can of beer. Walter Allen was sitting in the left rear seat. Between him and the car door there was a coat and under the coat there was a one-fifth bottle of Seagrams Whiskey with the seal unbroken. The officer took the cans of beer and the unopened whiskey bottle which he said he was going to retain for evidence. Walter Allen insisted that the unopened bottle of whiskey belonged to him and that the officer had no right to take it. They had words over it, and the officer took the whiskey anyway. Walter Allen got out of the car and followed the officer back to the patrol car. He was still insisting that it was his whiskey, and that the officer had no right to take it. Walter Allen then reached to get the whiskey bottle back but was unsuccessful. The officer got out of the car and told Walter Allen that if he did not cease arguing about the whiskey, he would place him under arrest. At that time a city policeman arrived on the scene and took Walter Allen back to the vehicle in question and attempted to pacify him but was unsuccessful. Walter Allen again left the vehicle and went back to the patrol car and again argued with the officer about his bottle of whiskey. At this time the officer took Walter Allen by the arm and told him he was placing him under arrest. Walter Allen then grabbed the patrolman's shirt. The Elizabeth City policeman separated Walter Allen from the patrolman and took him away. Bruce Allen was sitting in the patrol car during this episode. After the patrolman had attempted to arrest Walter Allen and Walter Allen had grabbed his shirt, the patrolman slapped him. Upon this occurrence Bruce Allen got out of the automobile and then committed an assault upon the patrolman for slapping his brother Walter.

At the trial results of a breathalyzer test given Bruce Lee Allen were introduced into evidence over defendant's objection.

The jury returned verdicts of guilty on all charges and judgments were entered on the verdicts.

From the verdicts and judgments, defendants appeal.

Attorney General Robert Morgan by Assistant Attorneys General James E. Magner and Claude W. Harris for the State.

John T. Chaffin for defendant appellants.

CAMPBELL, Judge.

[1] At the trial the court asked a number of questions of the State's witnesses. Defendants assign as error these questions contending that they conveyed the impression that the court had an opinion and was expressing that opinion in violation of G.S. 1-180.

Our examination of the record reveals that the questions asked by the trial court were for the purpose of clarification. We cannot perceive any expression of opinion in these questions. Defendants do not show us how the questions could have expressed an opinion nor do they show us how they were prejudiced by the trial court's questions.

It is sometimes necessary for a trial judge to question a witness, and such questions are proper so long as they are asked with care and in a manner which avoids prejudice to either party. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). The questions by the judge did not indicate an opinion nor did they prejudice the defendants. They served only to clarify the evidence and were therefore proper. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951).

[2] Defendants also contend that the court erred in permitting the State to ask its witness leading questions. The questions to which the exception was taken were for the purpose of eliciting elaboration about matters already mentioned. The questions did not suggest an answer. The court has discretionary power to permit leading questions to be asked and there will be no review of the court's ruling unless an abuse of discretion appears. *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972). There was no abuse of discretion in this case. This assignment of error is overruled.

Defendant Bruce Lee Allen next contends that it was error to admit the results of a breathalyzer test given him shortly after his arrest. Defendant contends that he was not informed

of his right to refuse to take the breathalyzer test and therefore the results of the test should not have been admitted. Defendant also contends that the court erred in permitting the officer who administered the breathalyzer test to testify that the ampules used in the breathalyzer had been tested by the S.B.I. It is contended that this testimony was hearsay.

[3] Defendants' first argument is without merit. Under our statutes anyone who operates a motor vehicle upon the highways of the State is deemed to have given consent to a breathalyzer test. G.S. 20-16.2. This Court has held that under this statute failure to advise a defendant of his right to refuse the breathalyzer test does not render the results of the test inadmissible in court. *State v. McCabe,* 1 N.C. App. 237, 161 S.E. 2d 42 (1968).

Defendants' next assignment of error is to certain testimony by the officer who administered the breathalyzer test. The officer testified that ampules containing an alcohol sensitive solution were used in the breathalyzer. The following questions were then put to the witness by the solicitor and the court:

"Q. Do you know whether or not they are tested at any time after they leave the manufacturer?

A. Yes, sir, they are tested.

Q. Where?

A. By the SBI laboratory.

OBJECTION by Mr. Chaffin.

BY THE COURT: Yes, do you know of your own knowledge?

A. I have a copy of the analysis, they are numbered, the batch; the ampules are numbered and a certain batch of these are sent in to the SBI laboratory and I have an analysis of it."

Defendant contends that the testimony as to where the ampules were tested was hearsay.

[4] 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 be produced. Stansbury, N. C. Evi-

dence, 2d Ed., § 138. Hearsay evidence is not admissible, unless it falls within one of the many exceptions to the hearsay rule.

[5] The witness in this case had no firsthand knowledge of any tests run by the S.B.I. laboratory and the report to which he referred was itself hearsay. We conclude that the testimony was in fact hearsay and should not have been admitted. Reversal will not, however, be granted for mere harmless error in the admission of evidence. In this case there was extensive testimony on both the procedure for administering the breathalyzer test and on the operator's test of the equipment. The defendant could not have been prejudiced in any way by the admission of this testimony. Defendant has failed to show prejudicial error and the ruling of the lower court will not be disturbed.

The defendant next assigns as error the court's charge to the jury on intoxication. We have examined this portion of the charge and find that the trial court gave full and proper instructions to the jury on this question. This assignment of error is overruled.

[6] The defendants next assign as error the denial of their motions for nonsuit as to each charge. An examination of the record reveals that there was sufficient evidence to go to the jury on the charge against Bruce Lee Allen of driving under the influence of intoxicating liquor. The arresting officer stated that Bruce Lee Allen walked with a weave, had a strong odor of alcohol about him and was obviously intoxicated. The breathalyzer test indicated a blood alcohol content of .16 per cent and a content of .10 per cent creates a presumption of intoxication. This evidence, when viewed in the light most favorable to the State, as it must be in ruling on a motion for nonsuit, was sufficient to go to the jury. The court was correct in denying defendant Bruce Lee Allen's motion for nonsuit on the charge of driving under the influence of intoxicating liquor.

[7] A review of the evidence against Bruce Lee Allen on the charge of assaulting an officer leads us to the conclusion that there is a fatal variance between the allegations in the indictment and the evidence. The indictment charges Bruce Lee Allen with assaulting a public officer, "while such officer was discharging and attempting to discharge a duty of his office, to wit: arresting the said Bruce Lee Allen for the offense of driving a motor vehicle while under the influence of intoxicating

liquor. . . ." All the evidence, however, was to the effect that Bruce Lee Allen had been arrested some fifteen minutes earlier. He submitted to the arrest and offered no resistance. Bruce Lee Allen did nothing to interfere with the officer until the officer attempted to arrest Walter Allen and an altercation developed between the officer and Walter Allen. Thus, the alleged assault was committed while the officer was attempting to arrest Walter Allen, not while the officer was attempting to arrest Bruce Lee Allen. The State's evidence did not establish the defendant's guilt as charged. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). *State v. Kimball*, 261 N.C. 582, 135 S.E. 2d 568 (1964). The defendant Bruce Lee Allen's motion for nonsuit should have been allowed as to this charge.

Defendant Walter Allen also moved for a nonsuit at the conclusion of the State's evidence. The indictment against Walter Allen charges him with resisting, delaying and obstructing a public officer while the officer was attempting to arrest Bruce Lee Allen and with assault on a public officer while the officer was attempting to arrest Bruce Lee Allen.

[8] The evidence produced at the trial is that Walter Allen protested that the liquor seized by the officer was his and that the officer had no right to take it. Walter Allen followed the officer back to the patrol car insisting that the officer return the liquor. He made no attempt to interfere with the officer and did not threaten to do so. There was no threat of physical violence. Walter Allen offered no resistance to the officer until he was placed under arrest.

The question is whether Walter Allen's actions up until the time of his arrest constituted the offense of resisting, delaying and obstructing an officer and thereby gave the officer cause to arrest Walter Allen. We hold that they did not.

> "[M]erely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer; . . .
>
> ". . . Vague, intemperate language used without apparent purpose . . . is not sufficient. . . ." 58 Am. Jur. 2d, Obstructing Justice, §§ 12 and 13, pp. 863, 864.

The Supreme Court of the United States has said that:

> "Although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duties, mere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference. . . ." *District of Columbia v. Little,* 339 U.S. 1, 94 L.Ed. 599, 70 S.Ct. 468.

Walter Allen was merely arguing with the officer and protesting the confiscation of his liquor. He had committed no offense and the officer had no authority to arrest him.

The assault alleged in count two of the indictment did not occur until the officer placed his hand on Walter Allen and arrested him. It is contended that since the arrest was illegal, the defendant had a right to resist the arrest.

[9, 10] We have held that the initial arrest was illegal. It is well established that every person has the right to resist an unlawful arrest and he may use such force as reasonably appears to be necessary to prevent the unlawful arrest. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954). See also 5 Am. Jur. 2d, Arrest, § 94. The evidence is that when the officer "took hold" of Walter Allen, Walter grabbed the officer's shirt pocket. The officer slapped Walter Allen who was then subdued by another officer. This is clearly not an unreasonable amount of force to use in resisting the unlawful arrest. It did not exceed that force which appeared to be necessary to resist the restraint. We conclude that Walter Allen was exercising his lawful right to resist an illegal arrest when the affray, out of which these charges arose, occurred.

The motion for nonsuit should have been allowed as to both counts in the indictment against Walter Allen.

Defendants have also assigned as error portions of the charge relating to resisting arrest and assault on an officer. In view of our holding above, it is not necessary to reach these questions.

For the reasons set forth above, the judgment of the court below is

Affirmed on Indictment No. 832, Case No. 71CR832 (Bruce Lee Allen).

Reversed on Indictments Nos. 833 and 834, Cases Nos. 71CR833 and 71CR834 (Bruce Lee Allen) and (Walter Allen, Jr.).

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. KENNETH CAMPBELL

No. 7211SC337

(Filed 24 May 1972)

1. **Narcotics § 4— possession of LSD**

The State's evidence was sufficient to support a jury finding that defendant was in possession of 289 LSD tablets found in a refrigerator in a house occupied by defendant.

2. **Searches and Seizures § 4— search under a warrant — admissibility of seized evidence**

Evidence obtained by a search of defendant's house under a warrant was inadmissible if the warrant was invalid. G.S. 15-27(a).

3. **Searches and Seizures § 3— affidavit for search warrant — insufficiency**

Affidavit of an S.B.I. agent alleging that he "is holding" arrest warrants charging defendant and two other persons who lived in defendant's house with possession and sale of narcotics on various dates during the preceding month, that all three of the persons named "have sold" narcotics to the agent, and that the three persons who live in the house "are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers," *held* insufficient to furnish an adequate basis for the finding of probable cause for the issuance of a warrant to search defendant's house for narcotics, there being nothing in the affidavit to support the conclusion that any of the events referred to occurred on or in connection with the premises to be searched.

Judge BRITT dissenting.

APPEAL by defendant from *Copeland, Judge,* 10 January 1972 Session of Superior Court held in HARNETT County.

Defendant pleaded not guilty to an indictment charging him with unlawful possession of LSD. The State's evidence showed that at approximately 6:00 a.m. on 20 May 1971 SBI Agents, under authority of a search warrant issued the preced-

ing night, searched a residence occupied by defendant and found 289 tablets, identified as LSD, in the freezer compartment of a refrigerator in the kitchen. Defendant offered no evidence. The jury found defendant guilty, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Henry E. Poole for the State.

Woodall, McCormick and Arnold by Edward H. McCormick for defendant appellant.

PARKER, Judge.

[1] The State's evidence, if competent, was sufficient to support a jury finding that the LSD was subject to defendant's dominion and control and was therefore in his possession, and the trial judge correctly denied defendant's motion for nonsuit. *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680. The substantial question raised by this appeal concerns the competency of the State's evidence.

[2] In apt time defendant challenged the validity of the search warrant under which the officers searched his premises and objected to the admission in evidence of the LSD found as a result of the search. The search was made under circumstances which required a search warrant, and unless the warrant was valid, the search was illegal and evidence obtained as a result thereof was not competent at the trial. G.S. 15-27(a); *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684. An "unlawful search is not made lawful because of resulting discoveries." *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753.

The warrant described with reasonable certainty the premises to be searched and the evidence for which the search was to be made, as required by G.S. 15-26(a). It was issued by a district court judge and bore the date and hour of its issuance, 19 May 1971 at 7:30 o'clock p.m., as required by G.S. 15-26(c). The question presented is whether the affidavit upon which it was issued indicates a sufficient basis for the finding of probable cause.

[3] The affidavit, which was signed on 19 May 1971 by a special agent of the SBI, states that the facts which establish probable cause for the issuance of a search warrant are as follows:

"AFFIDAVIT

"Affiant is holding arrest warrants charging Kenneth Campbell with sale of Narcotics on April 16, 1971 and possession of narcotics on April 16, 1971 and April 28, 1971.

Affiant is holding arrest warrants on M. D. Queensberry for sale of narcotics on April 16, 1971, April 28, 1971 and April 29, 1971. Also affiant has four arrest warrants charging Queensberry with four counts of possession of Narcotics.

Affiant is holding arrest warrants charging David Bryan with sale and possession of narcotic drugs on April 1, 1971.

All of the above subjects live in the house across from Ma's Drive-in on Hwy. 55. They all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers.

The house is owned by Macia Walker and leased to Kenneth Campbell who also pays the utility bills."

The SBI agent who signed the affidavit testified at the voir dire hearing which was held to determine the validity of the search warrant that he was the sole witness who appeared before the district judge at the time the search warrant was issued, that other search warrants and arrest warrants were issued at the same time, and that, while he discussed these with the judge, he had no independent recollection of speaking about this warrant. Of necessity, therefore, a finding of probable cause in this case must be based solely upon the allegations in the affidavit. "The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense *will reveal the presence upon the described premises of the objects sought* and that they will aid in the apprehension or conviction of the offender." (Emphasis added.) *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755. In our opinion, the affidavit in the present case does not supply reasonable cause for such a belief.

The statements in the affidavit that affiant "is holding" arrest warrants charging defendant and two other persons who lived in defendant's house with possession or sale of narcotics on various dates in April, 1971, furnish no rational basis for finding probable cause to believe that on 19 May 1971 narcotic drugs would be found in the house. Upon analysis, the statements concerning the arrest warrants amount to no more than statements that some undisclosed issuing officer on dates not stated, upon complaints, the factual basis for which is not revealed, made to him by complainants whose identity and reliability are not indicated, had found probable cause to order the arrest of the persons accused for offenses allegedly committed by them at places not specified on dates ranging from approximately three to seven weeks previous to the date of the affidavit. To translate these statements into a rational basis for finding probable cause to believe that on 19 May 1971 narcotic drugs would be found on the premises sought to be searched in this case simply requires too great a bootstrap operation.

The further statement that all three of the persons named "have sold" narcotics to the special SBI agent furnishes no additional support for the finding of probable cause. The time and place such sales were made is not stated, and for all that the affidavit reveals such sales may have occurred at times remote from the date of the affidavit and at places far distant from the premises to be searched. There remains only the allegation that the three person who live in the house "are all actively involved in drug sales to Campbell College students." Since here the present tense is used, it may be inferred that affiant is here asserting that on the date of the affidavit the three persons were still actively involved in drug sales to Campbell College students, but it is not clear whether this is stated as "known from personal knowledge of affiant" or from "interviews with reliable confidential informants and local police officers." If from the latter, there is nothing in the affidavit from which the judge who issued the search warrant could make his own independent finding crediting the information furnished by the unidentified confidential informants, as is required by the holdings in *Aguilar* and *Spinelli*. Even if there had been, or even if the affidavit be interpreted as stating that the involvement of defendant and the other two persons who lived in his house in sales to Campbell College students was within the personal knowledge

of the affiant in that he had actually observed such sales taking place, nothing in the affidavit suggests that such sales occurred on or were otherwise connected with the premises to be searched.

It is questionable whether any of the facts stated in the affidavit concerned events which were clearly alleged to have occurred at times sufficiently close to the date of the search warrant to justify finding probable cause at that time. See Annot.: "Search warrant: sufficiency of showing as to time of occurrence of facts relied on," 100 ALR 2d 525. We need not decide that question, however, since nothing in the affidavit supports the conclusion that any of the events referred to occurred on or in connection with the premises to be searched. In our opinion the facts stated in the affidavit fail to furnish an adequate basis for the finding of probable cause, which was essential to the validity of the search warrant.

For error committed in overruling defendant's objections to admission of evidence obtained as a result of the search, defendant is entitled to a

New trial.

Judge HEDRICK concurs.

Judge BRITT dissents.

Judge BRITT dissenting:

I respectfully disagree with the holding of the majority that the affidavit upon which the search warrant was issued indicates insufficient basis for the finding of probable cause by the judicial officer issuing the search warrant. Although the affidavit falls far short of being ideal, I think it meets the requirements of G.S. 15-26(b) and the Fourth Amendment to the Federal Constitution.

In *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 637, 89 S.Ct. 584 (1969) Black, Justice, dissenting said, "(I)n my view, this Court's decision in *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964) was bad enough. That decision went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial. . . . But not content with this, the Court today expands Aguilar

to almost unbelievable proportions." Even in *Spinelli,* the zenith of technicality for probable cause to support a search, the Court stated that it does not retreat from the established propositions "that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck v. Ohio,* 379 U.S. 89, 96, 13 L.Ed. 2d 142, 147, 85 S.Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois,* 386 U.S. 300, 311, 18 L.Ed. 2d 62, 70, 87 S.Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, 380 U.S. 102, 108, 13 L.Ed. 2d 684, 688, 85 S.Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States,* 362 U.S. 257, 270-271, 4 L.Ed. 2d 679, 707, 708, 80 S.Ct. 725, 78 ALR 2d 233 (1960)."

If these principles were not retreated from in *Spinelli,* suffice to say they were temporarily lost sight of by the Court. However, in *United States v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 (1971) the Court distinguished *Aguilar* and *Spinelli* with Justice Black and Justice Blackmun concurring, stating that *Spinelli* should not be distinguished but overruled. In *Harris,* the Court held:

> In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965): "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by the nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants

will tend to discourage police officers from submitting their evidence to a judicial officer before acting. 380 US, at 108, 13 L.Ed. 2d at 689.

Quoting further from *Harris,* the court continued:

> The substance of the tip held sufficient in Jones, closely parallels that here held insufficient by the Court of Appeals. Both recount personal and recent* observations by an unidentified informant of criminal activity, factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in Spinelli, supra, in which the affidavit failed to explain how the informant came by his information.

Quoting further from *Harris* we find:

> We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a "legal technician" as Mr. Justice Frankfurter—is not a "practical consideration of everyday life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.

In *State v. Vestal,* 278 N.C. 561, pp. 576-577, 180 S.E. 2d 755 (1971), Justice Lake quoted from *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723, as follows: "[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' * * * and will sustain the judicial determination so long as 'there was substantial basis for [the

*We reject the contention of respondent that the informant's observations were too stale to establish probable cause at the time the warrant was issued. The informant reported having purchased whiskey from respondent "within the past 2 weeks," which could well include purchases up to the date of the affidavit. Moreover, these recent purchases were part of a history of purchases over a two-year period. It was certainly reasonable for a magistrate, concerned only with a balancing of probabilities, to conclude that there was a reasonable basis for a search.

magistrate] to conclude that [the articles searched for] were probably present.' * * * "

Applying *Harris* to the case at bar the following findings are justified: The affiant, a special agent of the State Bureau of Investigation, is holding arrest warrants for the three occupants (including defendant) of the premises to be searched charging them with the sale or possession of narcotics on various days of April 1971. The warrants charge defendant with sale and possession on 16 April 1971 and possession on 28 April 1971. These arrest warrants would of necessity involve the reliability of unnamed magistrates and police officers in securing and issuing the warrants. This information coupled with the personal knowledge of the affiant that all of the subjects live together, all have sold narcotics to a special agent of the SBI (which could involve sales up to the date of the affidavit) and all *are still actively involved in drug sales* to Campbell College students are sufficient for probable cause.

These findings seem to fall squarely within the holding of *United States v. Harris, supra,* and upon such information a magistrate would be reasonably justified in concluding that there was a reasonable basis for a search when he is concerned only with a balancing of probabilities. Further, in the balancing of probabilities the magistrate would be justified, in the reasonable belief upon the information presented to him of the probability that narcotics would be found at the premises where all three subjects resided in light of their extensive dealing with narcotics, even if the sales occurred elsewhere which is not clear from the affidavit.

For the reasons stated, I vote

No error.

STATE OF NORTH CAROLINA v. HAROLD SAMUEL HAIGLER

No. 7219SC381

(Filed 24 May 1972)

1. **Indictment and Warrant § 12— amendment of indictment**

The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor after it has been returned by the grand jury as a true bill.

2. **Indictment and Warrant § 12; Burglary and Unlawful Breakings § 3; Larceny § 4— description of stolen property — amendment of indictment by solicitor**

A bill of indictment for felonious breaking and entering and felonious larceny was not invalidated when the solicitor changed the description of the stolen property in the larceny count from "scrap copper" to "scrap bronze," since bronze is a copper-based alloy, and the change was one of form rather than of substance.

3. **Indictment and Warrant § 12; Burglary and Unlawful Breakings § 3; Larceny § 4— amendment of larceny and receiving counts — effect on breaking and entering count**

Amendment by the solicitor of the description of the stolen property in felonious larceny and receiving counts of an indictment, if error, did not invalidate a count charging felonious breaking and entering, and was not prejudicial where the only sentence imposed was for breaking and entering.

4. **Criminal Law § 158— absence of charge from record — presumption**

When the charge, or the part thereof excepted to, is not brought forward in the record, it is presumed that proper instructions were given to the jury by the trial judge.

APPEAL by defendant from *Collier, Judge,* 13 December 1971 Session of Superior Court held in CABARRUS County.

Defendant, an indigent, was tried upon a warrant charging him with driving while his driver's license was in a state of revocation and upon a bill of indictment charging him with the two felonies of (1) breaking and entering with intent to commit the crime of larceny and (2) larceny of scrap bronze of the value of one hundred dollars after breaking and entering with intent to steal. There was a third charge included in the bill of indictment of receiving stolen scrap bronze of the value of one hundred dollars, knowing it to have been stolen.

There appears in the record the following: "A jury was impaneled and the defendant was tried on the charges alleged in the Bill of Indictment after the solicitor changed the Bill of

Indictment to allege larceny of Bronze instead of copper, without objection by the defendant." From other portions of the record, however, it appears that the charge of receiving stolen goods knowing them to have been stolen was not submitted to the jury.

The defendant offered no evidence, and the evidence for the State is briefly summarized as follows: On 1 February 1971, the date the crimes were alleged to have been committed, police officers of the City of Concord stopped an automobile being operated by the defendant on the public streets thereof about 10:30 p.m. The defendant got out from of the driver's side of the automobile and ran. The defendant's driver's license was at that time in a state of revocation. Another occupant of the automobile, one Jimmy Kee, also ran. Donald Wise, the owner of the automobile, remained in the car and was arrested for public drunkenness. In the trunk of the car was found a large quantity of bronze and a pair of hand trucks put there by Kee and the defendant.

Earlier on the same day Kee and defendant Haigler had brought a barrel full of scrap bronze to the home of Wise and asked him to take it out in the country for them. Kee and defendant Haigler told Wise that they had gone into Foil's Junkyard, a scrap iron and metal business operated by Foil's, Inc., and had taken the scrap bronze. The building at Foil's Junkyard had been broken into and entered by someone pushing out a piece of aluminum that covered one of the windows. Parallel tracks about the same width and size as those of the hand truck led from the junkyard to the home of Wise. The barrel of scrap bronze that was missing from Foil's, Inc., was worth about $285.00.

There was a stipulation that the jury found the defendant not guilty of driving while his driver's license was in a state of revocation, but the following appears in the record:

> "Having been found guilty of the offense of Felonious Breaking & Entering & Felonious Larceny which is a violation of G.S. 14-54 and of the grade of felony
>
> It is ADJUDGED that the defendant be imprisoned for the term of not less than three (3) nor more than five (5) years in the State Prison."

The defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Speas for the State.

Hartsell, Hartsell & Mills by W. Erwin Spainhour for defendant appellant.

MALLARD, Chief Judge.

We are not concerned on this appeal with the charge of driving an automobile while his driver's license was in a state of suspension because the defendant was found not guilty on that charge. Nor are we concerned with the charge of receiving stolen goods knowing them to have been stolen because the judge did not submit that charge to the jury.

The printed copy of the record on appeal does not indicate the fact that the bill of indictment was amended, but a photostatic copy of it filed herein with a "Motion in Arrest of Judgment" does reveal that the typewritten word "copper" describing the property stolen in the second and third counts was stricken out and the word "bronze" was written in by hand and that the initials "JER" (the solicitor's initials) were placed beside the amendment. This amendment changed the description of the property stolen from "scrap copper" to "scrap bronze." The main thrust of defendant's contention and argument is to the amendment to the second and third counts of the bill of indictment by the solicitor.

The courts had no power at common law to amend matters of substance in a bill of indictment. *State v. Sexton,* 10 N.C. 184 (1824); Annot. 17 A.L.R. 3d 1181, § 7; Annot. 14 A.L.R. 3d 1297, § 7; 42 C.J.S., Indictments and Informations, § 230. But some courts, in the absence of a permissive statute, have permitted amendments as to matters of form. Annot. 17 A.L.R. 3d 1181, § 4; Annot. 14 A.L.R. 3d 1297, §§ 8, 9. In the case of *State v. Cody,* 119 N.C. 908, 26 S.E. 252 (1896), the Supreme Court allowed an amendment to stand where it was made at the instance of the defendant in open court. However, in *State v. Dowd,* 201 N.C. 714, 161 S.E. 205 (1931), the defendant made a motion to amend the bill of indictment. The Court, citing *Sexton* and *Cody,* held that it was not error to deny the motion and said, "An indictment duly returned upon oath

cannot usually be amended by the court without the concurrence of the Grand Jury by whom it was found or the consent of the defendant." See also, *State v. Jackson,* 280 N.C. 563, 187 S.E. 2d 27 (1972).

We do not have a general statute in this State allowing amendments to bills of indictment; however, we do have several statutes, among which are G.S. 15-148, 149, 150, 151, 153 and 155, which seem to recognize that needless insistence on refinements, informalities, and technicalities required by the common law should be relaxed.

[1] By making the amendment to the second and third counts in the bill, the solicitor in the case before us was paying little, if any, attention to the well-established principle of law that the substance of a bill of indictment used in a trial may not be amended by the court or the solicitor after it has been returned by the Grand Jury as a true bill. Solicitors will best serve the administration of justice, as well as the expeditious and orderly processes of our courts, by observing approved rules of procedure and by refraining from trying defendants upon amended bills of indictment. By so doing they will thereby eliminate the raising of unnecessary questions as to which amendments are refinements and informalities under G.S. 15-153 and G.S. 15-155, and which are indispensable allegations under our Constitution and general statutory provisions.

The defendant contends that the amending of the bill of indictment, even though he did not object at the time, deprived the court of jurisdiction to try him and denied him his constitutional rights. We do not agree. *State v. Jackson, supra.*

The State argues that by failing to object to the amendment the defendant impliedly consented to it and also that the amendment made by the solicitor related only to form.

It is not necessary for decision in this case to rule on the effect of the failure of the defendant to object to the amendment. See *State v. Cody, supra,* and Annot. 17 A.L.R. 3d 1181, § 9. Furthermore, the defendant is correct in his argument that the description of the property alleged to have been stolen must be of sufficient certainty to enable the jury to say that the article proved to be stolen is the same. *State v. Ingram,* 271 N.C. 538, 157 S.E. 2d 119 (1967). In *State v. Caylor,* 178

N.C. 807, 101 S.E. 627 (1919), a rule with respect to the description of property is stated:

> " * * * The Court, in those cases *(State v. Campbell,* 76 N.C. 261; *State v. Nipper,* 95 N.C. 653; and *State v. Martin,* 82 N.C. 672), says that the former nice distinctions and technical refinements of the common-law courts, when punishments were so severe, have been abolished more recently, and especially by our statute mentioned above, because they frequently defeated the ends of justice. The Court, in *S. v. Campbell, supra,* adds: 'The description must still be in a plain and intelligible manner, and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other forms, etc., when stolen, it must be described by the name by which it is generally known.' *Justice Reade* says, in *S. v. Harris,* 64 N.C., 127, that 'the object of describing property stolen by its quality and quantity, is that it may appear to the Court to be of value. The object of describing it by its usual name, ownership, etc., is to enable the defendant to make his defense, and to protect himself against a second conviction. * * *' "

In the case before us the description in the original bill was "scrap copper."

[2] "Bronze" is described in Webster's Third New International Dictionary (1968) as:

> "1 a: an alloy of copper and tin and sometimes small proportions of other elements (as zinc and phosphorus) that is harder and stronger than brass, is used for a variety of industrial items (as wear plates, bushings, springs, clips, fasteners and chemical hardware) as well as for objects of art and bells, and is prepared from various proportions of the constitutent elements according to the purpose for which it is intended b: any of certain copper-base alloys containing considerably less tin than other alloying elements or no tin at all."

We think, however, that the word "scrap" is the key word, and inasmuch as bronze is a copper-based alloy, we hold that the amendment by the solicitor of the word "copper" to read

"bronze" did not produce a material change in the second and third counts in the bill of indictment so as to vitiate the entire bill. The scrap metal, if it were "bronze," was still a *scrap* metal with a *copper* base; and while the solicitor's act in changing the wording from "copper" to "bronze" is not approved, we think that such a change was more one of form than of substance under the circumstances of this case. It is difficult to percieve how such a change could prejudice the defense on the merits. See Annot. 17 A.L.R. 3d 1181, §§ 12, 13, and 42 C.J.S., Indictments and Informations, § 231.

With respect to the effect of an amendment of one count in a bill of indictment upon another unamended count in the same bill, courts in other states are not in harmony. In 41 Am. Jur. 2d, Indictments and Informations, § 207, p. 1008, it is said:

> " * * * There is authority, particularly in those jurisdictions which adhere to the rule that the court has no power to authorize an amendment of the indictment, which supports the rule that an unauthorized amendment of an indictment invalidates the indictment, whether the amendment goes to matters of form or surplusage or matters of substance, and leaves the court without power to proceed under the amended pleading. Some courts, however, take the view that an unauthorized or invalid amendment should not operate to arrest the power of the court to proceed with the trial of the case, but that the amendment should be regarded as ineffective or the matters introduced thereby treated as surplusage, and the trial should proceed on the original accusation.
>
> It has been held that an unauthorized amendment of one count does not affect the right of the court to proceed with the trial of the defendant on other counts in the indictment or invalidate conviction based thereon, or upset the convictions of codefendants not prejudiced by the amendment."

However, in *State v. Jackson, supra,* while the jury was deliberating, the solicitor moved and was allowed to amend the first count in the bill of indictment, and the court held that "(e)rror, if any, relating solely to the first count is of no avail to defendant since the sentences pronounced by Judge Johnston run concurrently."

[3] In the case before us, there were three separate and distinct counts in the bill of indictment. The solicitor did not change or amend anything in the first count, which charged the defendant with the felony of breaking and entering with intent to steal. That particular count is proper in form and is sufficient, and the amendment by the solicitor of the second and third counts in the bill of indictment did not invalidate the first count. Moreover, if the solicitor had no authority to amend, then the vain attempt to amend the second and third counts did not nullify, destroy or rescind the action of the Grand Jury in returning the first count a true bill, and it was proper to proceed thereon. *State v. Jackson, supra.*

The record states that the jury found the defendant guilty of the offense of "Felonious Breaking & Entering & Felonious Larceny which is a violation of G.S. 14-54 and of the grade of felony." The statute G.S. 14-54 concerns only the crimes of breaking or entering buildings and does not relate to the felony of larceny. Only one prison sentence was imposed and that sentence appears to be on the charge of breaking or entering. The crime of larceny after breaking or entering is punishable as provided in G.S. 14-72. Even if the two counts were consolidated, which the record does not support, there was only one sentence, and it was within the limits provided for punishment for the felony of breaking or entering with intent to steal under G.S. 14-54. Furthermore, no prejudicial error appears, because the record reveals that the defendant was sentenced under the first count, and the amendments to the second and third counts had no effect on the charge on the first count in the bill. *State v. Jackson, supra.*

[4] The full text of the instructions by the trial judge to the jury does not appear in this record. In fact, the portion relating to the doctrine of recent possession, to which the defendant excepts, does not appear in the record at all. When the charge, or the part thereof excepted to, is not brought forward in the record, it is presumed that proper instructions were given to the jury by the trial judge. *State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546 (1971); *State v. Brown,* 226 N.C. 681, 40 S.E. 2d 34 (1946).

There was ample evidence of the guilt of the defendant of breaking or entering with intent to steal, as well as of larceny. The trial judge did not commit error in denying de-

fendant's motion to dismiss and in submitting the case to the jury.

The defendant's motion in arrest of judgment, filed in this court, is denied.

We have considered all of defendant's assignments of error properly brought forward, and in the trial, conviction and sentencing of the defendant, we find no prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. GRADY LONG, JR.

No. 7215SC353

(Filed 24 May 1972)

1. **Narcotics § 2— sale of marijuana — indictment — name of purchaser**

An indictment charging the unlawful sale of marijuana must allege the name of the purchaser or that his name is unknown.

2. **Constitutional Law § 29; Jury § 7— jury list — absence of persons under age 21**

The petit jury which served at the trial of a 20-year-old defendant was not invalidated by the fact that the jury list had not been revised to include the names of persons under 21 years of age. G.S. 9-3.

3. **Grand Jury § 2; Indictment and Warrant § 14— return of fictitious indictments — effect on subsequent indictment**

Improper action of the grand jury in returning two fictitious bills of indictment charging undercover agents with narcotics violations, including the undercover agent who was the principal witness against defendant, did not necessarily taint all processes of that grand jury so as to require as a matter of law that a bill of indictment charging defendant with transportation of marijuana be quashed.

4. **Criminal Law § 88— cross-examination — indictment of friend of defendant**

In a prosecution for transportation of marijuana wherein defendant testified that he spent the night of the alleged crime on a college campus in the room of a student at the college, the trial court committed prejudicial error in permitting the solicitor to elicit on cross-examination of defendant's witnesses testimony that the student with whom defendant spent the night had been indicted on four counts of violating narcotic drug laws.

5. Narcotics § 5— transportation — punishment

The punishment for unlawful transportation of narcotics in violation of the Uniform Narcotic Drug Act was not limited to the confiscation of the vehicle used in such transportation, but in addition a fine or imprisonment, or both, could be interposed as authorized in former G.S. 90-111(a).

APPEAL by defendant from *Hobgood, Judge,* October 1971 Criminal Session of Superior Court held in ALAMANCE County.

On 4 May 1971 the grand jury of Alamance County returned as true bills two bills of indictment charging defendant with violations of the Uniform Narcotic Drug Act, which was then in effect. In Case No. 71CrS4792 defendant was charged with unlawfully selling 23.6 grams of marijuana, and in Case No. 71CrS4793 he was charged with unlawfully transporting 23.6 grams of marijuana in a 1968 Pontiac, license No. FM-9903, registered to Grady B. Long, Sr. In each case the offense was alleged to have been committed on 19 March 1971 in Alamance County. Defendant pleaded not guilty to both charges. The two cases were consolidated for trial.

The State's cases rested upon the testimony of Isaac M. Clontz, alias Vincent Arnold Barnett, an undercover agent, who testified that he met defendant at 9:30 p.m. on 19 March 1971 on the parking lot of the Holly Hill Mall in Alamance County, that defendant drove to the meeting place in the 1968 Pontiac described in the indictment in Case No. 71CrS4793, got out of his car and into the agent's car, and there delivered and sold the marijuana to the agent for the price of $40.00. The substance which the undercover agent said he purchased from defendant was tested by a chemist and found to be marijuana.

Evidence for the defense was in substance as follows: Defendant testified that he never sold any marijuana to the undercover agent at any time, had never possessed any marijuana, had never been convicted of violating any laws relating to narcotics or other drugs, and until the present cases, had not been charged with violating such laws. In March 1971 he was twenty years old, lived with his parents in Burlington, and was awaiting induction into the Air Force. The previous fall he had attended Campbell College at Buie's Creek, N. C., which is approximately 90 miles from Burlington. On 16 March 1971 he left Burlington and went to Campbell College to visit friends. On this trip he thumbed rides because his parents had to have the car. He remained in the area of Campbell College and Buie's

Creek continuously from the time of his arrival on the night of 16 March 1971 until his mother drove the 1968 Pontiac to the College on 20 March 1971, and brought him home to Burlington.

Four friends of defendant, all students at Campbell College, testified to defendant's presence at the College during the period of 16 March to 20 March 1971. Defendant's father testified that the 1968 Pontiac had been in his exclusive possession during the entire day and night of 19 March 1971. Defendant's mother testified that she had driven him out to the interstate highway on the afternoon of 16 March 1971 in order that he might catch a ride to Campbell College, and that on 20 March 1971 she had driven the 1968 Pontiac to the College to pick up her son. There was also evidence for the defense tending to attack the credibility and motivation of the State's witness, Clontz.

The jury found defendant guilty in each case. Judgment was imposed in each case sentencing defendant for a term of three years as a committed youthful offender, the two sentences to run concurrently. Defendant appealed.

Attorney General Robert Morgan by Associate Attorney Ann Reed and Associate Attorney Thomas W. Earnhardt for the State.

Clarence Ross for defendant appellant.

PARKER, Judge.

[1] The indictment in Case No. 71CrS4792 fails to state the name of the person to whom defendant allegedly sold marijuana or that the name of such person is unknown. Lacking either of these allegations, the indictment is fatally defective and cannot sustain the judgment in that case. *State v. Bennett,* 280 N.C. 167, 185 S.E. 2d 147. In fairness to the able trial judge, we point out that *State v. Bennett, supra,* was not decided by our Supreme Court until two months after the trial of the instant case. Since judgment in Case No. 71CrS4792 must be arrested, the remainder of this opinion will deal only with Case No. 71CrS4793 in which defendant was tried and convicted for illegal transportation of marijuana.

[2] Defendant was tried in October 1971, at which time he was 20 years of age. By Chapter 1231 of the 1971 Session

Laws, G.S. 9-3 was amended effective 21 July 1971 so as to make persons 18 years of age and over eligible to serve as jurors. Prior to that amendment a juror was required to be 21 years of age or older. At the time of defendant's trial, the jury list in Alamance County had not been revised to include the names of any persons under 21 years of age. On this ground defendant attacks the validity of the petit jury which served at his trial. A similar attack was made and rejected by our Supreme Court in *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768, decided 12 April 1972. On authority of that case, defendant's assignments of error in which he seeks to question the validity of the petit jury are overruled.

[3] The record reveals that the grand jury in returning the indictment against defendant as a true bill, did so after receiving testimony from only one witness, O. F. Hoggard, a sergeant with the Burlington Police Department. This officer testified at defendant's trial. On cross-examination by defendant's counsel, the officer testified that he had gone before the same grand jury and had induced the return of two sham bills of indictment as true bills. In one of these, "Vincent A. Barnett," whose true name was known to the officer to be Isaac M. Clontz, was charged with violating the narcotic drug act, and in the other, another undercover agent was similarly falsely charged. The accused in the first of these bogus bills of indictment was the same undercover agent who was the principal witness against the defendant. This witness, Clontz, also testified on cross-examination that he had had a conference with the solicitor and with Detective Hoggard, and, to "strengthen" his position as an undercover agent, it had been "arranged" that the witness would be arrested on a charge of violating the narcotic drug laws and would then be released on bond. Officer Hoggard testified he "arranged" for the bondsman to sign this bond and that Clontz, alias Vincent A. Barnett, did not pay any bond premium. He also testified he had revealed Clontz's true name and identity to the grand jury at the time he had obtained the false bill of indictment against "Vincent A. Barnett."

Defendant contends that the foregoing transactions before the grand jury, which came to light only during the course of cross-examination of the State's witnesses, so tainted the processes of the grand jury that his motion in arrest of

judgment should have been allowed. In response, the State's brief contains the following:

> "It is apparent from the record that in seeking the fictitious indictments against the two undercover agents, the State was attempting to protect these agents. The State contends that if undercover agents cannot be given this protection, their efforts in the area of drug abuse will be severely hampered."

Perhaps so, but we would only compound one corruption with another if, in attempting to stamp out drug abuse, we condone practices which can only result in corrupting essential processes of justice. The foreman and members of a grand jury take an oath to "present all things truly." G.S. 11-11. No solicitor or law enforcement officer, whatever his motives, should knowingly induce the grand jury to violate that oath. Such conduct is not condoned.

Nevertheless, while the question raised is a serious one, we have been cited to no authority and our research has disclosed none which holds that the action of a grand jury in knowingly returning a fictitious bill as true against one person, necessarily so taints all processes of that grand jury as to require that other bills returned as true bills charging other defendants with committing other offenses must, as a matter of law, be quashed. We find nothing in the record to suggest that the grand jury acted falsely in returning the true bill against *defendant*. Therefore, we find no error in the trial court's denial of defendant's motion in arrest of judgment.

[4] In the course of testifying concerning his activities during the period from 16 to 20 March 1971, defendant testified he spent the nights of 18 and 19 March 1971 on the campus of Campbell College in the room of a person who was then a student at the College. This person, Don McNamara, did not testify at defendant's trial. On cross-examining two of the college students who did testify for defendant, the solicitor was permitted, over defendant's objections, to bring before the jury the fact that on 24 June 1971 the grand jury in Harnett County had indicted McNamara on four counts of violating narcotic drug laws. Defendant assigns error to the overruling of his objections to this testimony, and this assignment of error must be sustained.

It is now established in North Carolina that, for purposes of impeachment, a witness may not be cross-examined as to whether he has been indicted for a criminal offense, since "an indictment cannot rightly be considered as more than an unproved accusation." *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. (As the record in the present case demonstrates, it is even possible that on occasion an indictment may be no more than a fictitious accusation.) If evidence that McNamara was under indictment for violation of drug laws would not have been competent for purposes of impeaching his credibility had he been a witness, *a fortiori* it was not competent for purposes of impeaching the credibility of defendant or of any other person who did testify at defendant's trial. Still less was it either competent or relevant to prove any material fact bearing upon the issue of defendant's guilt or innocence of the crimes for which he was being tried. Allowing such evidence to be presented to the jury opened up obvious possibilities that some process of finding "guilt by association" may have affected their verdict. We hold that, under the circumstances of this case, defendant suffered prejudicial error when his timely objections to such evidence were overruled, and by reason of this error he is entitled to a new trial.

[5] Defendant has filed in this Court a motion to arrest the active sentence imposed by the trial court in Case No. 71CrS4793. In support of this motion defendant contends that the only punishment which could lawfully be imposed upon a conviction for unlawful transportation of narcotic drugs is confiscation of the vehicle used in such transportation as authorized by former G.S. 90-111.2(b). We do not agree. The Uniform Narcotic Drug Act, formerly contained in Article 5 of Chapter 90 of the General Statutes, was in effect prior to 1 January 1972 and is controlling in this case. Former G.S. 90-111.2(a)(1) made it unlawful to transport any narcotic drug in, upon, or by means of any vehicle, except as authorized in Article 5. Former G.S. 90-111(a) provided that any person violating any provision of Article 5 might be punished by fine or imprisonment, or both. We hold that punishment for unlawful transportation of narcotic drugs was not limited to the confiscation of the vehicle used in such transportation, as defendant contends, but that in addition a fine or

imprisonment, or both, might be imposed as authorized in former G.S. 90-111(a).

The result is:

In Case No. 71CrS4792, the judgment is arrested.

In Case No. 71CrS4793, defendant is granted a new trial.

Judges BRITT and HEDRICK concur.

MRS. ALLIE MAE ROGERS v. THE CITY OF ASHEVILLE

No. 7228DC40

(Filed 24 May 1972)

1. **Municipal Corporations § 14— streets and sidewalks — duty of municipality**

The duty of a municipality to keep its streets and sidewalks in a reasonably safe condition implies the duty of reasonable inspection from time to time, including a duty to inspect manhole covers or any other device forming an integral part of the sidewalk over which pedestrians find it necessary or convenient to pass in the use of the streets.

2. **Municipal Corporations § 14 —streets and sidewalks — duty of municipality**

A municipal corporation is not an insurer of the safety of its streets and sidewalks.

3. **Municipal Corporations § 14— defective water meter cover — negligence — insufficiency of evidence**

Evidence tending to show that plaintiff sustained injuries when she stepped on the metal cover of a water meter built into a municipal sidewalk and the cover tilted and caused her to fall into the meter box, that the inside rim of the cover had rusted and corroded, that no defect was visible from the outside, and that adjacent buildings had been torn down, *is held* insufficient to permit a finding of negligence on the part of the municipality, there being no evidence that the condition of the water meter was in fact a defect, how long it might have existed, whether it might have reasonably caused the fall, or whether the municipality regularly inspected the meters and should have reasonably discovered the alleged defect.

APPEAL by defendant from *Winner, Judge,* 16 August 1971 Session of District Court, BUNCOMBE County.

Plaintiff instituted this action against the City of Asheville for damages for injuries sustained as a result of a fall on a city sidewalk. Plaintiff alleged that the city was negligent in maintaining the lid on a water meter box built into the sidewalk and that as a result of the city's negligence, she was injured when she stepped on the lid which tilted and caused her to fall into the meter box. Plaintiff filed a claim for damages with the city which was denied. She then instituted this action in District Court on 29 October 1970. The city denied any negligence on its part and averred that plaintiff was contributorily negligent in failing to keep a proper lookout to avoid visible dangers. Following a trial without a jury, judgment was entered awarding $1200 in damages for injuries proximately caused by defendant's negligence. Defendant appealed.

James S. Howell for plaintiff appellee.

Williams, Morris and Golding, by J. N. Golding, for defendant appellant.

MORRIS, Judge.

Plaintiff offered evidence which tended to show that on 17 April 1970 at about 9:45 a.m. she and her daughter walked to the courthouse by way of the sidewalk on the south side of College Street. It was misting rain, the sidewalk was wet, and the plaintiff and her daughter were sharing an umbrella. The sidewalk was concrete or cement, approximately eight to ten feet wide, and plaintiff had walked on this particular sidewalk many times before. Plaintiff had previously seen water meter boxes while walking on the sidewalk, but she had never fallen before. Plaintiff testified that "[T]here's a lot of meters along there because the old McIntyre Building had been torn down." On her way to the courthouse, plaintiff walked on or in close proximity to the place where she fell, but she did not notice anything wrong with any of the cement located adjacent to where the lid was. The lid was flush with the surface of the sidewalk, and she did not notice any rust on the surface of the lid. On her return from the courthouse, and as she approached the spot where she was injured, plaintiff did not notice anything unusual about the lid itself. The metal meter cover, approximately a foot to a foot and a half in diameter and made of cast iron, was still lying flush with the sidewalk. When plaintiff

stepped on the lid of the water meter box, it turned without warning, and her right leg went down in the hole full of muddy water. The lid pinned her leg, and she fell to the ground. After she fell, plaintiff then "observed that the lid was rusted and broken off, the rim that holds the lid" and "the rim on the concrete was cracked or broken." Plaintiff testified, "I could not see any rust anywhere on or near or about the lid until after I fell. . . . Before I was injured I at no time saw anything visibly wrong with the water meter lid or any of the sidewalk surrounding it."

The testimony of the plaintiff's daughter substantially corroborated that of her mother. She testified that: "Yes, I observed the cover of the meter box because I couldn't imagine what on earth had happened to her. I noticed that the inside rim had rusted and was corroded—as to the appearance of the rim, it was broken and corroded. . . . No, before my mother fell I did not notice anything wrong with the water meter lid or any of the sidewalk surrounding it."

The plaintiff also introduced evidence of the nature and extent of her injuries which is not pertinent to this appeal. At the close of plaintiff's case, rather than recall a witness, plaintiff's counsel requested a stipulation that the buildings adjacent to the sidewalk where the injury occurred had been torn down for some years. The trial court took judicial notice of that fact, and plaintiff rested. The City of Asheville declined to present any evidence. On appeal defendant excepts to the denial of its motion for involuntary dismissal in a nonjury trial under Rule 41(b) of the Rules of Civil Procedure. G.S. 1A-1.

> "In a nonjury case, in which all issues of fact are in any event to be determined by the judge, the function of the judge on a motion to dismiss under Rule 41(b) is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case." *Bryant v. Kelly*, 10 N.C. App. 208, 213, 178 S.E. 2d 113 (1970), reversed on other grounds 279 N.C. 123, 181 S.E. 2d 438 (1971); *Wells v. Insurance Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971).

In passing upon a motion for a directed verdict under G.S. 1A-1, Rule 50, had this been a jury trial, " . . . all evidence

which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. (Citation omitted.)" *Maness v. Construction Co.*, 10 N.C. App. 592, 595, 179 S.E. 2d 816 (1971), cert. denied 278 N.C. 522 (1971). Thus in this case, an action tried by the court without a jury, the court passed upon the weight and credibility of the plaintiff's evidence as recited above and ruled that the evidence was sufficient as a matter of law to permit recovery. See *Knitting, Inc. v. Yarn Co.*, 11 N.C. App. 162, 180 S.E. 2d 611 (1971). Our study of the evidence, viewed in the light most favorable to the plaintiff, leads us to the conclusion that there was not sufficient evidence of negligence on the part of defendant to establish a right to relief. Therefore, denial of defendant's motion for involuntary dismissal under Rule 41(b) was error.

[1] Plaintiff alleged that the defendant, a municipal corporation, was negligent in failing to maintain a sidewalk in a reasonably safe condition. The duty of a municipality to keep its streets and sidewalks in a reasonably safe condition implies the duty of reasonable inspection from time to time. *Radford v. Asheville, infra;* 5 Strong, N.C. Index 2d, Municipal Corporations, § 14, p. 641. "This duty applies to manhole covers, unloading chutes, coal chutes, or any other device forming an integral part of the sidewalk over which pedestrians find it necessary or convenient to pass in the use of the streets. (Citations omitted.)" *Radford v. Asheville,* 219 N.C. 185, 190, 13 S.E. 2d 256 (1941).

[2] A municipal corporation is not, however, an insurer of the safety of its streets and sidewalks.

> "Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of the defect in the street or sidewalk and the injury: he must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the

> town or city, if its officers should have discovered it in the exercise of due care. This principle is firmly established in our decisions. (Citations omitted.)" *Smith v. Hickory,* 252 N.C. 316, 318, 113 S.E. 2d 557 (1960).

In this case, plaintiff does not contend that defendant had actual notice. She does contend and had the burden of proving that the city had constructive notice of a defect in the water meter lid, i.e., that the defect had existed for such a length of time that the city should have discovered it in the exercise of reasonable inspection. See *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558 (1966).

In a case involving a plaintiff who fell on the unpaved portion of a sidewalk at night our Supreme Court, through Justice Lake, said that:

> "To survive a motion for judgment of nonsuit, the plaintiff must introduce evidence sufficient to support these findings by the jury: (1) She fell and sustained injuries; (2) the proximate cause of the fall was a defect in or condition upon the sidewalk; (3) the defect was of such a nature and extent that a reasonable person, knowing of its existence, should have foreseen that if it continued some person using the sidewalk in a proper manner would be likely to be injured by reason of such condition; (4) the city had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom." *Waters v. Roanoke Rapids,* 270 N.C. 43, 48, 153 S.E. 2d 783 (1967).

The evidence revealed by the record before us is insufficient to meet these requirements.

Several North Carolina cases are factually similar. *Bailey v. Asheville,* 180 N.C. 645, 105 S.E. 326 (1920); *Gasque v. Asheville,* 207 N.C. 821, 178 S.E. 848 (1935); *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799 (1940); *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14 (1960). In *Bailey, supra,* the plaintiff introduced evidence that the water meter box had been in place six to eight months; that an employee read the meter monthly; and the last time the meter was read was five days before the injury. The Court held that the evidence that the cover was insecurely fastened was sufficient to go to the

jury. In *Gasque, supra,* the plaintiff didn't see the meter box cover at night, but there was evidence by several other persons that there was dirt in the flange causing the lid to rest unevenly; that this was the old style of meter that was being replaced; and that the city had meter readers. The Court held that this evidence, coupled with that of a city employee who termed the old style lid unsafe, was sufficient to go to the jury. In *Gettys,* the water meter was in a grass area between the sidewalk and the curb rather than in the sidewalk. There was no evidence that the cap was not properly placed, or that it was otherwise defective in construction or maintenance. Neither was there any evidence that the city had any notice, actual or constructive, of any alleged defect in its condition. The Court held that since *res ipsa loquitur* does not apply, the plaintiff's evidence was insufficient to survive a motion for nonsuit; that the defect, if any, was latent; and that plaintiff failed to show that it was discoverable. In *Faw,* the water meter box was in an alley under the city's control. There the plaintiff introduced evidence of her husband's opinion, based upon his examination shortly after the accident, that the cover didn't fit properly; and the testimony of an experienced plumber who tested the cover and found it to be worn and smaller in size than the rim, and thus not properly fitted. The Supreme Court reversed the trial court which had found insufficient facts to go to the jury.

[3] Plaintiff, in this nonjury trial, relies upon the inferences which may be drawn from her own testimony and that of her daughter to survive a motion by defendant for involuntary dismissal. Absent evidence to the contrary, the rusting away of the underside of a metal water meter cover might exist for a long period of time, even years, without discovery, despite the exercise of reasonable care by the defendant municipality. Plaintiff introduced no lay or expert testimony in an attempt to show that the condition of the water meter lid was in fact a defect, or how long it might have existed, or whether it might have reasonably caused the fall. It would have been a simple task for plaintiff to introduce some evidence to show whether the defendant municipality regularly inspected the meters and if they did, whether they should have reasonably discovered the alleged defect. See 19 McQuillin, Municipal Corporations, 3d ed., §§ 54.109-54.111, pp. 308-327, and 63 C.J.S., Municipal Corporations, §§ 827-831, pp. 166-172. The evidence of the

plaintiff that adjacent buildings had been torn down would perhaps support an inference that certain water meters had been abandoned. However, this inference, standing alone and not supported by any established facts, is insufficient to take this case out of the realm of conjecture and surmise. *Smith v. Hickory, supra.* There is plenary evidence to show that the defect, if any, was not visible to the plaintiff prior to her injury and thus supports the finding that she was not contributorily negligent. However, this evidence just as strongly indicates that the defect was no more visible to the municipality than it was to the plaintiff. Compare *Gower v. Raleigh,* 270 N.C. 149, 153 S.E. 2d 857 (1967).

The evidence of constructive notice, taken in the light most favorable to the plaintiff, was insufficient to permit a finding that the city by reasonable inspection should have known of the alleged latent defect. It follows then that the denial of defendant's motion for involuntary dismissal was erroneous.

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

NINA H. FERGUSON v. JACK MORGAN, D/B/A J. E. MORGAN TRUCKING

No. 7228SC344

(Filed 24 May 1972)

1. **Statutes § 5— construction — purpose**

Where a literal interpretation of the language of a statute will contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the statute will control.

2. **Chattel Mortgages § 10; Registration § 2— security interest in motor vehicle — registration — certificate of title**

Plaintiff's security interest in a motor vehicle was not perfected on the date of delivery to the Department of Motor Vehicles of an application for notation of the security interest on the certificate of title where the security interest was never recorded on the certificate of title, since a security interest is perfected as of the date provided in G.S. 20-58.2 only if the notation of the security interest is actually made on the certificate of title by the Department of Motor Vehicles as provided in G.S. 20-58.1.

Judge BROCK dissenting.

Ferguson v. Morgan

APPEAL by plaintiff from *Thornburg, Judge,* 4 January 1972 Session of Superior Court held in BUNCOMBE County.

This is a civil action wherein plaintiff seeks to be declared the owner and entitled to possession of a 1963 Mack dump truck, heard on motions for summary judgment filed by both plaintiff and defendant.

The following facts are uncontroverted: By deed of trust dated 30 April 1966, Rock Products, Inc., created a lien on a 1963 Mack dump truck, the vehicle in question, in favor of the plaintiff to secure a promissory note for a cash loan actually made by the plaintiff to Rock Products, Inc., in the amount of $82,178.67. Said deed of trust was recorded in the Office of the Register of Deeds of Jackson County, North Carolina, on 15 July 1966 but was never recorded in Buncombe County, North Carolina. The deed of trust included all trucks and other vehicles owned by or in which Rock Products, Inc., had an interest.

By security agreement dated 21 March 1968, Rock Products, Inc., created a lien on said vehicle in favor of The Northwestern Bank in the amount of $6,000.00, which lien was noted as a first lien on the certificate of title to the vehicle.

On 30 March 1970, the plaintiff mailed to the North Carolina Department of Motor Vehicles an application for recording the lien of the deed of trust dated 30 April 1966 on Form MVR-6, which form indicated the make, style, title number, year model and serial number of said vehicle and, in addition to the lien of said deed of trust, indicated a first lien in the amount of $6,000.00 dated 21 March 1968 to The Northwestern Bank. Said form was executed by the registered owner of said vehicle and the application was accompanied by the required fee in the amount of $1.00.

On 31 March 1970, the North Carolina Department of Motor Vehicles received the application for recording a lien from plaintiff. On this date the certificate of title to the vehicle in question was in the possession of Northwestern Bank, the prior lienholder. Plaintiff's security interest in the vehicle in question has never been recorded on the certificate of title.

Pursuant to execution issued on February 26, 1970, in the case entitled *"The Northwestern Bank v. Rock Products,*

Inc. and United Bonding Co.", the Sheriff of Buncombe County seized the vehicle on 15 April 1970 and sold the vehicle to the defendant on 25 May 1970. Thomas H. Ferguson, Secretary of Rock Products, Inc., was present at the execution sale and notified each and every person at said sale of plaintiff's security interest in the vehicle. After said sale on 25 May 1970, the North Carolina Department of Motor Vehicles issued a certificate of title for said vehicle to the defendant and such certificate is presently issued in his name. Plaintiff's security interest has not been recorded on the certificate of title for said vehicle to this date. Rock Products, Inc., defaulted in the payment of the note evidencing the indebtedness to the plaintiff, and on 7 August 1970 the substitute trustee in the deed of trust securing the note to plaintiff sold the vehicle to the plaintiff for $3,200, subject to the lien of The Northwestern Bank created by the security agreement dated 21 March 1968.

Based on the uncontroverted facts, the court made the following conclusions of law:

"1. That the Plaintiff has failed to perfect her security interest on the Certificate of Title to the motor vehicle described in the Complaint by the required endorsement and has failed to comply with the mandatory provisions of North Carolina General Statutes Secs. 20-58, *et seq.*

2. That the Plaintiff has no perfected security interest.

3. That at the time of the sale on May 25, 1970 there was no notice of Plaintiff's security interest to the Defendant recorded on the Certificate of Title to said vehicle.

4. That the Defendant is the owner of said vehicle and is entitled to the possession thereof."

From a judgment declaring the defendant the owner and entitled to possession of the 1963 Mack dump truck, the plaintiff appealed.

Hendon & Carson by George Ward Hendon for plaintiff appellant.

Wade Hall for defendant appellee.

HEDRICK, Judge.

The sole question presented on this appeal is whether plaintiff had a perfected security interest in the 1963 Mack

dump truck prior to the levy and sale thereof by the Sheriff of Buncombe County to the defendant.

The North Carolina statutes relating to the perfection of a security interest in motor vehicles requiring certificates of title, rewritten in 1969 so as to make them conform to the Uniform Commercial Code, were first enacted as Chapter 835, S.L. 1961, and "revolutionized the laws of this State as they relate to chattel mortgages on property for which it is necessary to have a certificate of title." *Trust Co. v. Finance Co.*, 262 N.C. 711, 138 S.E. 2d 481 (1964). The preamble to Chapter 835, S.L. 1961, states:

> " 'WHEREAS, the present motor vehicle certificate of title law provides for a declaration of all existing liens at the time of application for registration, but does not require that liens given thereafter be declared and entered on the certificate of title; and
>
> WHEREAS, the certificate of title, often regarded as absolute, is not conclusive as to liens and may not be relied upon to show good title for purpose of sale or encumbrance, except as it relates to lien perfection under Section 213 of the Interstate Commerce Act; that is, liens on equipment of interstate common and contract carriers; and
>
> WHEREAS, the present certificate of title law does not meet the requisites of the Uniform Title Code because the certificate of title is not in and of itself adequate notice to third parties of existing liens; and
>
> WHEREAS, a certificate of title can be relied upon as a ready means by which all legal interests in motor vehicles may be determined would be to the public interest.' " *Trust Co. v. Finance Co., supra.*

G.S. 20-58, in pertinent part, provides:

> *"Perfection by indication of security interest on certificate of title.*—Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.
>
> * * *
>
> (2) If the vehicle is registered in this State, the application for notation of a security interest shall be

in the form prescribed by the Department, signed by the debtor, and containing the amount, date and nature of the security agreement, and the name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless it is in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition, contain the name and address of such prior secured party.

G.S. 20-58.1 provides:

"*Duty of the Department upon receipt of application for notation of security interest.*—(a) Upon receipt of an application for notation of security interest, the required fee and accompanying documents required by G.S. 20-58, the Department, if it finds the application and accompanying documents in order, shall either endorse upon the certificate of title or issue a new certificate of title containing, the name and address of each secured party, the amount of each security interest, and the date of perfection of each security interest as determined by the Department. The Department shall deliver or mail the certificate to the first secured party named in it and shall also notify the new secured party that his security interest has been noted upon the certificate of title.

(b) If the certificate of title is in the possession of some prior secured party, the Department, when satisfied that the application is in order, shall procure the certificate of title from the secured party in whose possession it is being held, for the sole purpose of noting the new security interest. Upon request of the Department, a secured party in possession of a certificate of title shall forthwith deliver or mail the certificate of title to the Department. Such delivery of the certificate does not affect the rights of any secured party under his security agreement."

G.S. 20-58.2 provides:

"*Date of perfection.*—If the application for notation of security interest with the required fee is delivered to the

Department within ten days after the date of the security agreement, the security interest is perfected as of that date. Otherwise, the security interest is perfected as of the date of delivery of the application to the Department."

Plaintiff contends her security interest in the motor vehicle in question was perfected on 31 March 1970, the date the application for the notation of her security interest on the certificate of title was delivered to the Department of Motor Vehicles. We do not agree.

[1, 2] Where a literal interpretation of the language of a statute will contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control. *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 162 S.E. 2d 363 (1968). The manifest purpose of G.S. 20-58 *et seq.* is to provide notice by recording the security interest on the certificate of title. Obviously, there would be no notice as contemplated by the statute, if the security interest was not actually put on the title certificate as provided by G.S. 20-58.1. When these statutes are considered together, we think it is clear that the security interest would be perfected as of the date provided in G.S. 20-58.2 only if the notation of the security interest is actually made on the certificate of title by the Department as provided in G.S. 20-58.1. Thus, in the present case, since the security interest claimed by the plaintiff has never actually been recorded on the certificate of title, we hold that she never had a perfected security interest on the Mack truck in question, and the trial court's ruling declaring the defendant the owner and entitled to possession of the truck is correct.

The order appealed from is affirmed.

Affirmed.

Judge VAUGHN concurs.

Judge BROCK dissents.

Judge BROCK dissenting.

In my view the majority opinion completely ignores the intent of G.S. 20-58.2, which provides that the security inter-

est is perfected as of the date of delivery of the application to the Department of Motor Vehicles, when not made within ten days of the date of the security agreement.

The trial judge found as a fact that plaintiff held a security agreement dated 30 April 1966; that on 30 March 1970, she forwarded to the Department of Motor Vehicles by mail an application to record her lien with the required fee, and gave the information required by G.S. 20-58(2); and that the Department received the application on 31 March 1970. The trial judge further found that the sheriff of Buncombe seized the vehicle in question under levy of execution on either 14 or 15 April 1970. Therefore, according to G.S. 20-58.2, plaintiff's security interest was perfected some fifteen days before the sheriff made his levy.

It is also interesting to note that the trial judge found as a fact that defendant was advised, at the time of the sheriff's execution sale of the vehicle on 25 May 1970, that plaintiff claimed a lien on the vehicle in question. In spite of this, defendant chose to ignore plaintiff's claim and the warning.

In my view, the trial judge was in error when he concluded that plaintiff has failed to perfect her security interest, and has failed to comply with G.S. 20-58, et seq.

I vote to reverse.

STATE OF NORTH CAROLINA v. HENRY TUDOR

No. 7215SC340

(Filed 24 May 1972)

1. Indictment and Warrant § 14— motion to quash — absence of "x" marks beside names of witnesses

Defendant's motion to quash the indictment on the ground that the indictment does not indicate "x" marks beside the names of the witnesses was properly denied by the trial court, since the requirement of G.S. 9-25 that the foreman of the grand jury mark on the bill the names of the witnesses sworn and examined by the grand jury is directory and not mandatory, and the mere absence of such endorsement is not sufficient to overcome the presumption of validity of the indictment arising from its return by the grand jury as a true bill.

2. **Criminal Law § 169— admission of testimony — similar testimony elicited by appellant**

The admission of testimony over objection is harmless where defendant elicits similar testimony on cross-examination.

3. **Robbery § 4— common law robbery — sufficiency of evidence**

The evidence was sufficient to support a jury verdict finding defendant guilty of common law robbery where it tended to show that defendant and a companion told the 75-year-old victim that they would give him a ride home, that they drove him around the countryside for an hour or two, during which time they drank beer, joked about guns and told the victim they had a gun, and that defendant's companion told the victim, "this is a hold-up," and took $20 from the victim's wallet.

4. **Criminal Law § 122— additional instructions after retirement of jury**

Statements by the trial judge, in giving the jury further instructions after they had begun their deliberations, that it was necessary for him to leave early because of a previous engagement some 120 miles away, and that "I am going to have to let you go home and come back here in the morning and resume your deliberations on this case unless you think you can finish it in 5 minutes," *held* not to constitute prejudicial error where the judge also twice told the jury that he was in no hurry, and it does not appear that the jury was rushed by the "5 minutes" admonition because they thereafter deliberated for 27 minutes before returning a verdict.

APPEAL by defendant from *Hobgood, Judge,* 6 December 1971 Session of ORANGE Superior Court.

Defendant was charged with armed robbery in one indictment and with breaking and entering and larceny in another indictment. The jury returned a verdict of guilty of common law robbery. From judgment imprisoning defendant for not less than seven nor more than ten years, he appealed.

Attorney General Robert Morgan by Associate Attorney Thomas E. Kane for the State.

Norman E. Williams and Charles Darsie for defendant appellant.

BRITT, Judge.

The evidence presented at trial by the State tended to show: Alexander Preston, the operator of Jeff's Campus Confectionary in Chapel Hill, asked defendant and Dennis Andrews, two patrons of the store, to give him a ride home. Instead of taking Preston home defendant drove him around the country-

side for an hour or two, purchased some beer, allowed the car to slide into a ditch, and had the car pulled out before returning Preston to a parking lot near the rear of the confectionary. During this time defendant and Andrews joked about guns and made out like they had a gun; Andrews then told Preston, "this is a hold-up" and took twenty dollars from Preston's wallet. Andrews then demanded the key to the confectionary and when Preston hestitated, defendant tried to choke Preston with a towel forcing him to give the key to Andrews. Defendant kept Preston in the car while Andrews went into the store. After about twenty minutes defendant and Preston went to find Andrews. They entered the store and found that Andrews had filled his pockets with money; defendant told Andrews he was returning to the car whereupon when defendant and Preston walked outside Preston ducked into a theater and yelled for the police. Defendant and Andrews ran.

Defendant testified that he rode Preston around with Andrews and waited in the car while Andrews went to get some beer; that a little later they went to check on Andrews and when Preston saw Andrews taking money from the confectionary started yelling, "it's a hold-up." Defendant ran and later turned himself in to the police. Defendant claimed he had no knowledge that Andrews had the key to the confectionary.

[1] Defendant assigns as error the failure of the court to allow his motion to quash the indictment charging him with armed robbery because the indictment does not indicate "x" marks beside the names of the witnesses. Defendant contends that this shows that no competent evidence was presented to the grand jury. We do not agree with this contention. The provisions of G.S. 9-25 that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the grand jury are directory and not mandatory, *State v. Mitchell,* 260 N.C. 235, 132 S.E. 2d 481 (1963), and the mere absence of such an endorsement is not sufficient to overcome the presumption of validity of the indictment arising from its return by the grand jury as "a true bill."

[2] Defendant next assigns as error the admission into evidence of the testimony of Alexander Preston pertaining to the trial of Dennis Andrews. Mr. Preston testified that Andrews pleaded guilty at his trial. Assuming *arguendo* that this testi-

mony was improper defendant waived his objection to the testimony. On recross-examination, defense counsel asked Preston, "Dennis Andrews pleaded guilty, did he not?" to which Preston replied, "Yes, he did." The admission of testimony over objection is harmless where the defendant elicits similar testimony on cross-examination. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967); *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264 (1954).

[3] Defendant contends that the court erred in signing the judgment for that the evidence does not support the verdict. Specifically, defendant contends that the victim was not intimidated, placed in fear or subjected to any force. In *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965) the court stated: "Generally, the element of force in the offense of robbery may be actual or constructive . . . . Under constructive forces are included 'all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . . No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.'" (Citations.) We hold that the evidence here of two much younger men taking a 75 year old man on a wild ride, while drinking and joking about having a gun and then stating that this was a hold-up before taking twenty dollars from his wallet was plenary to survive the motions for nonsuit as to common law robbery and to support the verdict.

[4] Defendant assigns as error the following instruction to the jury:

> "Let me tell you this. I have heretofore for a month planned to leave here today at 4 o'clock because of an engagement I have, and it is necessary for me to travel. That engagement is at 6:30. It is necessary for me to travel a hundred 20 miles between now and then. So I regret it, but I am going to have to let you go home and come back here in the morning and resume your deliberations on this case unless you think you can finish it in 5 minutes.

I am in no hurry whatsoever. You go back. I am in no hurry whatsoever. We can come back in the morning."

Defendant contends that the quoted instruction amounted to commenting on the evidence and influenced the jury to hurry in their deliberations which resulted in a hasty and inconsistent verdict. We do not agree with this contention.

The record discloses that the jury received the case at 2:43 p.m. and returned to the courtroom at 3:15 p.m. for further instructions. After the trial judge provided additional brief instructions he made the comments above quoted. The jury then retired at 3:23 p.m. and returned to the courtroom at 3:50 p.m. with their verdict.

Certainly we do not condone anything that has the appearance of rushing a jury to a verdict but we fail to perceive in this instance any detrimental effect the judge's words might have had upon the jury. We think the judge was merely informing the jury in advance why he might be calling them back a short while later. Furthermore, it does not appear that the jury was rushed by the "5 minutes" admonition because without further instructions from the court they stayed out for twenty-seven minutes and returned at 3:50 p.m. with their verdict. Assuming, *arguendo,* that the court erred, we do not perceive any prejudice.

Finally, defendant assigns as error certain portions of the jury charge. Suffice to say we have carefully reviewed the entire charge and considering it contextually as a whole, we find it free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

ALTON LEE JARMAN v. BETTY DAWSON JARMAN (NOW BETTY DAWSON JARMAN KELTZ)

No. 723DC365

(Filed 24 May 1972)

1. **Appeal and Error § 26— exception to the judgment**

An exception to a child custody order presents for review the questions of whether the findings of fact support the order and whether error of law appears on the face of the record.

2. **Divorce and Alimony § 24— child custody — sufficiency of findings**

The trial court's findings support its conclusion that the best interest of a child required that she remain in the custody of her father, who was assisted in caring for the child by the paternal grandmother, notwithstanding the court also found that the mother had established a home with facilities satisfactory for the child since she consented to the original order awarding custody of the child to the father.

3. **Appeal and Error § 57— failure to except to evidence or findings — presumption**

Where no exceptions were taken to the admission of evidence or to the findings of fact, the facts found are presumed to be supported by the evidence.

APPEAL by defendant from *Phillips, District Judge,* 1 October 1971 Session of District Court held in CRAVEN County.

This is a civil action instituted on 30 May 1969 wherein plaintiff sought an order for custody of his minor child Angela Dawn Jarman born 8 October 1965. On 4 June 1969 District Judge Wheeler entered an order, consented to by both plaintiff and defendant, awarding the general care, custody and control of the minor child to the plaintiff with reasonable visitation privileges to the defendant. On 25 June 1971 a motion seeking an order for custody of Angela Dawn Jarman was forwarded by defendant's counsel to plaintiff's counsel.

Pursuant to notice served 21 September 1971 this motion came on for hearing at the 1 October 1971 Session of District Court held in Craven County where Judge Phillips made the following pertinent findings and conclusions:

> " . . . (T)he defendant has exhibited very little interest in her daughter since August, 1968, and the present time, and has not visited with her since September, 1969.
>
> That both prior and subsequent to the Order dated June 4, 1969, awarding custody of the child to the plaintiff,

Alton Lee Jarman, the Court finds as a fact that the plaintiff, the father of the said child, has made very suitable arrangements with the maternal (sic) grandmother of the said child to assist him in looking after the needs of the said child and in taking care of the said child while the plaintiff works and that the said child is now being reared in a wholesome and proper atmosphere, is now enrolled in the first grade of public school and for the prior two years has been enrolled in kindergarten under the supervision of plaintiff's mother, Mrs. Guy Jarman. . . .

That the child in all respects is properly cared for and supervised and given ample opportunity for association with children her own age; that the said child is active in religious training and is happy; that her father is presently working as a railroad employee in and out of Alexandria, Virginia, and furnishes adequate support for the said child's wants and needs . . . . (T)he plaintiff's mother was in Court and has indicated a continued willingness to assist her son, the plaintiff, in looking after the needs of the said child. . . . (T)he plaintiff's mother, Mrs. Guy Jarman, is active in church, is in good health and is in every way willing and capable of assisting the plaintiff in caring for said child; that the plaintiff is devoted to his child, is a person of good reputation and character and in all respects has furnished adequate care and supervision for the child since the entry of the Order on July 4, 1969, and with the assistance of his mother has continued to furnish a suitable home far and away above the average.

That Betty Dawson Jarman is now Betty Dawson Keltz by reason of having remarried on July 11, 1970 and presently lives in Norfolk, Virginia, with her present husband, Mark L. Keltz; they have no children and live in an apartment complex with approximately 250 to 275 units. The apartment has a kitchen, living room, two bedrooms and bath and is near schools and other children in the neighborhood and the dwelling appears to be adequate for a child of Angela Dawn Jarman's age.

Mr. and Mrs. Keltz appear to be persons of good character and reputation in the community in which they live. She is a housewife who actively participates in church affairs in the community and Mr. Keltz is in the United States

Navy stationed in Norfolk, Virginia. Mrs. Keltz has made no apparent attempt to visit with her daughter, Angela Dawn Jarman, since September, 1969 and only on one or two occasions prior to that date....

* * *

That the primary custody of the child should remain with the plaintiff, Alton Lee Jarman; that the best interest and welfare of the said child requires that the custody remain unchanged and the defendant should be allowed to visit with the said child and have said child visit with her away from the home furnished by the plaintiff."

From an order entered on 21 December 1971, awarding the general care, custody and control of Angela Dawn Jarman to the plaintiff with reasonable visitation privileges to the defendant, the defendant appealed.

Cecil D. May for plaintiff appellee.

Robert G. Bowers for defendant appellant.

HEDRICK, Judge.

[1] Since the only exception brought forward on this appeal is to the order awarding custody of the child to the plaintiff, our consideration is limited to the question of whether the findings made by the trial judge support the order and whether error of law appears on the face of the record. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957); *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882 (1961); *Prince v. Prince,* 7 N.C. App. 638, 173 S.E. 2d 567 (1970).

In determining whether the findings support the order we refer first to the applicable statute, G.S. 50-13.2(a) which provides:

"An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child."

"This statutory directive merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever

be guided." *In re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d 524 (1968). In applying these legal principles to the facts of a particular case, the trial judge is vested with a wide discretion for he has an opportunity to observe the parties and the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. *In re Custody of Mason,* 13 N.C. App. 334, 185 S.E. 2d 433 (1971) ; *In re Custody of Pitts, supra.*

[2] It is clear from the findings of fact made by Judge Phillips why he concluded that the best interest and welfare of the child required that the child remain in the custody of her father. The findings reflect the fact that the consent order with the same arrangements with the paternal grandmother had been completely satisfactory and had served the best interest and welfare of the child for more than two years. Although his honor's findings do indicate that the circumstances of the mother have changed since she consented to the order awarding custody of the child to the father, and that she has established a home in Norfolk, Virginia, with facilities satisfactory for a child of Dawn's age, this fact alone did not require a change of the custody, or preclude the judge from awarding the custody of the child to the plaintiff. There is nothing in the record to indicate that the trial judge abused his discretion.

The case of *Boone v. Boone,* 8 N.C. App. 524, 174 S.E. 2d 833 (1970) relied upon by the defendant has no application in the facts of this case. In *Boone* this Court simply held that the evidence did not support a finding "that the best interest, health, and welfare of Daniel Richard Boone, age seven months, and Billy Ray Boone, age two years, would best be served if they were allowed to remain in the custody of the father *and* to remain at the home of Mr. and Mrs. Wilburn Frye."

[3] In the present case since no exceptions were taken to the admission of evidence or to the findings of fact, the facts found are presumed to be supported by competent evidence and are binding on appeal. *Stancil v. Stancil, supra.* We hold no error appears on the face of the record and the facts found by the trial judge support his conclusions which in turn support the order awarding custody of Angela Dawn Jarman to the plaintiff with visitation privileges to the defendant.

Affirmed.

Judges BRITT and PARKER concur.

MRS. FRANCES MARSH CHILDS, ADMINISTRATRIX OF THE ESTATE OF GARY MOTZ CHILDS, DECEASED v. MRS. RUTH CROWELL DOWDY AND CHARLOTTE CITY COACH LINES, INC.

No. 7226SC313

(Filed 24 May 1972)

1. Automobiles § 92; Carriers § 19— death of bus passenger — failure of automobile to yield right-of-way — negligence of bus driver

In an action to recover for the wrongful death of a bus passenger in an intersecton collision between the bus and an automobile, the evidence will not support a finding of actionable negligence on the part of the bus driver based on allegations with respect to speed, failure to keep a proper lookout or failure to keep the bus under proper control, where it tends to show that the collision occurred when the driver of the automobile, traveling on the servient street, failed to stop and yield the right-of-way to the bus, which entered the intersection on the dominant street, and there is no evidence to support an inference that the bus driver could or should have observed, in time to avoid the collision, circumstances putting him on notice that the driver of the automobile could not or would not stop and yield the right-of-way.

2. Carriers § 19— common carrier — duties to passenger

While a motor vehicle carrier for compensation is not an insurer of the safety of its passengers, it does owe them the duty of exercising the highest degree of care for their safety compatible with the practical operation of its motor vehicle, including the responsibility of seeing that passengers are not exposed to unusual risks of their safety.

3. Carriers § 19— operation of carrier with door open — negligence

Operation of a carrier with a door open while a passenger is standing in close proximity thereto is evidence of negligence.

4. Carriers § 19— death of bus passenger — intersection collision — operation of bus with door open — negligence — proximate cause

In an action to recover for the wrongful death of a bus passenger in a collision which occurred when the driver of an automobile failed to yield the right-of-way to the bus at an intersection, the evidence is sufficient to support a finding that negligence of the bus driver in operating the bus with the door open was a proximate cause of the decedent's death, where it tended to show that at the request of the driver decedent stood at the open door and occasionally leaned out to check a panel on the housing of the rear-end motor which had become unfastened, and that decedent was propelled by the collision through the open door and onto the street.

5. Negligence § 9— proximate cause — foreseeability

To be actionable it is not necessary that injury in the precise form in which it occurs should be foreseen from an act of negligence, it only being necessary that in the exercise of reasonable care, consequences of a generally injurious nature might be expected.

6. Automobiles § 94; Carriers § 19— automobile-bus collision — death of bus passenger — contributory negligence — instructions

In an action to recover for the wrongful death of a bus passenger which resulted from an intersection collision between the bus and an automobile, the trial court committed prejudicial error in charging the jury that in order to answer the issue of contributory negligence in the affirmative, it must find that negligence by plaintiff's intestate was a proximate cause of the *collision* and resulting death, where there was no contention or evidence that conduct of plaintiff's intestate contributed to the collision, but the question was whether plaintiff's intestate was negligent in assuming a position at or near the open door of the bus, and if so, whether such negligence was a proximate cause of the injuries causing his death.

APPEAL by defendants from *Blount, Special Superior Court Judge,* 1 November 1971 Civil Session of Superior Court held in MECKLENBURG County.

Action for wrongful death of plaintiff's intestate, Gary Motz Childs.

On 2 June 1970, Gary Childs was a 14-year-old student in the eighth grade at Alexander Graham High School in Charlotte. After school on that date, he boarded a bus owned and operated by defendant Charlotte City Coach Lines, Inc. (Coach Lines), a common carrier. The bus was being operated in a northerly direction on Roswell Avenue in Charlotte. When it entered the intersection of Roswell Avenue and Queens Road West, a car being operated by defendant Dowdy in an easterly direction along Queens Road West entered the intersection and struck the bus on the left side near the front. At that moment Gary fell, or was propelled by the collision, through the open door on the right side of the bus onto the street, sustaining injuries resulting in his death.

At the time of the collision there was a stop sign, and also a flashing red light, facing traffic moving into the intersection in an easterly direction along Queens Road West. There was a flashing yellow light facing traffic moving along Roswell Avenue. Mrs. Dowdy stated to an investigating officer that she was not sure whether she stopped before entering the intersection but that she traveled the street often and had always stopped before. Testimony from passengers on the bus tended to indicate that Mrs. Dowdy's car was moving when it reached the stop line at the intersection and that it did not slow down from that point until it struck the bus.

The jury found both defendants guilty of negligence, answered the issue of contributory negligence "No," and awarded damages. Both defendants appealed.

James O. Cobb for plaintiff appellee.

Carpenter, Golding, Crews & Meekings by John G. Golding for defendant appellant Mrs. Ruth Crowell Dowdy.

Mraz, Aycock & Casstevens by John A. Mraz for defendant appellant Charlotte City Coach Lines, Inc.

GRAHAM, Judge.

Defendant Coach Lines assigns as error the overruling of its motion for a directed verdict on the issue of its negligence.

In an amendment to her complaint, plaintiff alleged that Coach Lines was negligent in that its driver failed to keep a proper lookout, failed to keep the bus under proper control, and operated the bus at a speed greater than was reasonable and prudent under existing conditions. In our opinion the evidence will not support a finding of actionable negligence based upon these allegations.

[1] The Coach Lines bus was being operated on the dominant street and defendant Dowdy was entering the intersection from a servient street. There was no evidence as to the speed of the Dowdy car or the manner in which it was being operated as it approached the intersection. Consequently, no inference can be drawn that the bus driver could or should have observed, in time to avoid the collision, circumstances putting him on notice that defendant Dowdy could not or would not stop and yield the right-of-way. Therefore, the conduct of Mrs. Dowdy in failing to stop or yield the right-of-way made the collision inevitable and insulated any negligence of the bus driver with respect to speed, failure to keep a proper lookout or failure to keep the bus under proper control. *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919. See also *Hout v. Harvell,* 270 N.C. 274, 154 S.E. 2d 41; *Dolan v. Simpson,* 269 N.C. 438, 152 S.E. 2d 523; *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385; *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683.

However, plaintiff also alleged other acts of negligence. In the original complaint she alleged that the Coach Lines was negligent in that its driver operated the bus with the front

door open; and further, that the driver requested Gary Childs to stand in the open doorway and look out from time to time to see if a panel on the right side of the bus was remaining fastened.

The bus driver admitted that the door was open when he drove the bus into the intersection, but he denied that he asked Gary to stand in the doorway and look out. Evidence as to where Gary was actually standing at the time of the collision was conflicting, but there was plenary evidence to support a finding that he was standing so near the open door that the impact of the collision caused him to be thrown through the door and onto the pavement. In addition, when considered in the light most favorable to plaintiff, the evidence would support the following findings:

On the date of the accident a metal panel which was a part of a housing over the rear-end motor of the bus had become unfastened. The driver asked Gary Childs to check the panel before the bus left Alexander Graham school. The bus proceeded to Myers Park High School where additional students boarded as passengers. At this stop the bus driver again asked Gary to check the panel. From Myers Park High School until the collision, the bus was operated with the door open. Gary stood at the door and at the request of the driver occasionally leaned out to check the panel. One witness stated that at the time of the collision, "Gary was leaning up against the door holding it open. I could actually see him leaning against the door from where I was."

[2, 3] Coach Lines concedes that it may have been negligent in operating the bus with the door open. Under the evidence presented, we think the jury was justified in so finding. While a motor vehicle carrier for compensation is not an insurer of the safety of its passengers, it does owe them the duty of exercising the highest degree of care for their safety compatible with the practical operation of its motor vehicles. *Jenkins v. Coach Co.*, 231 N.C. 208, 56 S.E. 2d 571; *Humphries v. Coach Co.*, 228 N.C. 399, 45 S.E. 2d 546; *White v. Chappell*, 219 N.C. 652, 14 S.E. 2d 843. This duty includes the responsibility of seeing to it that passengers are not exposed to unusual risks to their safety. Operating a carrier with a door open while a passenger is standing in close proximity thereto is evidence of negligence. 13 C.J.S., Carriers, § 744(b).

[4] Coach Lines argues that even if it were negligent in operating the bus with the door open, the evidence will not permit a finding that this negligence was a proximate cause of Gary's death. We disagree. While having the door open had nothing to do with the collision, the evidence permits an inference that Gary's death would not have occurred if he had not been exposed to the open door, or if defendant Dowdy had not operated her automobile into the intersection without stopping or yielding the right-of-way. Both of these events could be found to have concurred to produce the tragic result.

[5] To be actionable it is not necessary that injury in the precise form in which it occurs should be foreseen from an act of negligence. It is only necessary that in the exercise of reasonable care, consequences of a generally injurious nature might be expected. 6 Strong, N.C. Index 2d, Negligence, § 9, p. 23. The question here is not whether the bus driver, in the exercise of reasonable care, should have foreseen that a motorist was likely to enter the intersection from a servient street, collide with the bus, and thereby cause Gary to fall or be thrown through the open door. The question is whether the driver should have expected consequences of a generally injurious nature to result from operating the bus with the door open, while permitting (or perhaps even instructing) the youthful passenger to stand near or in the opening. We have no difficulty in answering this latter question in the affirmative.

We are of the opinion, and so hold, that Coach Lines' motion for a directed verdict was properly overruled.

[6] Both defendants assign as error the court's charge on the issue of contributory negligence. This assignment of error is sustained.

The court charged that for the jury to answer the issue of contributory negligence in the affirmative, it must find that plaintiff's intestate was negligent and that his negligence was a proximate cause of the *collision* and resulting death.

There are instances where the position of a passenger in or about a motor vehicle contributes to a collision. See *Kuykendall v. Coach Line,* 196 N.C. 423, 145 S.E. 770. However, in this case there was no contention by either defendant that the conduct of plaintiff's intestate in any way contributed to the collision; nor was there evidence to this effect. The question

was whether plaintiff's intestate was negligent in assuming a position at or near the open door of the bus, and if so, whether this negligence was a proximate cause of the injuries causing his death.

It is unfortunate that there must be a new trial in this long and complicated case that was ably tried by the court and counsel for both parties. However, it is our opinion that under the charge given, the jury could have believed that it was their duty to answer the issue of contributory negligence "No" unless they found that the conduct of plaintiff's intestate actually contributed to the collision. For this reason, we must hold that a new trial is necessary.

We deem it unnecessary to discuss defendant's other assignments of error since they may not recur at the next trial.

New trial.

Judges CAMPBELL and BRITT concur.

GARFIELD OLIVER AND RICHARD A. SUTTON v. FRED ERNUL, LUZZIE ERNUL AND GRACE STAMPS

No. 723DC246

(Filed 24 May 1972)

1. **Easements § 3— way of necessity — judgment on pleadings — summary judgment**

Decision of the Supreme Court, based upon plaintiffs' evidence only, did not determine that plaintiffs are entitled to a way of necessity over defendants' land as a matter of law, but only that plaintiffs' evidence was sufficient to be submitted to the jury on that issue, and the trial court erred in allowing plaintiffs' motion for judgment on the pleadings, or for summary judgment, where a factual dispute remains as to whether plaintiffs already have means of access to their property.

2. **Rules of Civil Procedure § 12— motion for judgment on pleadings — treatment as motion for summary judgment**

When matters outside the pleadings are presented and not excluded by the court on a motion for judgment on the pleadings, the motion should be treated as one for summary judgment under G.S. 1A-1, Rule 56. G.S. 1A-1, Rule 12(c).

Oliver v. Ernul

3. Rules of Civil Procedure § 56— motion for summary judgment — insufficiency of supporting evidence — necessity for counter-affidavits

Where evidentiary matters supporting a motion for summary judgment are insufficient to establish the lack of a triable issue of fact, it is not incumbent upon the opposing party to present counter-affidavits or other material.

APPEAL by defendants from judgment on pleadings entered by *Phillips, District Judge,* 17 November 1971 Session of District Court held in CARTERET County.

Civil action instituted 23 October 1969. Plaintiffs seek an order restraining defendants from obstructing a right-of-way allegedly owned by plaintiffs over defendants' land and requiring them to remove obstructions from the right-of-way. Plaintiffs allege in the alternative that they are entitled to a way of necessity over defendants' land.

The case came on for trial at the 15 December 1969 Session of District Court held in Carteret County. At the close of plaintiffs' evidence, the trial court allowed defendants' motion for nonsuit. This Court reversed, holding that an instrument introduced by plaintiffs was sufficient as a deed creating an easement. *Oliver v. Ernul,* 9 N.C. App. 221, 175 S.E. 2d 618. The decision of this Court was upheld by the Supreme Court, but upon different grounds. The Supreme Court held that the instrument in question was insufficient to create a right-of-way, but that plaintiffs' evidence was sufficient to establish that they have a way of necessity over defendants' land by operation of law. *Oliver v. Ernul,* 277 N.C. 591, 178 S.E. 2d 393. Reference is made to the Supreme Court's opinion for a more thorough statement of the facts.

Before the case came on for retrial, plaintiffs filed a motion for judgment on the pleadings. The motion was allowed and judgment was entered awarding plaintiffs a way of necessity over defendants' land. The judgment ordered Grace Stamps, who is now the sole owner of the servient estate, to select the location of the way on or before 29 November 1971.

McNeill, Boshamer and Graham by Otho L. Graham for plaintiff appellees.

Bennett and McConkey by Thomas S. Bennett for defendant appellants.

GRAHAM, Judge.

[1] In granting plaintiffs' motion for judgment on the pleadings the District Court obviously interpreted the prior decision of the Supreme Court as having decided, based upon plaintiffs' evidence only, that no dispute exists as to the facts, and that plaintiffs are entitled to a way of necessity over defendants' land as a matter of law. Our interpretation of that decision results in a different conclusion.

This case was before the Supreme Court for a determination as to whether nonsuit was properly entered at the close of plaintiffs' evidence; not for a decision on the merits. It is true the court stated: "Under the circumstances revealed by the record, our cases establish that plaintiffs have a *way of necessity* by operation of law." However, the record which the court refers to is the record proper and plaintiffs' evidence. The question which the court was deciding was whether the plaintiffs' evidence, when accepted as true, was sufficient to be passed upon by a jury. In determining this question, the Supreme Court did not pass upon the credibility of the evidence, nor did it hold that defendants, who have denied plaintiffs' allegations that the property lacks access, are not entitled to present their evidence. We interpret the decision to hold:

1. Evidence presented by the plaintiffs, if found by a jury to be true, is sufficient to establish that on 4 June 1954 defendants Ernul conveyed to plaintiff Oliver, and to the predecessor in title of plaintiff Sutton, two tracts of land to which the grantees had no access except over grantors' other land or the land of strangers. If a jury so finds, plaintiffs have a way of necessity over defendants' land by operation of law.

2. If the plaintiffs have a way of necessity, and if "at the time a way of necessity was impliedly granted on 4 June 1954 there was in use on the land a way plainly visible and known to the parties, 'this way will be held to be the location of the way granted, unless it is not a reasonable and convenient way for both parties.' "

3. If no such way was in use on the land on 4 June 1954, the owner of the servient estate has the right to select the way of necessity, provided he exercises the right in a reasonable manner, with regard to the convenience and suitability of the way and to the rights and interests of plaintiffs.

At the hearing on their motion for judgment on the pleadings, plaintiffs stipulated that they will make no contention as to the location of any way of access existing across defendants' land on 4 June 1954, and that they will permit the present owner of the servient estate to select a location of the way provided she exercises this right in a reasonable manner. This stipulation effectively eliminates a possible jury question as to whether a way, plainly visible and known to the parties, was in existence over defendants' land on 4 June 1954.

The question remains, however: Did defendants Ernul convey to plaintiff Oliver, and the predecessor in title of plaintiff Sutton, land to which the grantees had no access except over grantors' other land or the land of strangers? Plaintiffs' evidence at the first trial obviously tended to show that they did. Defendants deny this fact in their answer and they also allege affirmatively that plaintiffs have means of access by two different roads onto their property. Whether defendants can establish the existence of these roads, and if so, whether the roads provide sufficient access to defeat plaintiffs' claim of a way of necessity, cannot be determined until defendants have been permitted to put on their evidence.

Plaintiffs contend that their motion, although designated a motion for judgment on the pleadings, should be considered as a motion for summary judgment.

[2] "When matters outside the pleadings are presented and not excluded by the court on a motion for judgment on the pleadings, the motion, by the express provisions of G.S. 1A-1, Rule 12(c), shall be treated as one for summary judgment under G.S. 1A-1, Rule 56." *Long v. Coble,* 11 N.C. App. 624, 630, 182 S.E. 2d 234, 238.

[1, 3] Even if we treat the motion as one for summary judgment, it is our opinion that plaintiffs have failed to show that no genuine issue as to any material fact remains. None of the evidence offered at the first trial was offered in support of the motion. The only items considered in support of plaintiffs' motion were the stipulation and the pleadings. The stipulation does not put to rest the issue of whether the property conveyed by defendants Ernul was landlocked. Allegations in the complaint with respect to this are denied in the answer. Where evidentiary matters supporting a motion for summary judgment are insufficient to establish the lack of a triable issue

of fact, it is not incumbent upon the opposing party to present counter-affidavits or other material. *Lineberger v. Insurance Co.*, 12 N.C. App. 135, 182 S.E. 2d 643.

Reversed.

Judges MORRIS and VAUGHN concur.

CHESTER A. COGBURN, ADMINISTRATOR OF THE ESTATE OF CAROLINE W. PLEMMONS, DECEASED v. NORTH CAROLINA STATE HIGHWAY COMMISSION AND TRAVELERS INSURANCE COMPANY

No. 7230IC297

(Filed 24 May 1972)

State § 8— decedent struck by dump truck — negligence — contributory negligence

In an action to recover for the wrongful death of plaintiff's intestate when she was struck by a dump truck which was backing into a dumping area on land owned by decedent and her husband, the evidence was sufficient to support a finding that the driver of the dump truck was negligent in failing to see what he ought to have seen, and did not reveal contributory negligence as a matter of law on the part of decedent, where it tended to show that while decedent was returning from the dumping area to a nearby sawmill where she worked, a dump truck backed into position to unload at a point between her and the sawmill, that she stopped about fifteen feet from the truck, that she was standing in open view with her back partially toward the direction from which a second truck came, that she was struck by the second truck as it backed toward the dumping area, and that there was noise from the sawmill, from a bulldozer operated by decedent's husband and from the first truck which was racing its motor to raise its bed to dump its load.

APPEAL by defendant from an award by the Industrial Commission in its decision and order filed herein on 1 December 1971.

This action was brought by plaintiff under the North Carolina Tort Claims Act, as provided in Article 31, Chapter 143 of the General Statutes.

Plaintiff sought, as administrator, to recover for the alleged wrongful death of his intestate, Caroline Winfield Plemmons. Mrs. Plemmons was the wife of John C. Plemmons.

Plaintiff alleged that the death of Mrs. Plemmons was proximately caused by the negligence of James Weaver Parkins (Parkins). It was stipulated that on 21 April 1970, Mrs. Plemmons was "overrun" and killed by a dump truck owned by the North Carolina State Highway Commission (Highway Commission) and operated at the time by Parkins, an employee of the Highway Commission, within the scope of his employment.

The evidence for the plaintiff tended to show that the Highway Commission requested and received permission to dump some excess "spill" dirt and rocks in a hole on the property of Mr. and Mrs. Plemmons adjacent to a sawmill located on Dutch Cove Road in Haywood County.

Mrs. Plemmons was employed at a salary of $8,000 per year in a "management capacity" at the sawmill, which had been owned and operated by her father who had died about five months before. On 21 April 1970, the Highway Commission had been dumping excess dirt and rock into the hole on the Plemmons property for several days, using two trucks for the operation. In order to reach the area for unloading, the driveway to the sawmill was used. The trucks then went to the dumping area, made a U-turn and backed up to the point where they dumped their loads. There was no particular place in the dumping area for the trucks to unload; the drivers selected the places, unless they were carrying very large rocks, in which event Mr. Plemmons signalled them where to unload. No signal was given on the occasion when Mrs. Plemmons was struck.

On 21 April 1970 shortly before 3:00 p.m., Mrs. Plemmons, who had been out in the dumping area several times that day, had just brought Mr. Plemmons some oil for the bulldozer he was using to keep the fill smooth. There were no trucks in the area at that time. When Mrs. Plemmons started back to the sawmill, one of the two highway dump trucks backed into position to unload at a point between her and the sawmill. She stopped about fifteen feet from the truck, waiting for it to dump its load and move out, and she was standing in open view with her back partially towards the direction from which the other truck, operated by Parkins, came. While Mrs. Plemmons was thus standing, there was noise from the sawmill (which was in operation), noise from Mr. Plemmons' bull-

dozer, and noise from the truck fifteen feet in front of her which was racing its motor to raise its bed to dump its load. Parkins, who had stopped the truck he was operating after reaching the dumping area, then moved it backwards and struck Mrs. Plemmons with the right back corner thereof. Mrs. Plemmons was knocked to the ground and rolled ten or fifteen feet away from the truck. The truck operated by Parkins kept backing up while the other truck continued to unload. Mr. Plemmons saw the truck strike his wife and tried to get Parkins to stop but failed to do so before the truck wheel had crushed Mrs. Plemmons' head.

The evidence for the defendant tended to show that James McComb Messer (Messer) was the driver of the first truck that dumped its load on this occasion and that when the other truck "passed in front" of him, the bed of his (Messer's) truck was up. Messer testified that he then let it down and moved out and that the other driver "pulled up there and stopped and I dumped." He did not see the accident and did not see Mrs. Plemmons there. It was a clear day. Parkins testified that he came to the dumping area and stopped just long enough to change into reverse gear, before backing to the place where he planned to unload. He testified that "(p)rior to backing up, I looked into my mirror; I did not see anything. I could see the dozer; only thing I could see." The mirrors on his truck were small ones. He then commenced backing at a speed of one or two miles per hour and did not see Mrs. Plemmons behind him. The first notice he had that anything was wrong was when Mr. Plemmons came up to the side of his truck.

After the hearing the Hearing Commissioner found as a fact that Parkins was negligent in the operation of the truck, that Mrs. Plemmons was not contributorily negligent and that plaintiff was entitled to recover $15,000, the maximum recovery at that time under the State Tort Claims Act, and an order was entered directing the payment of said amount.

The defendant appealed from the Hearing Commissioner to the North Carolina Industrial Commission (full Commission) which adopted as its own the findings of fact, concluclusions of law and order of the Hearing Commissioner. The defendant appealed to the Court of Appeals.

Millar, Alley & Killian by William I. Millar for plaintiff appellee.

Attorney General Morgan and Associate Attorney Witcover for defendant appellant.

MALLARD, Chief Judge.

The defendant contends that it was error under these factual circumstances to find that Parkins was negligent and that Mrs. Plemmons was not contributorily negligent. We do not agree. There was ample evidence upon which to base the factual finding that on the date in question Parkins was negligent in failing to see what he ought to have seen when backing the truck. *Bennett v. Young,* 266 N.C. 164, 145 S.E. 2d 853 (1966); *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541 (1956).

On the other hand, the evidence was not of such nature that it required, as a matter of law, the finding that Mrs. Plemmons was contributorily negligent. The question of whether she was or was not contributorily negligent in this factual situation was initially for the Hearing Commissioner and, upon appeal, by the full Commission. G.S. 143-291.

The order entered directing that the plaintiff be paid $15,000 is affirmed.

Affirmed.

Judges MORRIS and PARKER concur.

HERMAN VAUGHN v. TOMMY TYSON AND WIFE, EVELYN MORRING TYSON AND ARTHUR LEE MORRING TYSON AND WIFE, HALLIE MORRING

No. 721DC376

(Filed 24 May 1972)

1. **Evidence § 33; Witnesses § 5— letter containing hearsay — inadmissibility for corroborative purposes**

In this child custody proceeding, the trial court did not err in excluding from consideration as corroborative evidence a letter from the Department of Social Services of Westchester County, New York, to the Department of Social Services of Chowan County stating that plaintiff's late wife had received welfare assistance to cover expenses of the birth of the children and that plaintiff had abandoned her, since the letter was the assertion of a person other than the witness, offered to prove the matter asserted and not corroborative of the witness.

2. **Appeal and Error § 57— nonjury trial — findings by court — review**

In a nonjury trial the findings by the court have the force and effect of a verdict of the jury and are conclusive on appeal if supported by any competent evidence notwithstanding there is evidence which would sustain contrary findings.

3. **Infants § 9; Parent and Child § 6— child custody — right of surviving parent**

The evidence supported the trial court's findings and award of custody of two minor children to their father, the sole surviving parent, rather than to an aunt and the maternal grandparents with whom the children have resided since their mother's death.

APPEAL by defendants from *Walker, District Judge,* 4 January 1972 Civil Session of CHOWAN District Court.

Plaintiff, a native of Chowan County but now a resident of the State of New York, instituted this action seeking permanent custody of his minor children, twins Christopher Robert Vaughn and Crystal Michelle Vaughn. The femme defendant Tyson is the maternal aunt, and defendants Morring are the maternal grandparents, of the children.

Plaintiff offered evidence tending to show: The mother of the children, Carrie Morring Vaughn, died in June of 1970 in New York State of natural causes. A sister of the deceased mother brought the six-weeks old children to North Carolina to the homes of defendants in order to care for them. The care of the children was entrusted to defendants on a temporary basis with an understanding that they should remain with

defendants only until such time as plaintiff could properly care for them. In the Spring of 1971 plaintiff requested that the custody of his children be returned to him but defendants refused, contending they were more capable to rear the children. Plaintiff has been employed continuously and is now in a position to properly care for his children, having remarried and reestablished a home.

Defendants offered evidence tending to show: The children were placed with them permanently by plaintiff who reassured defendants of this fact several times. Plaintiff agreed not to interfere with the rearing of the children. Plaintiff has never cared for the children nor provided any substantial money for their support. Plaintiff did not support the mother of the children, has been unemployed for long periods of time, and allowed his late wife to obtain welfare assistance to cover expense of the birth of the children. Defendants are fit and proper persons to have custody of the children.

The case was tried without a jury and the court entered judgment awarding custody of the children to plaintiff, from which judgment defendants appealed.

Wiley J. P. Earnhardt, Jr., for plaintiff appellee.

John F. White, Merrill Evans, Jr., and White, Hall & Mullen by Gerald F. White for defendant appellants.

BRITT, Judge.

[1] Defendants contend the trial court erred in excluding from consideration as corroborative evidence a letter from the Department of Social Services of Westchester County, New York, to the Department of Social Services of Chowan County. The letter in question was offered when Mr. Hendricks, Director of the Chowan County Department of Social Services, was on the witness stand. In substance, the letter stated that in March 1970 plaintiff's late wife, eight months pregnant, applied for assistance; that her husband had deserted her and had provided no support; that full assistance was given from March 1, 1970 through June 1970 and the wife's hospital bill and other medical expenses were paid by the (New York) Department of Social Services.

Stansbury, North Carolina Evidence 2d, § 52, p. 105 states: "The liberality of these rules (pertaining to admissibility

of corroborating evidence) has sometimes misled counsel into the assumption that almost anything is admissible so long as it can be called corroborative. But important limitations must be observed. Unless the evidence offered is admissible for substantive purposes under independent rules, it must relate to some conduct or some characteristic *of the witness himself* which tends to establish him as a credible person."

Then on p. 108 Stansbury states: "The grounds upon which the witness's own prior statements are admitted do not justify the reception of *another person's* extrajudicial statements, and such statements would seem to be inadmissible hearsay unless they fall within some exception to the hearsay rule or are offered to impeach or corroborate the declarant's own testimony in the case." See also: *Bryant v. Bryant,* 178 N.C. 77, 100 S.E. 178 (1919).

We hold that since the letter was the assertion of a person other than the witness, offered to prove the matter asserted and not corroborative of the witness, the letter was properly excluded from the evidence.

[2] Defendant's other assignments of error relate to the finding of facts and conclusions of law by the trial judge. In a nonjury trial the findings by the court have the force and effect of a verdict of a jury and are conclusive on appeal if supported by any competent evidence notwithstanding that there is evidence contra which would sustain findings to the contrary. *Huski-Bilt, Inc. v. Trust Co.,* 271 N.C. 662, 157 S.E. 2d 352 (1967); *Young v. Insurance Co.,* 267 N.C. 339, 148 S.E. 2d 226 (1966). The evidence as previously reviewed is plenary to support the findings of fact and conclusions of law based thereon and will not be disturbed on appeal.

[3] It was established that plaintiff is the sole surviving parent of the children. In the case of *In Re Woodell,* 253 N.C. 420, 117 S.E. 2d 4 (1960), the late Chief Justice Parker quoted from *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759, as follows: "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." Although the trial judge in his judgment commended defend-

ants, particularly for the love, care and affection they had shown the children, he found that the best interest of the children would be served and promoted by awarding their custody to the plaintiff, their father.

The judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

THOMAS L. ETHERIDGE, J. C. ETHERIDGE, AND TRACY BARNHILL v. JAMES A. GRAHAM, COMMISSIONER OF AGRICULTURE, STATE OF NORTH CAROLINA

No. 712SC567

(Filed 24 May 1972)

1. **Public Officers § 9— breach of ministerial duty — liability**

A public officer cannot be held liable for a breach of a ministerial statutory duty unless the statute expressly provides for liability.

2. **Agriculture § 8; Public Officers § 9— Commissioner of Agriculture — individual liability**

The Commissioner of Agriculture cannot be held individually liable to producers of soybeans for failure to require a soybean dealer to obtain a permit to operate as a grain dealer and to furnish bond as set forth in [former] G.S. 106-496 *et seq.*, the statutes not having placed a mandatory duty on the Commissioner to require permits or bonds, and there being no liability provision in the statute.

3. **State § 4— sovereign immunity**

Neither the State nor an agency of the State can be sued in a State court without its permission.

4. **State § 4— tort claim against State agency — jurisdiction**

The superior court had no jurisdiction over an action for damages against the Department of Agriculture based on the failure of the Commissioner of Agriculture to require a soybean dealer to obtain a permit and to furnish bond, since jurisdiction of tort claims against a State agency has been vested in the Industrial Commission.

APPEAL by plaintiffs from *Bone, Judge,* 5 April 1971 Session of MARTIN Superior Court.

Plaintiffs, producers of farm products, seek to recover damages alleged to have been caused by the failure of the defendant to perform duties enumerated under G.S. 106-496 et seq. Plaintiffs' claim arises from the sale of their 1969 soybean crop to a nonbonded buyer on and after 17 November 1969. The soybeans were converted by the buyer who gave plaintiffs worthless checks in payment and plaintiffs have been unable to recover the soybeans. Unknown to plaintiffs the buyer was insolvent when the soybeans were delivered and was thereafter declared bankrupt in federal court.

At the time of delivery of the soybeans plaintiffs were "producers of farm products" within G.S. 106-496 et seq. regulating unfair practices of handlers of farm products. At delivery the corporate buyer, Bethel Peanut & Grain Market, was a "handler of farm products on a basis other than cash" within the meaning of G.S. 106-496 et seq. Plaintiffs allege that defendant had an official duty under G.S. 106-496 et seq. to require the buyer to obtain a permit to operate as a grain dealer and handler based on a bond or satisfactory evidence of financial ability. The buyer had no such permit or bond and had not been required to obtain one by defendant. Plaintiffs allege this omission on the part of defendant proximately resulted in their loss and damage.

Defendant filed a motion to dismiss the action on the ground that the superior court lacked jurisdiction to hear the case. From judgment granting the motion and dismissing the case, plaintiffs appealed.

Thorp & Etheridge by William D. Etheridge for plaintiffs appellants.

Attorney General Robert Morgan by Associate Attorneys William Lewis Sauls and Christine A. Witcover for defendant appellee.

BRITT, Judge.

It is not clear from the complaint whether plaintiffs are seeking to recover damages from James A. Graham individually, occupying the office of Commissioner of Agriculture, or whether plaintiffs are seeking to recover from the State, i.e., the office of the Commissioner of Agriculture occupied by James A. Graham.

[1, 2] Assuming plaintiffs are proceeding against James A. Graham individually, in North Carolina a public officer cannot be held liable for a breach of a ministerial statutory duty unless the statute expressly provides for liability. *Langley v. Taylor,* 245 N.C. 59, 95 S.E. 2d 115 (1956); *Wilkins v. Burton,* 220 N.C. 13, 16 S.E. 2d 406 (1941). There is no such liability provision in G.S. 106-496 et seq. The Commissioner's authority under the pertinent statutes appears to be expressed in permissive language such as "may require" in G.S. 106-497 and "(t)he Commissioner may withhold his approval in his discretion" in G.S. 106-499. In no section of the Article as worded prior to the 1971 amendment do we find language placing a mandatory affirmative duty on the Commissioner to actively require permits or bonds. Since the acts complained of occurred prior to 1971 the pre 1971 amended statutes are controlling in this instance. Therefore, if this legislation is deemed permissive as far as the Commissioner is concerned, it would be within his discretion to require a bond based on the financial condition. Absent a showing of abuse of that discretion, the court will not consider it. *Burton v. Reidsville,* 243 N.C. 405, 90 S.E. 2d 700 (1956). However, assuming *arguendo* the Commissioner had a mandatory duty to act in this instance, he would not be personally liable for his failure to act. *Langley v. Taylor, supra.*

[3] Assuming plaintiffs are proceeding against the State or its agency, the Board of Agriculture, it is settled law in this jurisdiction that neither the State nor any of its institutions or agencies can be sued in the courts of the State without its permission. *Insurance Co. v. Unemployment Compensation Com.,* 217 N.C. 495, 8 S.E. 2d 619 (1940); *Microfilm Corp. v. Turner,* 7 N.C. App. 258, 172 S.E. 2d 259 (1970), cert. den. 276 N.C. 497 (1970). The complaint alleges a cause of action in tort. Unless plaintiffs proceed under the Tort Claims Act the doctrine of sovereign immunity would apply.

G.S. 143-291 provides in part: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway Commission, and all other departments, institutions and agencies of the State."

[4] In *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703 (1955) the court held that since the Tort Claims Act is

in derogation of sovereign immunity it must be strictly construed and the terms must be strictly adhered to. See also, *Construction Co. v. Dept. of Administration,* 3 N.C. App. 551, 165 S.E. 2d 338 (1969). Therefore, jurisdiction of tort claims against the State, its agencies and departments having been vested in the industrial commission the superior court has no jurisdiction over this proceeding and was correct in dismissing it. Plaintiffs can find no relief under the Tort Claims Act, however, as it is applicable only to negligent *acts* of State employees and is not applicable to negligent *omissions.* G.S. 143-291; *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571 (1956).

The judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

FRANCIS M. SPECK ON BEHALF OF HIMSELF AND OTHER MEMBERS OF THE NEW BERN POLICE DEPARTMENT AND INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 150 v. CITY OF NEW BERN, NORTH CAROLINA, L. MACON TOLER, CHIEF OF POLICE OF THE NEW BERN POLICE DEPARTMENT, MAYOR E. H. RICKS, CITY MANAGER J. C. OUTLAW, ALDERMEN TOM I. DAVIS, BENJAMIN B. HURST, GRAHAM D. BIZZELL, PETE D. CHAGARIS, AND AUGUSTINE PINER, JR.

No. 723SC43

(Filed 24 May 1972)

Municipal Corporations § 11— probationary period of policeman — beginning — dimissal without cause

The twelve-month probationary period during which a police officer of the City of New Bern could be dimissed by the Chief of Police without cause and without a hearing began on the date on which he began to serve as an officer, not on the date of his conditional appointment to that position by the Board of Aldermen "subject to his release from the Marine Corps and his passing the required physical examination."

APPEAL by plaintiff from *Rouse, Judge,* 26 July 1971 Session of CRAVEN Superior Court.

Plaintiff instituted this action to restrain defendants from dismissing plaintiff from the New Bern City Police Department. Temporary restraining order was denied. The plaintiff moved for summary judgment. Judgment was entered denying injunctive relief and dismissing the action.

The facts in this case are free from substantial dispute. The plaintiff while on active duty with the United States Marine Corps applied for a position as a member of the New Bern City Police Department. On 6 January 1970, the New Bern City Board of Aldermen, acting on a recommendation of the Civil Service Board, appointed plaintiff to the position of police officer "subject to his release from the Marine Corps and his passing the required physical examination." Plaintiff was subsequently released from the Marine Corps. He passed the required physical examination on 13 February 1970 and reported for duty as a police officer on 16 February 1970. When plaintiff reported for duty on 16 February, he signed a statement acknowledging that he must reside within the corporate limits of the City of New Bern during the course of his employment and that his employment would be in a probationary status during the initial twelve months.

Sometime prior to 22 January 1971, plaintiff removed his residence to a location several miles outside the New Bern City Limits. On 22 January 1971 plaintiff was suspended from the police department until he resumed his residence within the City of New Bern. On 31 January 1971 plaintiff was dismissed from the police department by order of the Chief of Police without a hearing. The order of the Chief of Police was based on his authority under the Charter of the City of New Bern to dismiss any newly appointed officer without cause and without a hearing, during the initial twelve months of his employment.

The trial court found that the dismissal of plaintiff was proper. Judgment was entered dismissing plaintiff's action.

From this judgment, plaintiff appeals.

Robert G. Bowers for plaintiff appellant.

Ward & Ward by A. D. Ward for defendant appellees.

CAMPBELL, Judge.

Plaintiff contends that it was error for the trial court to find that his dismissal without cause or a hearing was proper.

Plaintiff argues that the 12-month probationary period, during which he could be dismissed without cause or hearing, should be computed from the date of his conditional appointment by the Board of Aldermen and not from the date he actually reported for duty. If plaintiff is correct, then his dismissal would have been after the probationary period and it would therefore be improper unless for cause and after a hearing.

The authority of the Chief of Police to dismiss an officer without cause is set forth in the Charter of the City of New Bern (Charter), Chapter F, Section 3(e) which provides that:

> ". . . From the date of his selection by the Board of Aldermen, each new appointee to the police department shall serve in a probationary status for a period of twelve (12) months, during which said period the officer may be dismissed by the Chief of Police, with or without cause. The officer so dismissed shall have no opportunity for a hearing before the Civil Service Board, or otherwise, on the subject of his dismissal."

The crucial question in this case is whether plaintiff's probationary period began on 6 January 1970, the date of his conditional appointment or on 16 February 1970, the date on which he began to serve.

Defendants argue that plaintiff's appointment on 6 January, 1970 was conditioned upon plaintiff's discharge from the Marine Corps and his passing the required physical examination. It is argued that plaintiff's appointment was conditional and did not become effective until the conditions were fulfilled and he began work.

It is the opinion of this Court that plaintiff's probationary status began on the date he began to serve and continued for twelve months thereafter.

The applicable provisions of the Charter provide that the appointee "shall *serve* in probationary status for a period of twelve months . . . ." (Emphasis added.) Among the myriad of definitions for the word "serve" is found the following: ". . . d: to hold an office: discharge a duty or function: act in a capacity. . . ." Webster's Third New International Dictionary, Unabridged (1968). Plaintiff did not begin to act in the capacity of police officer or function as such until he reported for duty on 16 February 1970.

The purpose of a probationary period of employment is to allow the employer's supervisors to observe and evaluate the employee's performance and determine if it is acceptable. This was the obvious legislative intent behind this provision of the Charter. Our construction of the Charter gives effect to the legislative intent.

To hold otherwise, would allow one to obtain an appointment to the police department and then delay reporting for duty months or even a year thereby impairing or nullifying the valid purpose behind the requirement of a probationary period.

It should also be noted that when plaintiff reported for duty he signed a statement dated 16 February 1970, in which he acknowledged that his employment was to be in a probationary status during the first twelve months.

For the above reasons we hold that plaintiff's probationary status was to run from the date he reported for duty, 16 February 1970. Plaintiff was dismissed on 31 January 1971, at which time he was still serving in a probationary status and the dismissal was proper.

Plaintiff has also challenged the validity of the requirement that City employees live within the corporate limits of New Bern. In view of our holding that plaintiff's dismissal, without cause, was proper, we do not reach this question.

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. CLIFTON RAY JONES

No. 7226SC82

(Filed 24 May 1972)

1. **Criminal Law § 86— accomplice's testimony — confessions**

There is no merit in defendant's contention that the testimony of his accomplice was inadmissible on the ground that it amounted to a confession which was induced by an expectation of leniency.

2. **Criminal Law § 86— accomplice's testimony**

An accomplice is a competent witness, and the fact that an accomplice hopes for or expects mitigation of his own punishment does not disqualify him from testifying.

3. **Criminal Law § 88— explanation of testimony — threats to State's witness**

Where a police officer testified on cross-examination that defendant's accomplice, who was a witness for the State, had been allowed to meet his girl friend at the Law Enforcement Center, the trial court did not err in allowing the witness to explain that this was necessary because the accomplice had been placed in isolation for his own protection after threats had been made against him.

4. **Criminal Law § 86— indictments for other crimes — cross-examination**

The rule that a defendant may no longer be cross-examined as to whether he has been indicted for a criminal offense other than that for which he is on trial does not apply to trials which occurred prior to 15 December 1971, the date of the decision of *State v. Williams*, 279 N.C. 663.

APPEAL by defendant from *McLean, Judge,* at the 17 June 1971, Schedule A, Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in a two-count bill of indictment with felonious larceny and felonious breaking and entering. Defendant entered a plea of not guilty to each charge.

At the trial the State called as a witness one Robert M. Suggs, an alleged accomplice of defendant. Suggs testified that defendant had participated, with him, in the offenses charged in the indictment. The State also called as a witness a police officer, Larry Ledbetter, who testified that he had had various conversations with Suggs and that as a result of the conversations a cash box taken in the break-in was found. On cross-examination Officer Ledbetter testified that he had allowed Suggs, who was in jail, to meet his girl friend at the Law Enforcement Center. He testified that the reason for this

was that threats had been made against Suggs and as a result he had been placed in isolation. Defendant objected to the testimony of Suggs and to Ledbetter's testimony as to threats against Suggs and his transfer to isolation.

The defendant testified on his own behalf. On cross-examination he was asked what other charges he had been indicted for and had pending. Defendant objected to the question but the objection was overruled. Defendant answered that he was under indictment on another charge of breaking and entering.

The jury returned a verdict of guilty as charged and judgment was entered on the verdict. A prison sentence was imposed.

From the verdict and judgment, the defendant appeals.

Attorney General Robert Morgan by Associate Attorney Walter E. Ricks III for the State.

Thomas E. Cummings for defendant appellant.

CAMPBELL, Judge.

[1] The defendant first contends that it was error for the trial court to allow the witness, Robert M. Suggs, to testify. Defendant argues that the testimony amounted to the confession of another party which was induced by expectation of leniency and that the testimony was therefore inadmissible. This argument is without merit.

A confession is defined as an acknowledgment by the *accused* in a criminal action of his guilt of the *crime charged.* 23 C.J.S., Criminal Law, § 816 (emphasis added). The testimony of Suggs does not fall within this definition. He is not the accused in this action nor is he charged with any crime in this action. He is merely a witness and the fact that his testimony implicates him does not make it a confession within the above-stated rule.

[2] It is well settled that an accomplice is a competent witness. The fact that an accomplice hopes for or expects mitigation of his own punishment does not disqualify him from testifying. 23 C.J.S., Criminal Law, § 805. Any objection to the manner in which this testimony was procured was available only to the witness and not to the defendant. *State v. Lippard,*

223 N.C. 167, 25 S.E. 2d 594 (1943), *cert. denied,* 320 U.S. 749. The trial court properly instructed the jury in considering the testimony of accomplice Suggs. There was no error in allowing the witness Suggs to testify.

[3] The defendant next assigns as error the admission of testimony of a police officer that threats had been made against the witness Suggs. The testimony was brought out on cross-examination in response to questions about Suggs being allowed to see his girl friend at the Law Enforcement Center. The officer testified that this had been done and explained further that it was necessary because Suggs had been placed in isolation for his own protection after threats had been made against him. This assignment of error is without merit.

The defendant inquired repeatedly as to privileges granted Suggs while he was in jail. The police officer was merely explaining the reasons for any such privileges. ". . . As a general rule a witness should be permitted to explain facts in evidence from which a wrong inference or conclusion is likely to be drawn without an explanation, . . ." 98 C.J.S., Witnesses, § 318(b), p. 17. See also 58 Am. Jur., Witnesses, § 670. There was no error in allowing the witness to explain his answer in this case.

[4] The defendant's final assignment of error is to questions by the Solicitor as to any other indictments against the defendant.

The defendant relies on the case of *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), in which the Supreme Court of North Carolina overruled a long line of precedent and held that a defendant could no longer be impeached by questions as to indictments he might be under other than the one on which he was being tried. Under the rule in *Williams, supra,* the questions propounded by the Solicitor to the defendant would not be proper today.

The judgments in this case were entered on 18 June 1971. The *Williams* decision was handed down on 15 December 1971. The Supreme Court has since indicated that the rule in *Williams* applies only to trials which occurred after the decision in *Williams. State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972). In *Gainey* a conviction was upheld where the Solicitor had asked defendant about a previous arrest.

"The trial of this case occurred before the decision in *Williams*. Although no longer permissible, the solicitor's questions with reference to defendant's arrest were then competent. . . ." *State v. Gainey, supra.*

The trial of this case occurred before the *Williams* decision and the questions of the Solicitor were therefore competent.

In the trial below we find no error.

Affirmed.

Judges BRITT and GRAHAM concur.

ROBERT H. PRESSLEY AND WIFE, HAZELINE S. PRESSLEY; AND THOMAS LEE TREADAWAY AND WIFE, CHERYL P. TREADAWAY v. AMERICAN CASUALTY COMPANY AND LAWYERS TITLE INSURANCE CORPORATION

No. 7226SC32

(Filed 24 May 1972)

1. **Appeal and Error § 35— appeal from judgment on pleadings — statement of case on appeal**

Where an appeal is from a judgment on the pleadings, the record proper constitutes the case to be filed in the appellate court and it is not necessary for appellants to file a statement of case on appeal.

2. **Appeal and Error § 35— summary judgment — affidavits — record proper — statement of case on appeal**

Where summary judgment was rendered on the pleadings and on supporting affidavits, the case could not be appealed by docketing the record proper without a statement of case on appeal, the affidavits not being a part of the record proper, and the trial court properly dismissed the appeal for failure to serve the case on appeal within the time allowed by the court.

3. **Insurance § 136— fire policy — absence of insurable interest — summary judgment**

Summary judgment was properly entered in favor of defendant insurer in an action to recover under a fire insurance policy on a house, where the pleadings and affidavits established that the named insured had conveyed the property prior to the fire, and that on the date of the fire the named insured had no insurable interest in the house and the persons who held title to the property were not insured under the policy issued by defendant.

Pressley v. Casualty Co.

APPEAL by plaintiff from *Hasty, Judge,* at the 21 June 1971, Schedule C Non-Jury Session, MECKLENBURG Superior Court.

This civil action was instituted by the plaintiffs to recover proceeds allegedly due under an insurance policy issued by defendant American Casualty Company.

The allegations contained in the complaint may be summarized as follows:

Plaintiffs Thomas Lee Treadaway and Cheryl P. Treadaway are the son-in-law and daughter of plaintiffs, Robert H. Pressley and Hazeline S. Pressley. Plaintiffs Thomas Lee Treadaway and Cheryl P. Treadaway held title to a tract of land located at 3200 Rockwell Boulevard, Charlotte, North Carolina. A house was located on this property. While they held title to the property, the Treadaways obtained fire insurance for the house from the W. L. Smith Agency. The Smith Agency placed the insurance policy with the defendant American Casualty Company. At some time prior to 26 December 1969, title to the property was transferred from the Treadaways to the Pressleys. It is alleged that at this time the W. L. Smith Agency was informed of the transfer of title. On or about 26 December 1969 the house was destroyed by fire. No record of the title change was ever made in the records of the W. L. Smith Agency. At the time the house was destroyed by fire, title to the property was in the name of the Pressleys and the insurance on the property was in the name of the Treadaways. Based on these allegations plaintiffs contend that they are entitled to the proceeds of the fire insurance on the property.

The defendant filed an answer and motion for summary judgment on the grounds that there was no genuine issue of fact to be determined. Defendant contends that the Treadaways had no insurable interest in the house or property on 26 December 1969 and that the Pressleys, who held title to the property on that date, were not insured under the policy issued by defendant.

Affidavits were filed by both parties, and the motion was heard before Judge Hasty. At the conclusion of the hearing, summary judgment in favor of the defendant was granted.

The judgment was filed on 2 July 1971. Plaintiffs gave notice of appeal and appeal entries were filed on 19 July 1971

allowing the plaintiffs 45 days to prepare and serve statement of case on appeal. On 7 September 1971 defendant filed notice of a motion to dismiss the appeal for failure to serve the case on appeal within the time allowed. Plaintiffs answered with a motion contending that since no testimony was taken at the hearing, there was no requirement that the case on appeal be served and that therefore they should be permitted to appeal by docketing the record proper with the Court of Appeals. Plaintiffs' motion was denied and an order was filed 10 September 1971 dimissing plaintiffs' appeal for failure to serve the case on appeal within the time allowed by the appeal entries.

From this order plaintiffs appeal to the Court of Appeals.

Warren D. Blair and Richard L. Kennedy for plaintiff appellants.

Kennedy, Covington, Lobdell & Hickman by Edgar Love III for defendant appellee, American Casualty Company.

CAMPBELL, Judge.

On appeal the plaintiffs assign as error the granting of the Motion to dismiss their appeal for failure to serve the case on appeal within the allowed time. They also assign as error the order granting defendant's motion for summary judgment.

Plaintiffs contend that a statement of case on appeal is not required in an appeal from a motion relating solely to the pleadings. They maintain that the record proper constitutes the case to be filed in the appellate court in such a case. It is argued that in the case before us it was not necessary to serve a case on appeal and therefore it was error to dismiss for failure to serve case on appeal within the time allowed.

[1] We agree that, where an appeal is from a judgment on the pleadings, the record proper constitutes the case to be filed in the appellate court, and it is not necessary for the appealing parties to file a statement of case on appeal. *Edwards v. Edwards,* 261 N.C. 445, 135 S.E. 2d 18 (1964). Dismissal for failure to serve case on appeal within the time allowed is not proper in such a case.

[2] The case before us is not one of judgment on the pleadings. In this case summary judgment was rendered on the pleadings

and on supporting affidavits. Pleadings themselves constitute a part of the record proper. The general rule is that affidavits being in the nature of evidence are generally not part of the record proper. In order to be considered on appeal, they must be brought into the record by appropriate means. 4A C.J.S., Appeal and Error, § 762(b). The proper method to bring the affidavits to the attention of the appellate court in this jurisdiction is to incorporate them into the statement of case on appeal.

The case before us involves affidavits which are not part of the record proper, and therefore it could not be appealed by docketing the record proper without a statement of case on appeal. The trial court was correct in dismissing the appeal for failure to serve the case on appeal within the time allowed. Furthermore the case on appeal was filed late in this Court.

[3] We have, nevertheless, reviewed the plaintiffs' other assignments of error and find them to be without merit. There was no factual dispute and the entry of a summary judgment was proper.

Appeal dismissed.

Judges GRAHAM and BRITT concur.

STATE OF NORTH CAROLINA v. ROBERT EARL HINTON

No. 722SC379

(Filed 24 May 1972)

1. Criminal Law § 66— in-court identification — competency

The trial court's finding that a robbery victim's in-court identification of defendant was not tainted by any unconstitutional pretrial identification procedure was supported by competent, clear and convincing evidence presented on *voir dire*.

2. Criminal Law § 162— necessity for objection to evidence

The competency of evidence is not presented when there is no objection or exception to its admission.

3. Robbery § 3— cigar box — competency

The trial court in an armed robbery prosecution did not err in the admission of a cigar box found under a bed near defendant's rented room where the robbery victim had testified that she poured money into a cigar box at defendant's direction.

4. Criminal Law § 126— instructions — unanimity of verdict

In the absence of a request, the trial judge is not required to charge the jury that its verdict must be unanimous.

ON *certiorari* to review defendant's trial before *Hubbard, Judge,* 6 December 1970 Session of Superior Court held in MARTIN County.

The defendant, Robert Earl Hinton, was charged in separate bills of indictment proper in form with the armed robbery of Mary B. Heath of 50 to 60 dollars, the property of Mary B. Heath and J. E. Heath, doing business as Heath's Jewelry Co., Williamston, N. C., and with assaulting Clarence Biggs with a deadly weapon, to wit: a .22 caliber pistol with intent to kill inflicting serious injury.

Upon the defendant's plea of not guilty the State offered evidence tending to show the following:

At about 1:30 p.m. on 6 July 1970 the defendant entered Heath's Jewelry store in Williamston, North Carolina, and asked Mrs. Heath about a watch for Johnny Spruill. When Mrs. Heath went to look for the watch, the defendant said, ". . . (F)orget the watch because this is a hold-up." The defendant pulled a gun, pointed it at Mrs. Heath and directed her to get the money out of the safe and put it in a cigar box which the defendant brought with him into the store. Mrs. Heath took sixty to sixty-five dollars from the safe, including some quarters, dimes, and pennies, and following the directions of the defendant poured the money into the cigar box. Mrs. Heath testified: "He stuck the gun at me again. He said, 'Get over there, get me some rings.' " While Mrs. Heath was getting the rings, the door opened and a customer, Clarence Biggs, came in and the defendant went around the counter and shot Mr. Biggs in the back.

The defendant testified denying that he committed the crimes charged in the bills of indictment and offered evidence tending to establish an alibi. The jury found the defendant guilty as charged in both bills of indictment and from judgments imposing prison sentences the defendant gave notice of appeal to this Court.

Attorney General Robert Morgan and Assistant Attorney General William F. O'Connell for the State.

James E. Keenan for defendant appellant.

HEDRICK, Judge.

[1] By his first assignment of error the defendant contends the in court identification of the defendant by Mrs. Heath was tainted by unconstitutional out of court identification procedures. When the defendant objected to Mrs. Heath's testimony, the trial judge followed the procedure set out by Chief Justice Bobbitt in *State v. Moore* and *State v. Accor,* 277 N.C. 65, 175 S.E. 2d 583 (1970) by having a *voir dire* hearing in the absence of the jury, where, after hearing the testimony of three witnesses, including Mrs. Heath, he made detailed findings as to what Mrs. Heath observed during and immediately after the robbery and shooting and what occurred relative to the out of court identification procedure, and based on such findings, the trial judge concluded that the in court identification of the defendant by Mrs. Heath was not tainted by any unconstitutional out of court identification procedure suggestive or conducive to mistaken identification.

We have carefully reviewed the evidence in the record of the *voir dire* hearing and hold there is plenary, competent, clear and convincing evidence to support his honor's findings, and the findings support his ruling allowing the witness Heath to identify the defendant as being the person who robbed her and shot Clarence Biggs. *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652 (1971).

The defendant contends that the Court erred by allowing the State to introduce into evidence over defendant's objection a shirt spotted with paint and a cigar box prior to a showing of their relevancy and materiality. We do not agree. Five of the six exceptions upon which this assignment of error is based relate to the identification of the shirt as being the defendant's property. When the shirt was offered into evidence as an exhibit the defendant did not object.

[2] Competency of evidence is not presented when there is no objection or exception to its admission. 7 Strong, N. C. Index 2d, Trial, § 15. These exceptions have no merit.

The sixth exception in this group relates to the introduction of the cigar box into evidence as an exhibit.

[3] In criminal cases every circumstance that is calculated to throw light upon the supposed crime is relevant and admissible

if competent. 2 Strong, N. C. Index 2d, Criminal Law, § 33, p. 531. Since the evidence tended to show that the defendant brought a cigar box into the store and that Mrs. Heath poured the money into a box, we think the court properly admitted the cigar box found under the bed near the defendant's rented room as a relevant circumstance tending to throw light on the crime charged.

[4] Finally, the defendant contends the Court committed prejudicial error in not instructing the jury that its verdict must be unanimous. This contention was considered and rejected in *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1970), where Justice Huskins said, "We hold that, in the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. Since the defendant has the right to have the jury polled, there is no apparent reason why the trial judge should be required in every case to so instruct." There was no request for such an instruction in the present case.

The defendant has other assignments of error which we have carefully considered and find to be without merit. In the defendant's trial, we find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF NEW BERN, NORTH CAROLINA v. BRANCH BANKING & TRUST COMPANY, A BANKING CORPORATION; CHASE MANHATTAN BANK OF NEW YORK, A BANKING CORPORATION; THE HANOVER INSURANCE COMPANY, A CORPORATION; AND UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION

No. 723SC304

(Filed 24 May 1972)

Banks and Banking § 11— forged draft — charge back — summary judgment

In an action by a savings and loan association to recover an amount charged back against it by a bank as a result of an alleged forged endorsement on a draft issued by defendant insurance company, summary judgment was properly entered in favor of defendant insurance company where it presented affidavits showing that the

endorsement of one of the payees on the draft was a forgery and that the draft was charged back in the normal collection channels in accordance with standard banking practices, and plaintiff presented nothing at the hearing on the motion other than the complaint.

PLAINTIFF appeals from *Rouse, Judge,* November 1971 Session of CRAVEN Superior Court.

Plaintiff seeks to recover $11,107.71 charged back against plaintiff by defendant Branch Banking and Trust Company (Branch) as a result of an alleged forged endorsement on a draft issued by defendant Hanover Insurance Company (Hanover). The draft was issued on 26 June 1968 payable to two payees—Winter Park Federal Savings and Loan Association (Winter Park) and Geraldine M. Stallings—jointly. Geraldine Stallings deposited the draft, bearing "endorsements" of both payees, to her account with plaintiff on 5 July 1968. Plaintiff endorsed the draft and deposited it in its account with Branch on 8 July 1968. The draft was accepted by Hanover and paid out of its account at Chase Manhattan Bank (Chase), the drawee bank, on 10 July 1968. On 5 October 1970, on demand of Hanover for reimbursement, Chase charged the draft back to the account of Branch due to notification that the endorsement of Winter Park on the draft was a forgery and Winter Park had never received payment. Branch then charged it back to plaintiff's account.

Defendant Hanover moved for summary judgment. Following a hearing the motion was allowed and from judgment dismissing the action as to Hanover, plaintiff appeals.

Barden, Stith, McCotter & Sugg by Laurence A. Stith for plaintiff appellant.

Ward, Tucker, Ward & Smith by David L. Ward, Jr., for defendant appellee, Hanover Insurance Company.

BRITT, Judge.

Plaintiff contends that it was error to grant summary judgment in this action.

The case of *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970) presents an excellent discussion of the summary judgment procedure in North Carolina. It states that the burden is on the party moving for summary judgment to establish

the lack of a triable issue of fact. But if the party moving for summary judgment by affidavit or otherwise presents materials which would require a directed verdict in his favor if presented at trial, he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him or comes forward with affidavits or other materials that show there is a triable issue of fact.

G.S. 1A-1, Rule 56(e) in part provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." See also: *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971); cert. den. 280 N.C. 180, 185 S.E. 2d 704 (1972); *Pridgen v. Hughes, supra.*

In the present case the moving party, Hanover, in addition to its answer presented affidavits showing that the endorsement of Winter Park on the draft was a forgery and that the draft was charged back in the normal collection channels in accordance with standard banking practice. Upon this showing by the movant the burden then fell upon plaintiff, the adverse party, to set forth specific facts showing a genuine issue for trial. *Bank v. Furniture Co.*, 11 N.C. App. 530, 181 S.E. 2d 785 (1971), cert. den., 279 N.C. 393, 183 S.E. 2d 241 (1971). Plaintiff presented nothing at the hearing on the motion other than the complaint. Under G.S. 1A-1, Rule 56(e) and decisions interpreting the statute, we hold that this was not sufficient to establish a triable issue of fact. Upon the facts presented by Hanover, the movant, it was entitled to judgment as a matter of law.

Among other things, plaintiff contends that it should be allowed to go to trial to show what interest Geraldine Stallings as joint payee had in the draft and that this amount should not have been charged back to plaintiff. The complaint is silent on this point and in its answer Hanover states that the full amount of the draft was paid to Winter Park. There is nothing in the record to indicate that Winter Park was not entitled to the entire amount of the draft and nothing in the record indicates that Geraldine Stallings was entitled to any part of it.

Upon a motion for summary judgment the adverse party may not rest upon his complaint and wait for trial to present his evidence, if any, when the moving party has presented affidavits or other matter indicating that summary judgment is appropriate. G.S. 1A-1, Rule 56(e); *Pridgen v. Hughes, supra.*

In the instant case defendant Hanover produced evidence showing a forged endorsement and an eventual charge-back to plaintiff who warranted good title to the draft when it deposited the draft with Branch. G.S. 25-3-417(2)(a); G.S. 25-4-207(2)(a). Absent any showing by plaintiff that there are any genuine issues for trial once defendant produces its evidence, summary judgment is proper.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. EUGENE BROWN

No. 7226SC119

(Filed 24 May 1972)

1. **Constitutional Law § 30— speedy trial**

The trial court properly denied defendant's motion to dismiss a homicide charge against him for lack of a speedy trial where the crime allegedly occurred on 22 March 1970, defendant employed an attorney on 10 April 1970, the indictment was returned in May 1970, the case was continued at defendant's request in September 1970 and was continued with defendant's consent in April 1971, defendant has been free on bail since April 1970, the case was placed on the trial calendar four times but was not tried because jail cases were being tried first, and all witnesses for defendant are still available.

2. **Criminal Law § 169— exclusion of testimony — failure to show witness' answer**

Where the record fails to show what the witness would have testified had he been permitted to answer the questions objected to, the exclusion of such testimony is not shown to be prejudicial.

3. **Criminal Law § 163— instructions — misstatement of contentions**

Any misstatement of contentions must be called to the attention of the court when made, so as to permit a correction, or such misstatement will be deemed waived.

State v. Brown

APPEAL by defendant from order of *McLean, Judge*, entered at the 9 August 1971 Criminal Session of MECKLENBURG Superior Court and judgment of *Fountain, Judge*, entered at the 30 August 1971 Criminal Session of MECKLENBURG Superior Court.

The indictment against defendant returned at the 11 May 1970 Session of Mecklenburg Superior Court charged defendant with the murder of Dorothy Brown (his wife) on 22 March 1970. On 19 April 1971 defendant filed a "plea in abatement and motion to quash" the bill of indictment, contending that his constitutional rights had been denied in that he had not been provided with a speedy trial. Following a hearing, Judge McLean entered an order denying the motion to quash. The case then came on for trial at the 30 August 1971 Criminal Session, defendant pleaded not guilty, a jury found him guilty of manslaughter, and the court entered judgment imposing prison sentence of not less than 12 nor more than 15 years. Defendant appealed from the order of Judge McLean and the judgment imposing prison sentence.

Attorney General Robert Morgan by Mrs. Christine Y. Denson, Assistant Attorney General, for the State.

Paul L. Whitfield for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the court's denial of his motion that he be discharged because he was not given a speedy trial.

Pertinent findings of fact contained in Judge McLean's order are summarized as follows: Around 10 April 1970 Attorney Paul L. Whitfield was employed by defendant. During the fall of 1970 the case was placed on the calendar for trial but defense counsel indicated that he was in no hurry to try the case due to the fact that his fee had not been fully paid. A new solicitor took office on 1 January 1971 at which time some 1000 cases were pending on the criminal docket of Mecklenburg Superior Court with approximately 125 defendants confined to jail awaiting trial. Since taking office the new solicitor has pursued the course of trying his jail cases first. Defendant was admitted to bail in April 1970 and has been on bail continuously since that time. This case has been placed on the trial calendar

some four times but was not tried due to jail cases being tried first. All witnesses for defendant are available and defendant has suffered no loss with respect to availability of witnesses. The solicitor has been diligent in attempting to bring this case to trial. Judge McLean concluded that the State has been diligent and has not unduly delayed the trial of this case. The record indicates that the case was continued at defendant's request on 21 September 1970 and that defendant's counsel was agreeable to a continuance on 19 April 1971.

In *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971), our Supreme Court in an opinion by Justice Moore said:

> The fundamental law of this State reserves to each defendant the right to a speedy trial. (Citations.) * * * The circumstances of each particular case determines whether a speedy trial has been afforded. Undue delay cannot be defined in terms of days, months, or even years. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by the defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. (Citations.)

In the case at bar the record does not disclose that defendant was prejudiced in any manner by the delay of his trial and he has failed to show that the delay was due to the neglect or willfulness of the State. Under the facts found, we hold that Judge McLean properly denied defendant's motion and the assignments of error relating thereto are overruled.

By his assignment of error No. 3 defendant contends that the trial court erred in permitting incompetent questions and inflammatory and prejudicial remarks by the solicitor. Although this assignment is broadside, we have carefully considered the twenty-six exceptions grouped under it and fail to find any error that was prejudicial to defendant, hence, the assignment of error is overruled.

[2] In the next assignment of error argued in his brief, defendant contends that the trial court erred in denying him the opportunity to prove decedent's violent propensities and previous assaults on defendant. Some twenty exceptions are grouped

under this assignment and a review of the record discloses that each exception was to the sustaining of the solicitor's objection to a question asked a witness by defendant's counsel. However, the record fails to disclose what the answer would have been had the court not sustained the objection. The rule is well settled in this jurisdiction that where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970) and cases therein cited. The assignment of error is overruled.

[3] Finally, defendant contends that the trial court erred in charging the jury on facts not in evidence. A review of the record relating to the exceptions grouped under this assignment of error discloses that each exception relates to the stating of a contention. In *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282 (1971), our Supreme Court said: "It is well settled that any misstatement of the contentions of the parties must be called to the attention of the court at the time, so as to permit a correction, or such misstatement will be deemed waived. (Citing cases.)" The record fails to disclose that defendant informed the court of any misstatement of contentions before the jury retired. The assignment of error is overruled.

A thorough review of the record impels the conclusion that defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

CLARENCE A. GARMON, PLAINTIFF v. TRIDAIR INDUSTRIES, INC., EMPLOYER; AND TRANSPORT INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7226IC305

(Filed 24 May 1972)

1. **Master and Servant § 65— workmen's compensation — performance of regular work in customary manner — accident**

There was sufficient evidence to support the Industrial Commission's determination that plaintiff, whose job included assembling hydraulic pipes and placing them on steel frames, was performing his regular work in his usual and customary manner when he suffered a back injury while attempting to lift a 150 pound brace over some cables in order to bring a steel frame into his work area, and that plaintiff therefore did not sustain an injury by accident within the meaning of G.S. 97-2(6).

2. **Master and Servant § 90— workmen's compensation — absence of finding by hearing commissioner — authority of Full Commission to make finding**

The fact that the hearing commissioner made no finding with reference to whether plaintiff failed to give written notice of an alleged accident to the employer in compliance with G.S. 97-22 does not preclude such finding by the Full Commission.

3. **Master and Servant § 90— workmen's compensation — failure to give timely notice to employer — reasonable excuse**

The evidence supported the Industrial Commission's finding that plaintiff failed to provide a reasonable excuse to justify his failure to give written notice to the employer within 30 days of the accident as required by G.S. 97-22, such notice having been given nearly three months after the alleged accident and more than a month after he was discharged from the hospital.

APPEAL by plaintiff from award and opinion of the North Carolina Industrial Commission dated 15 November 1971.

Plaintiff appeals an award of the Industrial Commission denying his claim for temporary total disability, permanent partial disability, and medical expenses resulting from an alleged industrial accident occurring on 28 January 1970.

The evidence tended to show: Plaintiff was an employee of defendant employer and his duties included assembling hydraulic pipes and putting them on steel frames. On the day of the injury he had attempted to bring one of the frames into his work area with a forklift. In order to move the frame, it was necessary to move a stand or scotch weighing about 150

pounds over some cables. He propped his knees against the stand and attempted to lift it over the cables and when he lifted up he felt a pain in his back. The Industrial Commission found that plaintiff was lifting the stand in the manner described but concluded as a matter of law that this was the performance of his normal duties in the usual manner and did not constitute an accident. The commission also found that plaintiff did not comply with G.S. 97-22 in that he failed to give written notice of the accident within thirty days.

S. Dean Hamrick for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Edgar Love III for defendants appellees.

BRITT, Judge.

[1] Plaintiff alleges error in the conclusion of law that he did not sustain an injury by accident as defined by G.S. 97-2(6), contending that the conclusion is not consistent with the findings of fact and the evidence. We do not agree with this contention. The question presented by the contention is whether there was evidence in the record to support the finding made by the commission that plaintiff had not sustained an injury by accident. The court does not weigh the evidence as this would invade the province and function of the commission. "If there is any evidence of substance which directly, or by reasonable inference, tends to support the findings, the courts are bound by them, 'even though there is evidence that would have supported a finding to the contrary.' *Keller v. Wiring Co., supra.*" *Bigelow v. Tire Sales Co.*, 12 N.C. App. 220, 225, 182 S.E. 2d 856, 860 (1971).

The commission found as a fact, from competent evidence, without objection by plaintiff that he was "performing his usual and customary duties for the defendant employer. . . . Plaintiff placed his knees against the stand to lift same and move it over, beyond the welding cables and as he lifted the stand, he felt a sharp pain in his back."

From this finding the commission concluded that the only unusual occurrence was that plaintiff felt a pain in his back. In *Bigelow, supra,* the court held that in order to have a compensable accident, there must be interruption of the work routine and the introduction of unusual conditions likely to result

in unexpected consequences. There was no showing of such circumstances or interruption of the work routine here; therefore, the conclusion of law by the commission that plaintiff did not sustain an injury by accident is fully supported by competent evidence and as such will not be disturbed on appeal.

[2] Plaintiff also contends there is error in the conclusion of law by the full commission, absent any finding by the hearing commissioner, that plaintiff failed to give written notice of the alleged accident to the employer in compliance with G.S. 97-22. The fact that no reference was made to this point by the hearing commissioner does not preclude such finding by the full commission. The Industrial Commission has authority to review, modify, adopt, or reject findings of a hearing commissioner and may *ex mero motu* strike out a finding of the hearing commissioner and his conclusion of law based thereon in order to make the record comply with the law, even though there is no exception to the finding or conclusion. *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608 (1962); *Petty v. Associated Transport,* 4 N.C. App. 361, 167 S.E. 2d 38 (1969), rev'd on other grounds, 276 N.C. 417, 173 S.E. 2d 321 (1970); G.S. 97-85. Therefore, the proposition becomes one of whether there is evidence to support such a finding by the commission.

[3] G.S. 97-22 calls for written notice and provides in part: "(B)ut no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death *unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.*" (Emphasis ours.) Plaintiff tendered incapacity as the excuse for not filing written notice, yet it was 20 April 1970 before he filed the notice—nearly three months after the alleged accident and more than a month after he was discharged from the hospital. The extent of plaintiff's incapacity is indicated by his statement that "I wasn't able to get around much at that time." The evidence is plenary to substantiate the commission's finding that no written notice was filed in the time required and that plaintiff has failed to provide a reasonable excuse to justify the lateness of the notice. In addition the record is devoid of any showing by plaintiff that the employer was not prejudiced by plaintiff's failure to

comply with G.S. 97-22. For these reasons the relevant findings of fact and conclusions of law are upheld.

The order and award of the full commission is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. BILLY LLOYD SHIPMAN

No. 7214SC325

(Filed 24 May 1972)

Rape § 18—assault with intent to rape — sufficiency of indictment

Bill of indictment alleging that defendant assaulted a named female with intent her to ravish and carnally know forcibly and against her will *held* sufficient to charge the crime of assault on a female with intent to commit rape, although the form of such indictment is disapproved.

APPEAL by defendant from *Ervin, Judge,* 15 November 1971 Session of Superior Court held in DURHAM County.

Defendant was brought to trial upon charges of assault with intent to commit rape and resisting arrest. The State elected not to prosecute the charge of resisting arrest.

Defendant entered a plea of nolo contendere to the charge of assault with intent to commit rape and answered under oath various questions asked by the court with respect to the voluntariness of his plea. Defendant's answers tend to show, among other things, that he understood that he was charged with the felony of assault on a female with intent to commit rape; the charge and the effect of a plea of nolo contendere had been explained to him by his counsel; he understood that his plea of nolo contendere had the same effect as a plea of guilty; he knew he could be imprisoned upon his plea for as much as 15 years; he had sufficient time to confer with counsel and to subpoena witnesses, and no promises or threats had been made to influence his plea.

Defendant's counsel was asked by the court: "Have you examined the Bill of Indictment in this case?" Counsel answered that he had examined the bill of indictment and had found it to be proper.

The State presented evidence tending to show that on 9 July 1971, at 9:30 or 10:00 p.m., several police officers went to Duke Gardens where some assaults and robberies had previously occurred. The officers were disguised in wigs and dressed like "hippies." A 22-year-old nurse also went to the Gardens at the request of the officers. Defendant approached the young lady twice and asked for a light. He approached her a third time. This time his pants and underclothes were down around his knees and his private parts exposed. Defendant grabbed the young lady and pulled her toward him. She tried to pull away. As defendant was bending over her the officers approached, identified themselves as police officers, and ordered defendant not to move. At this point defendant ran toward the officers with a shiny object in his hand. He was apprehended, disarmed and placed under arrest.

Defendant offered three witnesses, all of whom testified as to his good character.

Judgment was entered imposing an active prison sentence of not less than seven nor more than twelve years, and the court recommended that defendant be given a complete psychiatric evaluation after his admission to the Department of Corrections.

Attorney General Morgan by Assistant Attorney General Banks for the State.

Kenneth B. Spaulding for defendant appellant.

GRAHAM, Judge.

All of defendant's assignments of error are based upon his contention that the bill of indictment is insufficient to charge the offense of assault on a female with intent to commit rape.

The indictment charges:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Billy Lloyd Shipman late of the County of Durham on the 9th day of July 1971 with force and arms,

at and in the County aforesaid, 1st Count: did unlawfully, wilfully, and feloniously commit an assault on one Sandra Garrison, a female, with intent her, the Sandra Garrison, feloniously, forcibly, and against her will to ravish and carnally know the same Sandra Garrison, the same offense being against the peace and dignity of the State and in violation of law, to wit G.S. 14-22."

The bill of indictment reflects an archaic style, probably as a result of being fashioned from an old form. Cf. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677. The language used is substantially the same as that contained in a bill of indictment considered by the Supreme Court in 1902 in the case of *State v. Peak,* 130 N.C. 711, 41 S.E. 887. The bill of indictment in that case was held sufficient and we follow that case in overruling defendant's assignments of error here.

The effect of the indictment here is to charge that defendant assaulted Sandra Garrison, a female, with intent her to ravish and carnally know forcibly and against her will. The form is disapproved; however, in substance the indictment is sufficient to withstand defendant's attack. G.S. 15-153.

It is noted that the indictment was not attacked at the trial and defendant's counsel expressly stated that he had examined it and found it to be proper. Answers given by defendant and his counsel show that they were in no way confused by the bill's lack of refinement.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID VANCE JACKSON

No. 721SC118

(Filed 24 May 1972)

1. **Criminal Law § 154— settlement of record on appeal**

The trial court alone has authority to settle for the appellate court what occurred at the trial.

2. **Criminal Law § 154— record on appeal — court's exclusion of Clerk's Worksheet of Judgment**

The trial court did not err in excluding the "Clerk's Worksheet of Judgment" from the record on appeal, the Worksheet not being a part

of the record proper; even if the Clerk's Worksheet were included in the record on appeal, it could not be used to impeach the record as settled by the trial judge.

3. **Criminal Law § 144; Judgments § 6— correction of clerk's records — power of court**

The trial court had inherent power to make corrections on the "Clerk's Worksheet of Judgment" after term.

4. **Criminal Law § 134— incorrect commitment — judgment**

When the commitment fails to set forth the judgment correctly, it is void and the judgment itself controls.

5. **Criminal Law § 134— variance between judgment and commitment — correction**

Defendant is not entitled to a new trial by reason of a variance between the judgment and commitment, but the case is remanded for correction of the commitment, with defendant to be given credit for any time served upon the invalid commitment.

APPEAL by defendant from *Cohoon, Judge,* at the 6 September 1971 Session of CHOWAN Superior Court.

In this case defendant was charged in a warrant with the offenses of (1) operating a motor vehicle while under the influence of intoxicating liquor, second offense and (2) driving while his license was suspended. The defendant entered a plea of guilty to each charge in the district court. Judgment was entered sentencing defendant to a jail term.

Defendant appealed to Superior Court and again entered a plea of guilty to each charge. Upon ample evidence this plea was adjudged to have been freely, understandingly and voluntarily entered. Judgment was entered imposing a sentence of four months in the county jail on the count of driving under the influence of intoxicating liquor, second offense, and a consecutive jail sentence of four months on the count of driving while his license was suspended. The latter, however, was suspended upon certain conditions. The defendant has complied with those conditions, appealed from the active sentence and is free on bond awaiting the result of the appeal.

In the commitment order, defendant was ordered confined to the county jail on the plea of guilty to the charge of driving while his license was suspended. This was incorrect and not in compliance with the judgment.

From the judgment of the court below, defendant appealed.

In preparing the case on appeal the defendant's attorney included therein the "Clerk's Worksheet of Judgment." This document was excluded from the record when the record on appeal was settled by the trial court.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

W. J. P. Earnhardt, Jr., for defendant appellant.

CAMPBELL, Judge.

Defendant assigns as error the exclusion of the "Clerk's Worksheet of Judgment" from the record on appeal. It is contended that this document is inconsistent with the judgment and was altered after term. Defendant argues that this document is necessary to an understanding of the appeal and should have been included in the record on appeal.

[1, 2] In this jurisdiction it is well-settled law that the trial court alone has the authority to settle for this court what occurred at the trial. *State v. Allen,* 4 N.C. App. 612, 167 S.E. 2d 505 (1969). The Clerk's Worksheet is not a part of the record proper. It is, at best, analogous to a stenographer's notes, and it is clear that such notes cannot replace the trial court in settling what occurred at the trial. *State v. Allen, supra.* It was not error to exclude the Clerk's Worksheet of Judgment from the case on appeal. Even if the trial court had allowed the Clerk's Worksheet to be included in the case on appeal, it could not be used to impeach the record on appeal as settled by the trial judge. 4A C.J.S., Appeal and Error, § 731.

[3] Defendant argues that the Clerk's Worksheet of Judgment was amended after the term and that this was error. It is sufficient to note that a court of record has the inherent power to amend its records or correct the mistakes of its clerk and no lapse of time will preclude the court from so doing. *State v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339 (1956). This assignment of error is overruled.

The defendant's final argument is that there is a variance between the judgment and commitment. Defendant maintains that a new trial should be granted.

We agree that there is a variance between the judgment and the commitment. In the judgment the active sentence was

imposed on the charge of driving under the influence of intoxicating liquor, second offense, while the commitment order confined defendant for driving during suspension of his license.

[4, 5] A valid judgment is the only authority for the lawful imprisonment of a person and when the commitment fails to set forth the judgment correctly it is void and the judgment itself controls. *In Re Swink,* 243 N.C. 86, 89 S.E. 2d 792 (1955). We do not agree with defendant that the proper remedy for this error is a new trial.

It is hereby ordered that a revised commitment be issued by the Clerk of Superior Court of Chowan County, dated on the date of the original commitment, and effective upon that date, to be substituted for the commitment heretofore issued, and to order the defendant confined on the judgment entered on the plea of guilty to the charge of driving a motor vehicle while under the influence of intoxicating liquor, this being his second offense.

The effect will be that the defendant will receive credit upon the new commitment for the time, if any, heretofore served upon the invalid commitment. *State v. Smith,* 267 N.C. 755, 148 S.E. 2d 844 (1966).

Modified and affirmed.

Chief Judge MALLARD and Judge BROCK concur.

SHERRY LEWIS, ON BEHALF OF HERSELF AND SUCH OTHER PERSONS AS ARE SIMILARLY AFFECTED BY THOSE CERTAIN AMENDMENTS TO CHAPTER 11 OF THE CHARLOTTE CITY CODE WHICH ARE REFERRED TO HEREIN v. J. C. GOODMAN, CHIEF, CHARLOTTE POLICE DEPARTMENT; B. L. PORTER, CHIEF, MECKLENBURG COUNTY POLICE DEPARTMENT; DONALD W. STAHL, SHERIFF OF MECKLENBURG COUNTY, AND JOSEPH A. STONE, TAX COLLECTOR FOR THE CITY OF CHARLOTTE AND THE COUNTY OF MECKLENBURG

No. 7226SC189

(Filed 24 May 1972)

1. Injunctions § 2— inadequacy of remedy at law

An injunction will not lie where there is an adequate remedy at law.

2. Injunctions § 5; Taxation § 38— tax on topless dancers — procedure to test validity

An action for an injunction is not the proper procedure for testing the validity of a municipal ordinance requiring topless dancers and waitresses to pay a license tax of $500 per year, the proper remedy of the taxpayer being to pay the tax under protest and sue for its recovery under G.S. 105-267.

APPEAL by defendants from *McLean, Judge,* at the 27 September 1971, Schedule "B" Jury Session of MECKLENBURG Superior Court.

This is a civil action to enjoin the collection of a license tax imposed by the City of Charlotte on topless or nude waitresses, entertainers, dancers or employees.

The complaint alleges that the city council of the City of Charlotte, North Carolina, has duly ratified an ordinance requiring topless dancers and waitresses to pay a license tax of $500.00 per annum; that plaintiff has been employed as a topless dancer or waitress and derives her income from this occupation; that the city ordinance has as its purpose the discouragement or prohibition of the taxed activity and the ordinance is therefore invalid; that plaintiff is thereby prevented from engaging in her occupation; and that plaintiff has no adequate remedy at law.

At the final hearing the trial court entered judgment holding that the tax imposed by the city ordinance was unconstitutional and unenforceable and defendants were enjoined from enforcing the ordinance.

From this order defendants appeal.

Arthur Goodman, Jr., and Warren D. Blair for plaintiff appellee.

City of Charlotte by Henry W. Underhill, Jr., for defendant appellants.

CAMPBELL, Judge.

In rendering a decision on this appeal it is necessary for us to determine whether injunction is the proper remedy where plaintiff challenges the validity of a tax ordinance.

[1] It is well-settled law that where there is an adequate remedy at law, an injunction will not lie. This principle is applica-

ble to all cases in which the complaining party can have adequate relief by the prosecution of his remedy in the courts, or in a procedure pointed out by statute, and this is especially true in controversies arising out of the taxing power. *Wilson v. Green,* 135 N.C. 343, 47 S.E. 469 (1904). In cases challenging the imposition of a tax the taxpayer must pursue those remedies provided by statute. *R. R. v. Reidsville,* 109 N.C. 494, 13 S.E. 865 (1891).

[2] The legislature has established the remedies by which a taxpayer may challenge the validity of a tax. The proper remedy where a taxpayer has a valid defense to the collection of a tax is provided in G.S. 105-267. This section requires a taxpayer to pay the tax and demand a refund, and if the tax is not refunded he may then bring suit to recover the amount paid. G.S. 105-267. This remedy, by its own terms and by the decisions of the Supreme Court, applies to taxes imposed by municipalities as well as those imposed by the State and this has been held to be the rule even where the tax in question was imposed pursuant to Chapter 160 (now Chapter 160A) of the General Statutes. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433 (1951). This is the appropriate procedure for testing the constitutionality of a tax. *Oil Corp. v. Clayton, Comr. of Revenue,* 267 N.C. 15, 147 S.E. 2d 522 (1960).

The remedy provided by statute is readily available to plaintiff. She testified:

> "My name is Sherry Lewis and I am the plaintiff in this action. I am a topless dancer and entertainer and I make my livelihood as such. Since the Ordinance in question was passed, the one requiring a $500 license tax, I have not been able to pursue this livelihood. This has had an effect on my ability to earn a living; it has cut down my income to at least $300.00. I usually made not less than about $1,000 a week, and now I don't make but about $300.00 a week. I have not bought a license. I am employed at the Sip and Cork or Bamboo Lounge, trading as Sip and Cork, and am dancing, but not topless."

Plaintiff could easily have paid the $500.00 tax and sued for a refund. She had an adequate remedy at law and is required to pursue that remedy.

The rule we follow today was stated succinctly in *Bragg Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918 (1954) as follows:

> "Ordinarily the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State Government. If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. . . . "

See also *Loose-Wiles Biscuit Co. v. Sanford,* 200 N.C. 467, 157 S.E. 432 (1931).

We call attention to the fact that G.S. 105-406 which authorized injunctive relief under certain circumstances was repealed effective July 1, 1971 and before the institution of the present action.

We hold that under the facts of this case an action for an injunction is not the proper procedure for testing the validity of the tax in question.

The order appealed from is vacated and

Reversed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. THOMAS JEREMIAH REDMOND

No. 7222SC219

(Filed 24 May 1972)

Burglary and Unlawful Breakings § 5— felonious breaking and entering — intent to steal

The evidence was sufficient to sustain a verdict of guilty of the felony of breaking and entering a dwelling house with intent to steal, where it tended to show that defendant entered a dwelling after dark by opening a closed front door, that defendant was found under the bed in an upstairs bedroom, and that defendant fled after being discovered, notwithstanding there was no evidence that anything was stolen from the dwelling.

State v. Redmond

APPEAL by defendant from *Lupton, Judge,* August 1971 Session, IREDELL Superior Court.

The defendant and his attorney duly entered a waiver of indictment and defendant was tried upon an Information properly charging him with the felony of breaking and entering a dwelling house with intent to steal. To the charge contained in the Information the defendant entered a plea of not guilty.

The evidence on behalf of the State tended to show that on 11 September 1970, Mary Lizzie Bruce owned and lived in a home located on the Old Mocksville Highway. Her son, Hoyt Lee Bruce, and his wife lived with her. About 5:00 p.m. the defendant drove an automobile into the yard of the Bruce home. Mrs. Rebecca Bruce, the daughter-in-law, went out on the porch and asked the defendant what he wanted. The defendant inquired as to where Pink Murdock lived. Rebecca Bruce told him where Pink Murdock lived and then went in the house to the kitchen where Mary Lizzie Bruce was eating her supper. The defendant followed her into the house and stood in the kitchen doorway for some twenty-five or thirty minutes. Mary Lizzie Bruce asked him to leave three different times and finally the defendant left. About 6:30 p.m. Hoyt Bruce, the son of Mary Lizzie Bruce, and the husband of Rebecca Bruce came in from work. He remained in the house a few minutes and then he and his wife went to see a neighbor and left Mary Lizzie Bruce with the three children, the oldest being three years old. It was after dark. Mary Lizzie Bruce was sitting in the living room rocking the baby to sleep when she thought she heard the front door, which had been closed, open. She got up and looked and found the front door partly open and thought she saw someone going up the steps, but she was not sure of this. Some fifteen or twenty minutes later Hoyt Bruce and his wife returned to the house. Mary Lizzie Bruce did not tell her son that she thought someone had entered the house because she had looked and had not seen anyone. When Hoyt and Rebecca had returned home, they observed a pair of shoes on the front porch. Hoyt asked his mother if she knew whose shoes they were and she replied that she did not. About this time a noise was heard upstairs. Hoyt got his single-barrel shotgun and went upstairs. The defendant was found under the bed in an upstairs room. Hoyt sent a neighbor boy to call the sheriff and told the defendant to remain seated on the steps until the sheriff arrived. Instead of doing this, the defendant began to move down the steps and

Hoyt shot at him but missed. The defendant jumped through a kitchen window taking the frame and all with him. A few minutes later officers from the Sheriff's Department arrived but they were unable to find anyone. Hoyt Bruce remained in the yard after the officers left, and within a short while thereafter, saw the defendant. Hoyt ordered him to stop, but the defendant started running and Hoyt shot at him again. This time bird shot entered the legs of the defendant. The defendant kept running and later appeared across a field. This time Hoyt pointed the gun at him and the defendant fell down in the edge of the field and lay there until the sheriff's officers returned and arrested him. The defendant had no shoes on. The shoes which were found on the front porch of the Bruce home were brought to the defendant and he put them on.

The defendant testified in his own behalf and denied that he had been at the Bruce home but did admit that the shoes which were brought to him were his shoes.

Attorney General Robert Morgan by Assistant Attorney General H. A. Cole, Jr., for the State.

Pope, McMillan and Bender by William P. Pope for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the sufficiency of the evidence to sustain a verdict of guilty of felonious breaking and entering because there was no evidence that the defendant intended to commit any crime since nothing was taken from the house.

There is no merit in this position.

In the case of *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887), it is stated:

> ". . . The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of

any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. . . ."

As stated in *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967),

"[A]ctual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary. . . ."

We hold that the evidence in this case was ample to be submitted to the jury and to sustain the jury's verdict of guilty.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. LEWIS CLARK PITTMAN

No. 7218SC204

(Filed 24 May 1972)

1. **Burglary and Unlawful Breakings § 6— indictment charging breaking and entering — instructions on breaking or entering**

In a prosecution under an indictment charging that defendant feloniously broke *and* entered a building, the trial court did not err in instructing the jury that it should return a verdict of guilty if it was satisfied beyond a reasonable doubt that defendant broke *or* entered the premises.

2. **Burglary and Unlawful Breakings § 5— breaking and entering — sufficiency of evidence**

State's evidence, including testimony that defendant's fingerprints were found on pieces of broken glass at the crime scene, *held* sufficient to be submitted to the jury in a prosecution for breaking and entering of an automobile supply store.

3. **Criminal Law § 168— recapitulation of evidence — immaterial variance**

In this prosecution for breaking and entering and larceny, a statement by the court in recapitulating the evidence that a witness testified that he observed a hacksaw that had been used to saw a lock in two, when the witness actually testified that he "assumed" the lock had been sawed in two with a hacksaw he observed, *held* an immaterial variance which could not have affected the result of the trial.

State v. Pittman

APPEAL by defendant from *Seay, Judge,* 11 October 1971 Session of Superior Court held in GUILFORD County.

This appeal is from a third trial of defendant on the same charges of felonious breaking or entering and felonious larceny. On appeal from the first trial error was found in the admission of evidence by the State of defendant's participation in an unrelated criminal offense. *State v. Pittman,* 10 N.C. App. 508, 179 S.E. 2d 198. On appeal from the second trial error was found in the judge's instructions to the jury. *State v. Pittman,* 12 N.C. App. 401, 183 S.E. 2d 307.

The State's evidence at the third trial was substantially the same as at the first two trials. It tended to show the following:

The Western Auto Supply Company store, located at 300 North Elm Street, Greensboro, North Carolina, was closed and locked by its manager at approximately 7:00 p.m., 6 August 1970. When the manager returned at approximately 8:30 a.m., 7 August 1970, he discovered the store had been broken into and entered. A glass, approximately 22 by 32 inches, in the service bay door nearest the retail part of the store had been broken; the locked access door between the retail department and service department of the store had been broken; and the lock on the rear exit door had been sawed off and a bar covering this door removed. The bar and a hacksaw were near the rear exit door. An inventory disclosed that ten television sets, a phonograph, three automobile tape players, and a tape recorder were missing, at a total value of $1277.47. No one had been authorized to enter the building to take this property. The defendant's fingerprints were found on pieces of broken glass at the service bay door. There were several drops of blood near the service bay door and a small amount of blood on the door leading from the service area to the retail store. The defendant had a small cut on his right thumb covered with a bandage on 9 August 1970 at the time of his arrest.

The defendant offered no evidence.

Attorney General Morgan, by Assistant Attorney General O'Connell, for the State.

Eighteenth District Assistant Public Defender Shepherd for defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge instructed the jury that it should return a verdict of guilty on the first count in the bill of indictment if it was satisfied beyond a reasonable doubt that defendant broke or entered the premises. It is defendant's argument that this instruction is error because the bill of indictment charges that defendant broke and entered, and therefore the State has the burden of proving both breaking and entering.

It seems that the public defender is seeking to resurrect an argument which was laid to rest in *State v. Jones,* 272 N.C. 108, 157 S.E. 2d 610. This assignment of error is without merit and is overruled.

[2] Defendant next assigns as error that the trial court denied his motions for nonsuit. The sufficiency of the State's evidence has twice been ruled upon. *State v. Pittman, supra,* and *State v. Pittman, supra.* We again hold that the State's evidence was sufficient to require submission of the case to the jury. This assignment of error is without merit and is overruled.

[3] Defendant assigns as error that in its instructions to the jury the trial court assumed a fact not in evidence. In recapitulating the testimony of the manager of the Western Auto Supply Company store, the trial judge, *inter alia,* stated: ". . . he observed the receiving door at the rear of the premises and the hacksaw that had been used to saw a lock on it in two; and that the bar securing the door had been removed. . . ." Defendant argues that the store manager did not testify that the hacksaw had been used to saw the lock. In the manager's testimony we find the following: "The lock had been sawed in two with a hacksaw, I assume, anyway the hacksaw was lying there nearby." It is true that the trial judge failed to recapitulate that it was assumed that the hacksaw had been used to saw the lock, but this is immaterial. The important fact was that the lock had been sawed in two with something.

If the charge as a whole summarizes the evidence fairly and presents the law fairly to the jury, an isolated, insubstantial, technical variation which could not have affected the result will not be held prejudicial. *State v. McWilliams,* 277 N.C.

680, 178 S.E. 2d 476. This assignment of error is without merit and is overruled.

Defendant's remaining assignments of error are formal, and, in view of what has heretofore been said, are overruled.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. LARRY ROSS PASCHALL

No. 7214SC384

(Filed 24 May 1972)

1. **Burglary and Unlawful Breakings § 3; Indictment and Warrant § 9— breaking and entering — description of premises**

A bill of indictment alleging that defendant broke and entered a building occupied by one Dairy Bar, Inc., Croasdaile Shopping Center in the County of Durham, described the premises with sufficient particularity to withstand defendant's motion to quash.

2. **Criminal Law § 105— offer of evidence by defendant — waiver of prior nonsuit motion**

When defendant offers evidence, he waives the motion for nonsuit made, either actually or by virtue of G.S. 15-173, at the close of the State's evidence, and only the motion made at the close of all the evidence is considered.

3. **Criminal Law § 105— motion for nonsuit — omission of defendant's evidence from record**

Defendant's motion for nonsuit at the close of all the evidence cannot be considered by the appellate court where defendant's evidence was omitted from the record on appeal, since the State is entitled to the benefit of any portion of defendant's evidence which is favorable to the State or which explains or clarifies the State's evidence.

APPEAL by defendant from *McKinnon, Judge,* 25 October 1971 Session of Superior Court held in DURHAM County.

Defendant was tried and convicted of felonious breaking and entering and felonious larceny.

State's evidence tended to show that at about midnight on 6 August 1971, in response to a police radio call that someone was thought to be inside the Dairy Bar at Croasdaile Shopping

Center, two deputies of the Durham County Sheriff went to the premises. Upon arrival, they found an automobile parked on the side of the Dairy Bar building. A subject was on the front seat of the automobile, facing the rear, stacking cartons of beer on the back seat. A noise was heard inside the store and upon command defendant came out. Another subject was found in a rest room inside the building. Cases of cold beer, taken from the cooler, were stacked on the floor beside the door. The front door had been broken open and the slats and louvers were out.

The record on appeal does not disclose defendant's evidence.

Attorney General Morgan, by Associate Attorney Ricks, for the State.

Powe, Porter & Alphin, by William G. Harriss, for defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial court denied his motion to quash the indictment. He contends that the description of the premises, allegedly broken into, is insufficient. Defendant cites *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105, where this Court said, "In the light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting offices of this State would be well advised to identify the subject premises by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures. . . ." The advice given in *Burgess* is as applicable, if not more so, today than it was in 1968. However, the bill of indictment in this case describes the subject premises as a building occupied by one Dairy Bar, Inc., Croasdaile Shopping Center in the County of Durham. There could hardly be confusion as to which building in Croasdaile Shopping Center the indictment refers, nor can there reasonably be any confusion about which building belonging to Dairy Bar, Inc., the indictment refers. It is not likely that Dairy Bar, Inc., ran two businesses by the same name in one shopping center. We hold that the bill of indictment adequately described the premises and defendant's motion to quash was properly denied.

Defendant next assigns as error that the trial court erred when it denied his motion for nonsuit made at the close of the State's evidence. Following the place in the record on appeal where defendant's motion for nonsuit at the close of the State's evidence is recorded, appears the following: "The defendants each put on evidence which is not set forth in narrative form since it is not necessary to the consideration of the questions raised by this appeal." The record on appeal, including the foregoing statement, was agreed to by the solicitor.

[2, 3] G.S. 15-173 provides in pertinent part: "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." The provisions of G.S. 15-173.1, allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether motion for nonsuit has been made or not, does not change the foregoing rule. When the defendant offers evidence, he waives the motion lodged, either actually or by statute, at the close of the State's evidence and only the motion lodged at the close of all the evidence is considered. *State v. Sallie,* 13 N.C. App. 499, 186 S.E. 2d 667. In considering the motion for nonsuit lodged at the close of all the evidence, any portion of defendant's evidence which is favorable to the State and any portion of defendant's evidence which explains or clarifies the State's evidence is to be considered. See, *State v. Jones,* 280 N.C. 60, 184 S.E. 2d 862. By omitting defendant's evidence from the record on appeal, defendant would deprive the State of the benefit of such portions of defendant's evidence which are entitled to consideration under our rules. Therefore, we cannot consider defendant's motion. In any event the evidence was more than ample to require submission of the case to the jury. This assignment of error is overruled.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. RAYMOND GIBSON

No. 7227SC372

(Filed 24 May 1972)

1. **Burglary and Unlawful Breakings § 10— connection of defendant with burglary tools — sufficiency of evidence**

The State's evidence sufficiently connected defendant with a canvas bag containing various tools to support his conviction of unlawful possession of burglary tools where it tended to show that defendant was a passenger in an automobile driven by defendant's admitted companion behind a closed business establishment at 4:00 a.m., and that defendant was sitting in the back seat either on top of or in front of the canvas bag containing the tools.

2. **Burglary and Unlawful Breakings § 10— implements of housebreaking — combination of tools**

Although crowbars, sledge hammers, flashlights, adjustable wrenches, screwdrivers, punch-pry bars, Kent tools, wrecking bars, braces and bits, goggles, cutting torches, and gloves have honest and legitimate uses in themselves, evidence that such tools were found at 4:00 a.m. in an automobile which had been driven behind a closed business establishment was sufficient to support a finding that they were possessed without lawful excuse as implements of housebreaking.

APPEAL by defendant from *Martin (Harry), Judge,* 3 January 1972 Session of Superior Court held in GASTON County.

Defendant was charged in a bill of indictment with the felony of possession, without lawful excuse, of implements of housebreaking.

The State's evidence tended to show the following: At approximately four o'clock in the morning of 14 October 1971, Deputy Sheriff Leroy Howard observed a light colored vehicle drive behind the Winn-Dixie Store near Belmont. As Deputy Howard continued surveillance of the area, he observed the vehicle come back into the road from behind the Winn-Dixie Store. Deputy Howard called the Belmont police by radio and proceeded to follow the vehicle. One Belmont police car pulled in behind Deputy Howard and another approached from the opposite direction. Deputy Howard turned on his car's blue light and the light colored vehicle that he was following pulled to the right side of the road and stopped. Deputy Howard and the two Belmont police officers walked to the light colored vehicle.

The light colored vehicle was a 1963 Thunderbird. A subject by the name of Braswell was driving; a subject by the name of Brooks was in the right front seat; and defendant Gibson was alone in the back seat. During the course of the arrest of Brooks for carrying a concealed weapon, defendant was asked to get out of the car. As defendant got out a canvas bag was observed on the back seat, either behind or under where defendant had been seated. Two crowbars or wrecking bars were observed sticking out the end of the bag. The canvas bag was removed from the 1963 Thunderbird and found to contain the following: 2 crowbars, 1 ten pound sledge hammer, 1 flashlight, 1 adjustable wrench, 1 screwdriver, 1 combination punch-pry bar, 1 Kent tool, 1 T-50 wrecking bar, 1 brace, 1 no. 12 bit, 1 pair protective goggles, 2 cutting torch heads, and 3 pair of brown gloves.

Defendant offered the testimony of Claude Braswell, Jr., the driver of the 1963 Thunderbird. His testimony tended to show the following: Defendant and Braswell had been in Atlanta, Georgia, for the purpose of getting narcotics and were hitchhiking back from Atlanta on Interstate 85. Near Blacksburg, South Carolina, they caught a ride on 13 October 1971 with Brooks in the 1963 Thunderbird. Later Brooks asked Braswell to drive and they were taking Brooks home when the officers stopped them. Neither Braswell nor defendant was aware of the canvas bag or its contents until after they were taken to the Police Station. Both Braswell and defendant were "on narcotics" at the time they were arrested.

The jury found defendant guilty as charged, and he has appealed.

Attorney General Morgan, by Assistant Attorney General Magner, for the State.

Frank Battley Rankin for defendant.

BROCK, Judge.

[1] Defendant argues that nonsuit should have been entered because there was no direct connection shown between him and the canvas bag and its contents. It would be a strain upon rational thought to say that defendant sat in the back seat either on top of or in front of the bag of tools listed above without knowing they were there. But, be that as it may, the conduct

of defendant's admitted companion in driving around behind the Winn-Dixie Store at 4:00 a.m. is sufficient, when added to the existence of the tools, to carry the case to the jury on the question of possession.

[2] Defendant also argues that nonsuit should have been entered because the State failed to offer any evidence that the tools found in the vehicle were tools commonly used for breaking and entering. While crowbars, sledge hammers, flashlights, adjustable wrenches, screwdrivers, punch-pry bars, Kent tools, wrecking bars, braces and bits, goggles, cutting torches, and gloves have honest and legitimate uses in themselves; nevertheless, when found in combination, without explanation, at 4:00 a.m. in an automobile which has been driven behind a closed business establishment, it is ample to sustain a conviction of possession, without lawful excuse, of implements of housebreaking. See, *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21; *State v. Shore,* 10 N.C. App. 75, 178 S.E. 2d 22.

We have carefully examined defendant's remaining assignments of error and find them to be without merit. Defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. KENNETH CAMPBELL

(71CR3754 and (71CR3756)

No. 7211SC336

(Filed 24 May 1972)

1. **Constitutional Law § 6— rules of practice and procedure — authority of legislature**

The General Assembly has the final word on rules of practice and procedure in the trial courts of this State. Article IV, Sec. 13(2), of the N. C. Constitution.

2. **Criminal Law § 102— jury argument — time limitation**

The trial court committed prejudicial error in limiting defense counsel's jury argument of three felony cases to thirty minutes where defense counsel had requested an hour for such argument. G.S. 84-14.

State v. Campbell

APPEAL by defendant from *Copeland, Judge,* 6 December 1971 Session, HARNETT Superior Court.

In case #71CR3754 defendant was charged with felonious possession of LSD on 16 April 1971 and in case #71CR3755 he was charged with felonious sale of LSD on 16 April 1971. In case #71CR3756 defendant was charged with felonious possession of LSD on 29 April 1971. On motion of the solicitor and without objection by defendant, the cases were consolidated for trial. The jury returned verdicts of guilty in the two possession cases and a verdict of not guilty in the sale case. The court entered judgments as follows: In #71CR3754, prison sentence of not less than four nor more than five years with credit to be given for eight days spent in jail awaiting trial. In #71CR3756, prison sentence of not less than four nor more than five years to run concurrently with sentence imposed in #71CR3754. Defendant appealed from the judgments.

Attorney General Robert Morgan by Henry E. Poole, Associate Attorney, for the State.

Woodall, McCormick and Arnold by Edward H. McCormick for defendant appellant.

BRITT, Judge.

By his first assignment of error defendant contends that the trial court erred in limiting defense counsel's jury argument to thirty minutes. The assignment of error is sustained.

The record reveals that before jury arguments began defendant's attorney requested one hour within which to argue the three felony cases against his client. The record further reveals that the court "in its discretion sets a time limit of thirty minutes to each side to which the defendant objects and excepts."

Article IV, Sec. 13(2) of the Constitution of North Carolina provides in pertinent part as follows: ". . . . . The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, ... No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal

any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions."

[1, 2] It is readily apparent from reading this section of our State Constitution that the people of North Carolina, with certain reservations, have vested in their elected senators and representatives in The General Assembly the final word on rules of procedure and practice in the trial courts of our State. The General Assembly has seen fit to enact G.S. 84-14 which provides in pertinent part as follows: "In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: To not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. . . ."

In his brief the Attorney General contends that while the court in the instant case may have technically violated G.S. 84-14, the violation was not prejudicial to the defendant and was a harmless error. We cannot agree with this contention. No doubt it is true that many jury arguments are too lengthy but this court has nothing in the record to show that defendant's counsel in the instant case was able to fully argue his contentions in the thirty minutes allowed by the trial judge. Defendant was tried on three separate bills of indictment, charging entirely different offenses—one of them on a date thirteen days later than the others. The General Assembly, pursuant to authority clearly given it by the constitution, vested defendant with certain rights and they must be respected. It would appear that this is a right that a defendant may waive and in many instances the length of jury arguments are limited by agreement, but in the absence of waiver or agreement a defendant is entitled to the rights provided by our constitution and statutes. The error entitles defendant to a new trial.

Defendant assigns as error the failure of the trial court to allow his timely made motions to dismiss the possession

charges against him. We think the evidence was sufficient in each case to survive the motions.

We have considered the other assignments of error brought forward and discussed in defendant's brief but find them to be without merit.

For the reasons stated, defendant is awarded a

New trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES ARNOLD GADDY

No. 7226SC77

(Filed 24 May 1972)

1. **Criminal Law § 157— record on appeal — absence of verdict, organization of court, and showing of jurisdiction**

Appeal is subject to dismissal for insufficiency of the record where the record on appeal contains no verdict and nothing to show the organization and jurisdiction of the trial court.

2. **Arrest and Bail § 3— arrest without warrant — drunken driving — operation of vehicle in officer's presence**

An arrest without a warrant for the offense of operating a motor vehicle under the influence of intoxicating liquor is illegal unless the defendant operated the vehicle in the presence of the arresting officer.

3. **Arrest and Bail § 3; Criminal Law § 84— arrest without warrant — public drunkenness — motion to quash warrant — motion to suppress evidence**

The trial court in a prosecution for drunken driving properly denied defendant's motion to quash the warrant and to suppress evidence on the ground that he was arrested without a warrant at the scene of a traffic accident by officers who had not seen him operate a vehicle, where defendant was arrested at the accident scene for public drunkenness, not for drunken driving, and was later arrested upon a valid warrant for drunken driving, and the trial court found upon competent evidence that the officers had probable cause to arrest defendant for public drunkenness.

4. **Arrest and Bail § 3— arrest without warrant — public drunkenness**

An officer has a right to arrest a defendant without a warrant for being drunk in a public place, a violation of G.S. 14-335(a). G.S. 15-41(1).

5. Criminal Law § 84— illegal arrest — admissibility of evidence

Evidence obtained from a defendant in custody as a result of an illegal arrest is not *ipso facto* inadmissible.

6. Criminal Law § 84— illegal arrest — sobriety tests — admissibility

Even if defendant was not in lawful custody as a result of a valid arrest at the time sobriety tests were administered to him, the results of such tests would not be subject to suppression where there were no oppressive circumstances surrounding defendant's arrest and detention and defendant makes no contention that he did not voluntarily consent to the tests.

APPEAL by defendant from *McLean, Judge,* 9 August 1971 Criminal Session of Superior Court held in MECKLENBURG County.

Defendant appeals from a judgment imposing sentence for a third offense of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor.

Attorney General Morgan by Associate Attorney Conely for the State.

Paul L. Whitfield for defendant appellant.

GRAHAM, Judge.

[1] The record filed in this Court contains no verdict and nothing to show the organization and jurisdiction of the trial court. "On appeal in criminal cases, the indictment or warrant, and the plea on which the defendant was tried in the court below, the verdict, and the judgment appealed from, are essential parts of the transcript." *State v. Hunter,* 245 N.C. 607, 608, 96 S.E. 2d 840, 841. The organization of the court is a part of the record proper. *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669.

After oral argument a stipulation as to the organization of the court, signed by the solicitor and defendant's counsel, was mailed to the clerk of this Court, presumably by defendant's counsel. However, no motion has been made that this stipulation be added to the record and printed as an addendum to the record on appeal. Even if we add the stipulation to the record on our own motion the record will still lack a verdict.

"It is the duty of appellant to see that the record is properly made up and transmitted to the Court," *State v. Stubbs,* 265 N.C. 420, 423, 144 S.E. 2d 262, 265, and where an essential

portion of the record has been omitted the appeal is subject to dismissal. *State v. Hunter, supra; State v. Byrd,* 4 N.C. App. 672, 167 S.E. 2d 522.

This appeal is dismissed for an insufficient record; however, we have nevertheless reviewed all of defendant's assignments of error and found them without merit.

Defendant's principal contention is that the court erred in denying his motion to quash the warrant and suppress the evidence. The motion was based upon allegations that defendant was illegally arrested at the scene of a traffic collision by officers who were not armed with an arrest warrant and who did not see him operate a vehicle.

[2, 3] An arrest without a warrant for the offense of operating a motor vehicle under the influence of intoxicating liquor is illegal unless the defendant operated the vehicle in the presence of the arresting officer. *State v. Hill,* 277 N.C. 547, 178 S.E. 2d 462. However, defendant was not arrested at the scene of the accident for that offense but was arrested there for public drunkenness. He was later arrested upon a valid warrant for the offense of driving under the influence.

[4] Two police officers testified on voir dire as to the circumstances surrounding defendant's initial arrest. The court found from their testimony that the arresting officer had probable cause to arrest defendant for public drunkenness. The evidence supports this finding. An officer has the right to arrest a defendant without a warrant for being drunk in a public place, a violation of G.S. 14-335(a). *State v. Shirlen,* 269 N.C. 695, 153 S.E. 2d 364. This authority is granted by G.S. 15-41(1):

> "A peace officer may without warrant arrest a person:
>
> (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence. . . ."

[5, 6] We further note that evidence obtained from a defendant in custody as a result of an illegal arrest is not *ipso facto*

inadmissible. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53. The evidence sought to be suppressed here consists of the results of various sobriety tests taken before defendant was arrested for the offense of operating a vehicle under the influence of intoxicating liquor. Even if defendant had not been in lawful custody as a result of a valid arrest for public drunkenness at the time the tests were administered, the evidence would not be subject to suppression as there were no oppressive circumstances surrounding defendant's initial arrest and detention, and he makes no contention that he did not voluntarily consent to the tests.

Appeal dismissed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. DANNIE ROMES

No. 7214SC282

(Filed 24 May 1972)

1. **Narcotics § 4— possession of heroin — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of possession of heroin, where it tended to show that nine bindles of heroin were found in the bathroom of an apartment, that defendant was in charge of the premises, that defendant and several others were in the apartment when the heroin was found, and that defendant "had one or two tracks on his right arm."

2. **Narcotics § 4.5— instructions on possession**

The trial court did not err in instructing the jury that a person possesses a narcotic drug "when he has either by himself or together with others the power and intent to control the disposition or use of the drug."

APPEAL by defendant from *Hall, Judge,* 8 November 1971 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment, proper in form, with the felony of unlawful possession of nine bindles of the narcotic drug heroin.

The evidence for the State tended to show that on 31 August 1971, the defendant was in charge of the premises at 1215

Dawkins Street in Durham, North Carolina, that several other persons were there, and that the defendant gave the officers permission, at first, to search the premises for one Kenneth McCauley (for whom they had a capias) and then later gave them permission to search the premises for drugs. As a result of the search for drugs, the officers found nine bindles of heroin in the bathroom. The defendant "had one or two tracks on his right arm."

Defendant offered evidence which tended to show that 1215 Dawkins Street was his "girl friend's house," that she was away at work and that he was "there keeping the baby." His girl friend had a job and paid the rent on the premises, a three-room apartment. At the time of his arrest, the defendant was present in the apartment with four other persons and had heard some of these persons, all of whom he knew, talking about heroin. He told the officers that the heroin discovered during the search belonged to one Bobby Barnes, that Barnes had put the heroin in the bathroom when the officers had knocked on the door, that the heroin was not his and he had nothing to do with it, and that Barnes was also charged with possession of this same heroin.

From a verdict of guilty and a judgment imposing a prison sentence, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Assistant Attorneys General Eagles and Walker for the State.

Felix B. Clayton for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant's first contention is that the trial judge erred in failing to allow his motion for judgment as of nonsuit. We do not agree. We think there was ample evidence to require submission of the case to the jury. See *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968). The jury could have found from the defendant's evidence that he did not possess the heroin, but the jury apparently did not believe all of the testimony of the defendant and his witnesses.

[2] The defendant also argues and contends that the trial court failed to properly instruct the jury concerning "possession" and "constructive possession" of narcotic drugs.

The judge instructed the jury:

> "Now, members of the Jury, I instruct you that a person does have possession of a narcotic drug when he has either by himself or together with others the power and the intent to control the disposition or use of the drug."

Later, after they had retired, the jury voluntarily returned to the courtroom and upon request, the judge instructed them:

> "* * * A person to be guilty of possession must knowingly possess it and as I instruct you that a person possesses a narcotic drug when he has either by himself or together with others the power and intent to control the disposition or use of the drug. * * *"

The language used in these instructions is in accordance with the law of possession that is stated in connection with the possession of intoxicating liquor in *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667 (1951), wherein Justice Ervin said:

> "An accused has possession of intoxicating liquor within the meaning of the law when he has both the power and the intent to control its disposition or use. The requisite power to control may reside in the accused acting alone or in combination with others. *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600."

In the case of *State v. Jones,* 213 N.C. 640, 197 S.E. 152 (1938), Justice Barnhill (later Chief Justice) said: "Personal property is in the possession of a person whenever it is in his custody and control and subject to his disposition." See also, *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680 (1971), and 73 C.J.S., Property, § 14.

The principle of law relating to the possession of intoxicating liquor and other personal property is also applicable to the possession of narcotic drugs. We hold, therefore, that the trial judge did not commit error in instructing the jury as to the law on "possession" of narcotic drugs.

In the trial we find no error.

No error.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. JAMES CLIFTON TUCKER

No. 727SC80

(Filed 24 May 1972)

1. **Larceny § 8— recent possession doctrine — instructions — identity of the property**

In this prosecution for larceny of a tractor, the trial court adequately instructed the jury on the principle that the inference of guilt arising from the possession of recently stolen property does not arise until the jury finds from the evidence and beyond a reasonable doubt that the property found in defendant's possession was the same property that had been stolen, where the court instructed the jury that in order to find defendant guilty of larceny it must find beyond a reasonable doubt that defendant "took and carried away a Ford Tractor Model 2000, being the property of North Hills Construction Company."

2. **Larceny § 5— recent possession doctrine**

The possession of recently stolen property is only an evidentiary circumstance to be considered by the jury along with all other circumstances.

3. **Larceny § 5— recent possession doctrine**

The presumption arising from the possession of recently stolen property did not shift the burden of proof to the defendant, or deprive him of the benefit of the presumption of innocence or of the rule requiring proof of his guilt beyond a reasonable doubt.

APPEAL by defendant from *Cowper, Judge,* 23 August 1971 Session of Superior Court held in WILSON County.

The defendant, James Clifton Tucker, was charged in a bill of indictment, proper in form, with felonious larceny.

Upon the defendant's plea of not guilty, the State offered evidence tending to show that a 1970 Ford-2000 tractor, color-blue, and bearing model # B1022B and serial # C271288, valued at over $3,000.00, was removed from a Wilson construction site on 10 December 1970 and that North Hills, Inc., owner of the tractor, had not given permission for its removal from the site. Bill Cox, Vice President of North Hills, Inc., testified that the stolen tractor was returned by Wake County deputies and that he identified it by serial and model number which corresponded to the numbers on the tractor which was taken. A farmer, Sherwood Holt, stated that he bought the tractor returned to North Hills, Inc., for $1,500 from a man, dressed in coveralls and driving a white Chevrolet truck, on 11 December 1970. Mr. Holt

made an in-court identification that defendant was the man from whom he had purchased the tractor.

Defendant offered evidence through his wife and son that defendant did not own a pair of coveralls and that he owned a navy blue Chevrolet truck.

The jury found the defendant guilty of felonious larceny, and from a judgment of imprisonment of eight years, the defendant appealed.

Attorney General Morgan, by Assistant Attorney General Weathers, for the State.

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

BROCK, Judge.

Defendant's only assignment of error brought forward in his brief relates to the charge of the Court upon the presumption arising from the possession of recently stolen property. Defendant does not contend that the trial judge should not have instructed the jury on the doctrine. Clearly the conditions set out for the application of the doctrine of possession of recently stolen property in *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62, are met in the present case, where there was sufficient evidence to meet the conditions and to show that the tractor had been recently stolen from the Wilson construction site. In this case, the presumption arising from the possession of recently stolen property was properly applied, because there was evidence of an unlawful taking coupled with the unequivocal identification of the stolen property as being the tractor in defendant's possession.

[1] Defendant argues that it was prejudicial error for the trial judge to fail to instruct the jury that before any presumption arises by reason of defendant's possession of the tractor they must find from the evidence and beyond a reasonable doubt it was *the same tractor* stolen from North Hills, Inc. In support of this argument, defendant cites and relies on *State v. Frazier*, 9 N.C. App. 44, 175 S.E. 2d 377, and *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369, which he contends require such a charge in every case involving possession of recently stolen property. We agree with the general principle of defendant's argument,

but do not agree that the particular words advanced by defendant need be used. In this case we think the trial judge has adequately instructed the jury upon the principle.

[2] The doctrine of possession of recently stolen goods as recognized by our Courts affords evidence that the possessor is guilty of larceny. It is only an evidentiary circumstance to be considered by the jury along with all other circumstances. *State v. Foster, supra; State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578. Here there is ample, cogent evidence identifying the tractor found in defendant's possession as the identical property stolen and the tractor is a type of property which was readily identifiable by make, model, and serial number. The trial judge clearly instructed the jury that in order to find defendant guilty of larceny they must be satisfied beyond a reasonable doubt that defendant "took and carried away a Ford Tractor Model 2000, being the property of North Hills Construction Company. . . ."

[3] The presumption arising from the possession of recently stolen property did not shift the burden of proof to the defendant, or deprive him of the benefit of the presumption of his innocence or of the rule requiring proof of his guilt beyond a reasonable doubt. The defendant's assignment of error is overruled.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. ROBERT LEE BUTTS

No. 723SC145

(Filed 24 May 1972)

Larceny § 7— sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of larceny of $35.00, where it tended to show that defendant was employed at a service station and was authorized to use the cash register, that defendant was authorized to draw money from the register and put a ticket in its place, that the register was $25.00 short one day, that the next day the operator of the service station positioned himself in the attic to watch the register area through a hole he had cut in the ceiling, that the operator observed defendant remove five $5.00 bills from the register

and put them in his pocket and thereafter observed defendant remove a $10.00 bill from the register and put it in his pocket, and that the cash register was $35.00 short and no ticket was in the register to represent the cash shortage.

APPEAL by defendant from *Godwin, Judge,* 27 September 1971 Session of Superior Court held in PITT County.

Defendant was charged in a warrant with larceny of $35.00. After a trial and verdict of guilty in District Court, defendant appealed to the Superior Court where he was tried *de novo* on the original warrant.

The State's evidence consisted of the testimony of one Jack Harris, operator of an Esso service station in Greenville. His testimony tended to show the following: Defendant had worked for him as a service station attendant off and on for about two years. Defendant was authorized to use the cash register to make sales, make change, and pay for items delivered to the station. Also, as were other employees, defendant was authorized to draw money from the register and put a ticket in its place; this amount would later be deducted from his salary.

When Harris "checked up" on 22 December 1970, the register was $25.00 short. On 23 December 1970 Harris went to the station early for the purpose of observing persons operating his cash register. He climbed into the attic and positioned himself to watch the register area through a hole he had cut in the ceiling. The employees, including defendant, came to work about 7:15 a.m. without knowing of Harris's presence.

A Carolina Dairy truck made a delivery to the station and defendant paid the driver from the cash register. As defendant removed money from the cash register to pay the dairy truck driver, he also removed five $5.00 bills which he put in his pocket. A little later in the morning defendant removed one $10.00 bill from the cash register and put it in his pocket.

After observing this, Harris left the attic and went directly to the register to check it. He found it was short $35.00 and there was no ticket in the register to represent the cash shortage. Harris then confronted defendant, who denied stealing the money, and discharged him. Harris told defendant that he would wait until 4:00 p.m. before issuing a warrant and would

not do so if defendant returned his money. Defendant called the station by telephone about noon and told Harris that he would get the money to him before 4:00 p.m. Defendant did not return and about 4:00 p.m. Harris signed the warrant.

Defendant's evidence consisted of his own testimony. Defendant's testimony tended to contradict the State's evidence in every material respect.

The jury found defendant guilty as charged and he has appealed to this Court.

Attorney General Morgan, by Associate Attorney Haskell, for the State.

Laurence S. Graham for defendant.

BROCK, Judge.

Defendant assigns as error that his motion for nonsuit was not allowed. The rules for considering the evidence in the light most favorable to the State upon motion for nonsuit is familiar learning and need not be repeated here.

When considered according to the applicable rules, the evidence in this case clearly requires submission to the jury of the issue of defendant's guilt.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

CHARLES DOUGLAS RIVENBARK v. ATLANTIC STATES CONSTRUCTION COMPANY, ORIGINAL DEFENDANT AND WILSON EARL BLACKMON T/A W. E. BLACKMON CONSTRUCTION COMPANY, ADDITIONAL DEFENDANT

No. 728SC94

(Filed 24 May 1972)

Master and Servant § 19— employee of subcontractor — personal injury — liability of general contractor

In an action by an employee of a subcontractor against the general contractor to recover for personal injuries allegedly caused by defendant's negligence in failing to provide plaintiff a safe place to work when a ditch caved in on him while he was laying pipe in a sewer line, summary judgment was properly entered in favor of de-

fendant general contractor where plaintiff offered no evidence to refute defendant's evidence that the subcontractor was an independent contractor, that if there were any negligence it was imputed to the subcontractor's work methods, and that defendant had no control or authority over the manner in which the work was performed by the subcontractor.

APPEAL by plaintiff from *Tillery, Judge,* 23 August 1971 Session of WAYNE Superior Court.

Plaintiff's claim for damages arose out of personal injuries sustained while laying pipe in a sewer line as an employee of Blackmon Construction Company (Blackmon). Blackmon was an independent subcontractor which had subcontracted the work from the original defendant, Atlantic States Construction Company (Atlantic States). Plaintiff recovered his full benefits under the Workmen's Compensation Act from his employer, Blackmon. Plaintiff's alleged cause of action for damages against Atlantic States, the general contractor, is based on his contention that Atlantic States failed to provide plaintiff a safe place to work. Atlantic States moved for summary judgment based on there being no genuine issue for trial. From judgment granting the motion and dismissing the action, plaintiff appealed.

Herbert B. Hulse and Sasser, Duke & Brown by John E. Duke for plaintiff appellant.

Connor, Lee, Connor & Reece by Cyrus F. Lee for defendant appellee, Atlantic States Construction Company.

BRITT, Judge.

Plaintiff contends that summary judgment was improperly granted for the reason that a genuine issue for trial was shown at the hearing. We do not agree with this contention.

Atlantic States' motion for summary judgment was supported by the pleadings, depositions of the plaintiff, and Blackmon, the subcontractor-employer of plaintiff, plaintiff's interrogatories to Atlantic States and its answers, a certified copy of the order of the industrial commission award for plaintiff's claim against Blackmon, the subcontracts between Blackmon and Atlantic States and an affidavit of the vice president of Atlantic States authenticating the contracts. This evidence tended to show: Plaintiff was injured when a ditch caved in

on him while working for Blackmon; that Blackmon was an independent subcontractor; that Atlantic States, the general contractor, had no control over the manner or work methods used to perform this job; that if there were any negligence it was imputed to Blackmon's work methods and that plaintiff has recovered full benefits under his Workmen's Compensation claim against Blackmon.

Plaintiff offered nothing but the event of the accident to show negligence; but, assuming *arguendo* there was negligence, it is not attributable to Atlantic States. In 20 A.L.R. 2d 868 at 915 we find: "If the negligence which caused the injury was that of the injured person's own employer, and it is found as a fact that his employer was an independent contractor, the general contractor is not liable for the injury unless he or his own employees participated in the negligent act."

In *Mack v. Marshall Field & Co.*, 218 N.C. 697, 12 S.E. 2d 235 (1940), the court held that absent some control by the general contractor over the manner or way a subcontractor performed his work that there was a corresponding absence of any liability incident thereto. "That authority precedes responsibility, or control is a prerequisite of liability, is a well recognized principle of law as well as of ethics."

Therefore based on the evidence presented by Atlantic States to support its motion showing that Atlantic States had exerted no control or authority over the manner in which the work was performed by Blackmon, the subcontractor, the burden shifted to plaintiff to produce evidence which would present a genuine issue for trial. *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971), cert. den. 280 N.C. 180, 185 S.E. 2d 704 (1972); G.S. 1A-1, Rule 56(e). Plaintiff offered no evidence but relied solely on his pleadings and the evidence presented by Atlantic States, the movant.

Plaintiff's complaint failed to allege any sound legal theory of North Carolina law under which the general contractor would be liable to an employee of a subcontractor under the facts presented at the hearing. Therefore, the finding of fact by the court that there is no genuine issue as to material facts and the conclusion of law that defendant Atlantic States is entitled to a judgment of dismissal of the plaintiff's claim as a

matter of law were fully supported by the evidence and summary judgment was properly granted.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL SUTTON

No. 728SC331

(Filed 24 May 1972)

Forgery § 2— uttering — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for uttering a forged money order where it tended to show that twenty-one money order blanks were stolen from a drug store, that defendant cashed at a grocery store a money order bearing the number of one of those stolen, that the sum of $100 was machine imprinted on the money order, that the names of a purchaser and payee were written on the money order in defendant's handwriting, that defendant signed the name of the purported payee on the back of the money order, that the machine imprinted "$100" on the money order was not authorized, and that defendant had no authority to write anything on the money order.

APPEAL by defendant from *Tillery, Judge,* 6 December 1971 Criminal Session, LENOIR Superior Court.

The bill of indictment returned in this case charged defendant (1) with forging and counterfeiting a certain money order and (2) with uttering said forged and counterfeited money order. The jury returned a verdict of not guilty of forgery but found defendant guilty of the second count. From judgment imposing prison term of not less than five nor more than seven years, defendant appealed.

Attorney General Robert Morgan by Mrs. Christine Y. Denson, Assistant Attorney General, for the State.

Thomas H. Morris for defendant appellant.

BRITT, Judge.

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

Briefly summarized, the evidence for the State tended to show: On 10 May 1971 Johnson Drug Store in Jacksonville, North Carolina, had a quantity of blank money orders for sale. The money orders were provided by Financial Money Order Corporation, a wholly owned subsidiary of the Bank of North Carolina, N.A. of Jacksonville, N. C. When a sale was made the drug store by the use of a machine would indent the amount of the money order and the code symbol of the drug store. The customer would then write in his name as purchaser and the person to whom the money order was payable. On 10 May 1971 between 9:00 a.m. and 9:45 a.m. twenty-one money order blanks were taken from the Johnson Drug Store, one of the blanks bearing number 4508141. On 18 June 1971 defendant went to a grocery store owned and operated by one Hobbs in or near Kinston in Lenoir County. Defendant expressed his desire to purchase some groceries and asked Mr. Hobbs to cash a money order for him. Defendant presented Mr. Hobbs with said money order #4508141, the name of William O. Marley having been written in as payee, the name of Christine Marley having been written on the money order as purchaser and the date 6/10/71 having been written on the instrument. Also, the sum $100 was machine imprinted on the instrument. Mr. Hobbs asked defendant for identification and after being furnished with acceptable identification, Mr. Hobbs requested defendant to write his name, serial number and telephone number on the money order. Defendant proceeded to sign the name "William Marley" on the back of the money order and also wrote a serial number and a telephone number on the back. Defendant then purchased approximately $17 worth of groceries and was given cash for the balance of the $100 represented by the money order.

When the money order eventually returned to the bank for payment, payment was refused. Witnesses testified that defendant had no authority to write anything on the money order and the machine imprinted "$100" on the money order was not authorized. Expert testimony regarding defendant's handwriting was introduced and Witness Burney of the Pitt County

Sheriff's Department testified that he had known defendant from 28 June 1971 until the date of this trial, that defendant identified himself during that time as William Earl Sutton and never identified himself as William O. Marley.

Defendant offered no evidence.

Considering the evidence in the light most favorable to the State, as we are bound to do, we hold that it was sufficient to be considered by the jury on the charge of uttering a forged instrument and sufficient to support a verdict of guilty of that charge. G.S. 14-120; *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22 (1968). The assignment of error is overruled.

By his second assignment of error defendant contends that the trial court erred in its charge to the jury. Although defendant's assignment is broadside, we have carefully reviewed the charge and find it to be free from prejudicial error.

We conclude that defendant had a fair trial, free from prejudicial error, and the sentence imposed is within the limits allowed by statute.

No error.

Judges PARKER and HEDRICK concur.

IN RE: LYNN ASHBY McALLISTER

No. 7226DC335

(Filed 24 May 1972)

Courts § 15; Infants § 10— juvenile delinquency proceeding — jurisdiction — petition or summons

The trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or other notice was ever served on the juvenile, her parents, guardian or custodian prior to any of the hearings as required by G.S. 7A-283, notwithstanding the juvenile and her mother were present at several of the hearings, the juvenile and her mother signed a waiver of counsel on one occasion, and the juvenile was represented by privately employed counsel at one hearing.

APPEAL by respondent from *Johnson, District Judge,* 4 January 1972 Session of District Court held in MECKLENBURG County.

In re McAllister

This is an appeal by Lynn Ashby McAllister, juvenile respondent, from an order entered 4 January 1972 committing her "to the Board of Youth Development for an indefinite period of time, however, not to exceed her 18th birthday." The order appealed from followed a hearing wherein Judge Johnson adjudicated the respondent to be a ". . . DELINQUENT in that said juvenile did knowingly, wilfully, and intentionally violate the orders of this Court dated July 8, 1971, and October 26, 1971. . . ."

The record reveals that on 8 July 1971 the district court adjudicated the juvenile respondent to be an "undisciplined child" and placed her on probation for a period of six months under the supervision of the probation officer of the court.

On 26 October 1971, based on a finding that the juvenile was a delinquent ". . . in that she had violated the terms and conditions of her probation as ordered by this Court on September 16, 1971," the district court ordered that the juvenile be committed to the North Carolina Board of Juvenile Correction for an indefinite period of time, not to exceed her 18th birthday. This sentence was suspended and the juvenile was "placed on probation for a period of two (2) years in addition to the probation as ordered by this Court on July 8, 1971. . . ."

Attorney General Robert Morgan and Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

John G. Newitt, Jr., attorney for defendant appellant.

HEDRICK, Judge.

Respondent contends the district court did not have jurisdiction over the juvenile to enter the several orders involved in this proceeding.

With commendable candor the Attorney General states:

"It appears that the court was without jurisdiction over the subject juvenile and its orders, therefore, void."

"Juvenile proceedings in this State are not criminal prosecutions and a finding of delinquency in a juvenile proceeding is not synonymous with the conviction of a crime. Nevertheless, a juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to

the constitutional safeguards of due process and fairness. *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879; *In re Alexander,* 8 N.C. App. 517, 174 S.E. 2d 664. These safeguards include notice of the charge or charges upon which the petition is based. *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428." *In re Jones,* 11 N.C. App. 437, 181 S.E. 2d 162 (1971).

Although the record indicates that the juvenile was present with her mother at the hearings to review the pending proceedings in September and October, 1971, and in January, 1972, and that the juvenile and her mother signed a "Waiver Of Right To Have Assigned Counsel" on 4 October, 1971, and that the juvenile was represented by her privately employed counsel at the hearing on 4 January, 1972, there is nothing in the record to show that Summons or Petition or any notice whatsoever was ever served on the juvenile, her parents, guardian, or custodian, prior to any of the hearings as required by G.S. 7A-283. Indeed, the record does not indicate that the juvenile, her parents, guardian or custodian, were even present at the initial hearing on 8 July 1971, wherein the juvenile was adjudicated to be "an undisciplined child."

For the reasons stated, the Court was without jurisdiction to enter the order appealed from which is

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. LITTLE HENRY HAYES

No. 7223SC312

(Filed 24 May 1972)

1. Narcotics § 4— giving away stimulant drugs

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of giving away stimulant drugs in violation of G.S. 90-113.2(5), where it tended to show that defendant placed an aqua colored piece of paper in a library book which he gave to the prosecuting witness, and that two capsules containing amphetamines were thereafter discovered in the paper which had been placed in the book.

2. **Criminal Law § 118— statement of defendant's contentions — absence of evidence by defendant**

Although defendant did not testify or offer evidence, the trial court did not err in stating defendant's contentions in its instructions, since defendant's plea of not guilty put in issue every essential element of the crime charged.

APPEAL by defendant from *Crissman, Judge,* 13 December 1971 Session of Superior Court held in WILKES County.

The defendant was charged in a bill of indictment, proper in form, with giving stimulant drugs to Brenda Sue Faw in violation of G.S. 90-113.2(5). The defendant pleaded not guilty.

The State offered evidence tending to show that on 29 June 1971 at about 6:20 p.m. Brenda Sue Faw, a tenth grade student at West Wilkes High School, and her friend Chris Gambill were standing in front of the Liberty Theater in the town of North Wilkesboro when they were approached by the defendant and a boy named Bill Holcomb. The defendant asked Brenda to let him see a library book which she had in her hand. The defendant thumbed through the book, and Brenda saw him place an aqua colored piece of paper in the book. Brenda did not know the defendant, but Bill Holcomb had been trying to get her to date him, and she thought the paper was a note from him. The defendant returned the book just as Brenda's mother drove up, and Brenda got into the automobile and put the book on the seat. On the way home they stopped at a grocery store and Brenda went to get some milk. While Brenda was out of the automobile her five year old sister opened the book, found the aqua paper, and two "brown and clear capsules, containing orange and white pellets," which Brenda's mother took and gave to George L. McSwain, a special agent for the North Carolina State Bureau of Investigation. These capsules were analyzed and found to contain the stimulant drug amphetamine. The defendant offered no evidence.

The jury found the defendant guilty and from a judgment of imprisonment the defendant appealed.

Attorney General Robert Morgan and Associate Attorney William Lewis Sauls for the State.

Jerry D. Moore for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends the Court erred in denying his motion for judgment as of nonsuit made at the close of all the evidence. We do not agree. When the evidence is considered in the light most favorable to the State, it is sufficient to raise an inference that the defendant placed the two brown and clear capsules containing the stimulant drug amphetamine in the aqua colored paper which he then put in the library book and gave to Brenda Sue Faw. We hold the evidence was sufficient to require the submission of the case to the jury and to support the verdict.

[2] The defendant contends that since he did not testify or offer evidence, the judge made "prejudicial remarks" when he stated the defendant's contentions to the jury. The defendant's plea of not guilty put into issue every essential element of the crime charged so as to require the State to prove these elements beyond a reasonable doubt. *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177 (1968). A trial judge is not required to state the contentions of the litigants. But when he undertakes to give the contentions of one party, he must fairly charge as to those of the other. Failure to do so is error. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968). In the charge to the jury the judge briefly and fairly stated the contentions of the State and the defendant. This was not error.

We have reviewed the entire record and hold the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

MELVIN A. EWARD v. THEODORE R. KALNEN AND WIFE, THELMA B. KALNEN

No. 725SC357

(Filed 24 May 1972)

1. **Vendor and Purchaser § 1— option contract — acceptance**

Acceptance of an option must be in accordance with the terms thereof.

2. **Vendor and Purchaser § 1— option contract — duration**

In the absence of special circumstances, time is of the essence in an option to purchase land, and acceptance and tender must be made within the time required by the option.

3. **Vendor and Purchaser § 5— option contract — expiration — specific performance**

Plaintiff was not entitled to specific performance of an option contract which set the purchase price at $11,000 plus the value of improvements placed on the land by defendants, with provision for the selection of appraisers to determine the value of improvements in case of disagreement, where it is clear from the terms of the option that time was of the essence, there was disagreement as to the value of improvements, plaintiff's suggestion that appraisers be appointed was not received by defendants until after the option expired, prior to the expiration of the option plaintiff had not accepted the deed tendered, paid or asserted his willingness to pay the purchase price demanded, or asserted his willingness to pay the additional amount as might be appraised as the value of improvements, and plaintiff's words and conduct at the time the deed was tendered suggested an abandonment of his rights under the option.

APPEAL by plaintiff from *Bone, Judge,* 11 October 1971 Session of Superior Court held in NEW HANOVER County.

Plaintiff brought this action on 14 March 1967 for specific performance of an option agreement executed by the defendants to him on 1 March 1957. The pertinent provisions of the option are as follows:

> "FIRST: This option shall become operative and capable of being exercised five years from the date of execution of this instrument, and *shall exist and continue to and including the day and month which marks the passage of ten years from the date of execution of this instrument, but no longer.*
>
> SECOND: If the party of the second part (the plaintiff) elects to purchase said land under this option, the pur-

chase price therefor shall be Eleven Thousand Dollars ($11,000.00), plus the value of the physical improvements placed upon the land by the parties of the first part (the defendants) between the date of this instrument and the date of notification of intent to exercise this option, *payable in cash upon delivery of the deed.*

THIRD: At any time within the period above limited, *but not thereafter,* the parties of the first part will make, execute and deliver to said party of the second part a good and sufficient deed for said land, in fee simple, with general warranty, and free from encumbrances, upon the payment by said party of the second part of the said purchase price in the sum and manner above set out; provided, however, that the party of the second part shall give notice of his intention to exercise said option at least six months prior to exercising same.

FOURTH: In the event that the parties of the first part and the party of the second part shall not be able to agree upon the value of the physical improvements made upon this property by the parties of the first part, three appraisers shall be selected to arrive at said value. Their appraisal figure shall be final and binding. One of these appraisers shall be selected by the parties of the first part, one by the party of the second part, and the third by the Resident (sic) of this Judicial District." (Emphasis added.)

Jury trial was waived. Judge Bone heard the evidence, found facts, stated his conclusions of law, and entered judgment that "the plaintiff take nothing by this action, that the defendants go hence without day and that the plaintiff pay the costs of the action to be taxed by the Clerk."

Plaintiff appealed to the Court of Appeals, assigning error.

James L. Nelson for plaintiff appellant.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellees.

MALLARD, Chief Judge.

The only question involved on this appeal is whether the plaintiff complied with the terms of the option.

Judge Bone found, upon competent evidence, that on 17 February 1967, before the option expired at midnight on 28 February 1967, the plaintiff and the male defendant met at the office of the male defendant's attorney and the following transpired:

> "* * * At that time Mr. Calder showed plaintiff a deed from Elizabeth M. Kalen (sic), an unmarried woman, to Melvin A. Eward, the plaintiff, which had been duly executed by said grantor on February 16, 1967. At some time previously the defendant had put title to the land in the name of his sister, Elizabeth M. Kalen (sic), to avoid its becoming encumbered by a lien which the United States Government was threatening to file against him on account of a disputed tax lien. At the time Mr. Calder exhibited said deed to plaintiff, he also, gave plaintiff an itemized statement showing that defendants claimed $13,339.86 for physical improvements made by them on the property, and told plaintiff to look at these papers and give them the money, or words to that effect. The plaintiff replied that he did not have the money with him but had made arrangements with the Wilmington Production Credit Association to borrow the money and he had enough there to pay the $11,000.00 purchase price but that it was impossible for him to pay any such fantastic amount as defendants were claiming for improvements; that if the amount for improvements was over $500.00 he would not be interested in buying the property back.
>
> The plaintiff then walked out and the defendant followed him out into another room and said 'let's make a deal.' The plaintiff replied, 'No, I've already made one deal too many with you,' and then left Calder's office."

Judge Bone further found that on 27 February 1967, the plaintiff wrote the defendants a letter, received by them on 1 March 1967, stating that he was not in agreement with the amount charged by defendants for physical improvements, that he was selecting an appraiser, that he was calling upon the defendants to select one, and that by copy of the letter, he was requesting the resident judge of superior court to appoint a third appraiser under the paragraph of the option numbered "FOURTH." On 1 March 1967, the male defendant wrote plaintiff a letter stating that the option had expired on 28 February

1967, and declining to appoint an appraiser. It was also found that the plaintiff had not tendered to defendants the $11,000.00 purchase price set out in the option or any amount of money for physical improvements placed on the land by the defendants, nor had the plaintiff committed himself unconditionally to pay the defendants the purchase price or such amount as appraisers might set as the value of such physical improvements.

Upon the facts found, Judge Bone concluded as a matter of law that the plaintiff had not complied with the terms of the option.

> "An option is a unilateral agreement by which the maker grants the optionee the contractual right to accept or reject a present offer within a limited or reasonable time. It is unilateral because only the maker is bound; the other party is not obligated in any way to perform by purchasing. Because options are unilateral, they are construed strictly in favor of the maker. *Ferguson v. Phillips,* 268 N.C. 353, 150 S.E. 2d 518; *Carpenter v. Carpenter,* 213 N.C. 36, 195 S.E. 5." *Lentz v. Lentz,* 5 N.C. App. 309, 168 S.E. 2d 437 (1969).

In 7 Strong, N. C. Index 2d, Vendor and Purchaser, § 2, pp. 492 and 493, it is said:

> "Where an option specifies a definite time for performance, it is not revocable during the time specified, and upon acceptance in accordance with its terms and conditions within that time it becomes an executory contract of bargain and sale. * * *"

See also, *Byrd v. Freeman,* 252 N.C. 724, 114 S.E. 2d 715 (1960).

[3] In the case before us, the option expired as of midnight on 28 February 1967. On 17 February 1967, the plaintiff had had tendered to him a deed for the property in question and demand had been made upon him for payment of the $11,000.00, plus $13,339.86 for physical improvements placed on the lands. Prior to midnight on 28 February 1967, the plaintiff had not accepted the deed tendered, had not paid the purchase price and had not asserted his ability or willingness to pay the purchase price demanded. In fact, his words and conduct at the time the deed

was tendered to him on 17 February 1967 suggested an abandonment by him of his rights under the option. His belated suggestion regarding the appointment of appraisers was not received by the defendants until after the option had expired, and even then, insofar as is shown by this record, the plaintiff did not unconditionally assert his ability or willingness to pay such additional amount as might be appraised as the value of the improvements. The court found that the plaintiff had stated at the time the deed was tendered to him that, if the improvements were over $500, he would not be interested in buying the property.

[1, 2] Acceptance of an option must be in accordance with the terms thereof. *Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687 (1913); *Builders, Inc. v. Bridgers,* 2 N.C. App. 662, 163 S.E. 2d 642 (1968). The general rule is that, absent special circumstances, time is of the essence in an option to purchase land and that acceptance and tender must be made within the time required by the option. *Trust Co. v. Medford,* 258 N.C. 146, 128 S.E. 2d 141 (1962); *Douglass v. Brooks,* 242 N.C. 178, 87 S.E. 2d 258 (1955).

[3] By the terms of the option in the case before us, the purchase price was payable in cash upon delivery of the deed. In the event the parties could not agree as to the value of the physical improvements, appraisers would be appointed and act *before* the expiration of the option. It is clear from a reading of the terms of the option that time was of the essence because it is specifically provided therein that "(a)t any time within the period above limited, *but not thereafter,*" the defendants would make, execute and deliver a good and sufficient deed for the property upon the payment of the purchase price in cash. See *Sheppard v. Andrews,* 7 N.C. App. 517, 173 S.E. 2d 67 (1970).

We hold that the trial judge did not commit error when he found as a fact and concluded as a matter of law that the plaintiff did not comply with terms of the option.

The judgment is affirmed.

Affirmed.

Judges CAMPBELL and BROCK concur.

GLADYS B. RIGGINS v. COUNTY OF MECKLENBURG, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA

No. 7226SC33

(Filed 24 May 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — evidence which may be considered**

Evidence which may be considered upon motion for summary judgment includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.

2. **Counties § 9— county courthouse steps — wetness during rainfall — liability for personal injuries**

In an action to recover for personal injuries sustained by plaintiff when she slipped and fell during a heavy rainfall on steps leading into a county courthouse, the evidence on motion for summary judgment failed to show actionable negligence by defendant county where it established that the steps were typical granite steps of the type used in many governmental buildings and were no more slippery when wet than any others, that the steps had been in use for 40 years and this was the first known instance of anyone falling on the steps when wet, and that there is no practical procedure for precluding wetness of outside steps during rainfall.

APPEAL by plaintiff from *Friday, Judge,* 2 August 1971 Session of MECKLENBURG Superior Court.

Plaintiff seeks compensatory damages of $100,000 for medical expenses, pain and suffering, lost earnings, permanent disability and decreased earning capacity resulting from a fall on steps leading into the Mecklenburg County Courthouse. Plaintiff alleged that defendant was negligent in that it maintained an entranceway that is slippery when wet, failed to provide a handrail, failed to provide materials that would make the steps less slippery and failed to provide notice or warning of the dangerous condition of the steps. Governmental immunity had been waived by defendant. Following a hearing defendant's motion for summary judgment was allowed and from judgment dismissing her action, plaintiff appealed.

Weinstein, Sturges, Odom & Bigger, P. A. by T. La Fontine Odom and William M. Bernstein for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding and Ruff, Perry, Bond, Cobb, Wade & McNair by James O. Cobb for defendant appellee.

BRITT, Judge.

Did the trial court err in granting defendant's motion for summary judgment? We hold that it did not.

[1] A party against whom a claim, counterclaim, or crossclaim is asserted may move for a summary judgment in his favor as to all or any part thereof. G.S. 1A-1, Rule 56(b). Evidence which may be considered upon motion for summary judgment includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Rule 56 is for the disposition of cases where there is no genuine issue of fact and the purpose of the rule is to eliminate formal trials where only questions of law are involved. *Kessing v. Mortgage Corp., supra.*

[2] At the hearing on the motion for summary judgment in the case at bar, the court had before it the complaint and answer, the deposition of plaintiff, interrogatories on behalf of plaintiff, and defendant's answers to the interrogatories.

The pleadings established the following pertinent facts: On 18 March 1969 at 8:00 a.m. and for many years prior thereto defendant owned and maintained a public building in the City of Charlotte known as the Mecklenburg County Courthouse. As a part of said building, defendant caused to be constructed and maintained on the western side of the building an entranceway leading from a public sidewalk next to Alexander Street to the basement floor of the building. The entranceway had a door leading into the basement floor of the building and to gain access to said basement a person could go down a stairway containing five or more steps. It had been raining for some time prior to the time of the accident complained of and defendant knew that the steps were wet and had water on them.

Plaintiff's deposition disclosed: She is 62 years old and employed as an executive secretary. On the occasion in question, she was going to the courthouse to see about a traffic ticket. She was alone. It was raining very hard at the time and had been raining for several hours. As she approached the Alexander Street entrance to the courthouse she was wearing a raincape and bonnet, was holding an umbrella in her right hand and was

carrying a handbag on her left arm. She was wearing shoes with leather soles and heels, the heels being from one and one-half to two inches high. Plaintiff walked up to the steps, stopped, and closed her umbrella, continuing to hold it in her right hand. She went to the right side of the entranceway where there was a wall but used neither hand to steady herself. She slipped on the very first step when she put her foot down. The steps, which she had used on previous occasions, were made of marble or granite and had a smoother surface than the sidewalk. There was no handrail, sign warning of slippery conditions when wet, or any abrasive material on the steps to make them less slippery.

Defendant's answers to interrogatories revealed: The steps were typical granite steps of the type used in many governmental buildings and were no more slippery when wet than any others. The steps had been in use for 40 years and this was the first known instance of anyone falling on the steps when wet. The maintenance superintendent makes a daily inspection of the grounds and there is no practical procedure for precluding wetness of outside steps.

We think plaintiff failed to show actionable negligence on the part of defendant, therefore, there was "no genuine issue as to any material fact" and defendant was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c).

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. RAY BAXTER HUNT

No. 7217SC453

(Filed 24 May 1972)

1. **Criminal Law § 155.5— failure to docket record in apt time**

Appeal is dimissed where the record on appeal was not docketed within 90 days after the date of the judgment appealed from and the record on appeal contains no order extending the time for docketing. Court of Appeals Rule 5.

2. **Criminal Law § 155.5— time for docketing record — extension of time to serve case on appeal**

An order extending the time within which to serve the case on appeal on the solicitor does not extend the time within which an appeal must be docketed in the appellate court.

3. Forgery § 2— forgery and uttering — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on issues of defendant's guilt of forgery and uttering where it tended to show that defendant, an acknowledged alcoholic, tied his 80-year-old father to a chair, removed his father's Social Security check from the mailbox, signed his father's name thereto, signed his own name under his father's name, cashed the check at a local bank, and that defendant had no authority to sign his father's name to the check or to cash it.

APPEAL by defendant from *Crissman, Judge,* 3 January 1972 Session of Superior Court held in SURRY County.

Defendant was prosecuted upon a bill of indictment, proper in form, containing two counts. The first count charges defendant with the forgery of a United States Treasurer's check in the amount of $101.90. The second count charges him with uttering the same check, knowing it to be forged.

Defendant entered a plea of not guilty. The jury found him guilty and he appeals from judgment of imprisonment entered upon the verdict.

Attorney General Morgan by Associate Attorney Byrd for the State.

Carroll F. Gardner for defendant appellant.

GRAHAM, Judge.

[1, 2] The judgment appealed from is dated 6 January 1972. The record on appeal was docketed in this Court on 24 April 1972, which was more than 90 days after the date of the judgment. The record on appeal contains no order extending the time for docketing. Rule 5, Rules of Practice in the Court of Appeals, requires that a record on appeal, absent an order extending the time, be docketed within 90 days after date of the judgment or order appealed from. The record does show that an order was obtained extending the time for serving the case on appeal on the solicitor. However, an order extending the time within which to serve a case on appeal does not automatically extend the time within which an appeal must be docketed in this Court. *Horton v. Davis,* 11 N.C. App. 592, 181 S.E. 2d 781; *Reece v. Reece,* 6 N.C. App. 606, 170 S.E. 2d 546; *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547.

In accordance with the practice of this Court, defendant's appeal is dismissed for failure to docket within the time allowed by the rules. *Alley v. Alley,* 14 N.C. App. 176, 187 S.E. 2d 500; *Bank v. Barry,* 14 N.C. App. 169, 187 S.E. 2d 478.

[3] We have nevertheless reviewed the record and the contentions made by defendant. Defendant contends the case should have been nonsuited. The State's evidence was sufficient to permit a finding that defendant, an acknowledged alcoholic, tied his 80-year-old father to a chair, removed his father's Social Security check from the mailbox, signed his father's name thereto, signed his own name under his father's name and cashed the check at a local bank. Defendant admitted cashing the check, getting drunk on some of the proceeds and spending all of the money but $16.00 before he was arrested. He contended, however, that his father signed his own name to the check and authorized defendant to get it cashed. His father contended to the contrary, testifying that he did not endorse the check nor authorize anyone else to do so. When cross-examined by defendant's attorney, the father testified: "Why did he want to tie me up? He tied me up so he could do what he wanted to do and get away. He just went up there and got it on his own hook."

We hold that the evidence was sufficient to go to the jury on both counts.

We have also reviewed defendant's other assignment of error and the record proper. We find no error sufficiently prejudicial to require a new trial.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM J. MOSS

No. 725SC290

(Filed 24 May 1972)

Criminal Law § 118— expression of opinion — instructions on contention of the State

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the trial court did not express an opinion on the evidence in stating the State's contention that defendant's statement to a witness constituted an admission of guilt of assault on a female at least, although the court's instruction should have been more clearly identified as a contention of the State.

CERTIORARI to review judgment of *Parker, Judge,* 19 July 1971 Session of Superior Court held in NEW HANOVER County.

Defendant was tried under a bill of indictment charging him with assaulting his wife with a deadly weapon, "to wit: Knife, mop handle, coca-cola bottle, & fists" with intent to kill, inflicting serious injury not resulting in death.

The State's evidence tended to show that on Friday, 4 June 1971, defendant came home from work drinking 100 proof vodka. That evening he slapped his wife several times but did not injure her. On Saturday he continued to drink liquor and also some wine. During the course of that day and night defendant struck his wife in the head several times with a coca-cola bottle and beat her repeatedly with his fists. On Sunday defendant continued to drink and assault his wife. She recalled that on Monday he struck her with a hammer, ashtray, broom and mop handle. In addition, defendant cut through his wife's ear with a knife and jabbed her about the legs and thighs and other parts of her body. While she was in bed and helpless because of her injuries, defendant stuck a lighted cigarette to her face causing a blister.

On Monday evening, 7 July 1971, defendant's wife was carried to the hospital in an unconscious condition. She remained there for 15 days and received treatment for a broken rib, a broken nose, a broken jaw and various other injuries.

Shortly after Mrs. Moss was removed to the hospital, a Wilmington police officer went to the Moss home. There he found a broken mop handle, a broken broom handle, a hammer,

an ashtray, and a broken coca-cola bottle. He testified that various of the items had blood on them and he noticed blood on the sheets and mattress of the bed and in other parts of the home.

Defendant did not testify or offer other evidence.

The jury returned a verdict of guilty and judgment was entered imposing an active prison sentence for a term of not less than nine nor more than ten years.

Attorney General Morgan by Assistant Attorney General Webb for the State.

Herbert P. Scott for defendant appellant.

GRAHAM, Judge.

Defendant's only assignment of error encompasses exceptions to the following statements contained in the court's charge to the jury.

> "He admitted to the witness Howard that he beat his wife and that constitutes an assault as the State says and contends an intentional offer by force or violence to do a hurt or an injury and that Mrs. Moss is a female person.
>
> Therefore he is guilty of an assault on a female."

The above statements were made by the court in summarizing for the jury the contentions of the State.

The witness Howard testified that he and defendant drank whiskey and beer together at a bar on Sunday night, June 6. Defendant told Howard that he had "beat his wife up" and was sorry. Howard went with defendant to the Moss home where they continued to drink and while there Howard observed defendant strike his wife with his fists several times and knock her to the floor.

The State undoubtedly contended that Moss's statement to Howard constituted an admission of guilt of assault on a female at least. It was not improper for the court to summarize this contention in its charge. While the statements should have been more clearly identified as contentions of the State, we are of the opinion that, when considered in context, the statements

leave no reasonable cause to believe that the jury was misled into thinking the court was stating its opinion.

We have reviewed the entire record and find that defendant was afforded a fair trial, free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

HAROLD VANCE WILSON v. CHARLEES EDISON YOUNG

No. 7225SC234

(Filed 24 May 1972)

1. **Automobiles § 46— opinion testimony as to speed — harmless error**

The admission of testimony as to the speed of plaintiff's vehicle, if error, was not prejudicial where the testimony went only to the issue of contributory negligence, and that issue was not reached by the jury because it found no actionable negligence on the part of defendant.

2. **Trial § 51— motion to set aside verdict — review**

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed in the absence of a showing of abuse.

APPEAL by plaintiff from *Snepp, Judge,* 12 October 1971 Session of Superior Court held in BURKE County.

Plaintiff instituted this action to recover for personal injuries and property damage sustained in a collision with an automobile owned and driven by defendant. The accident occurred on Rural Paved Road 1803 at approximately 10:30 a.m. on 24 December 1969.

Plaintiff's evidence tended to show that he was operating his 1966 Ford truck in a northwesterly direction at a speed of 45 to 50 miles per hour; that as he entered a curve to his left he first observed the defendant approaching from the opposite direction. Defendant was looking over his left shoulder to the rear and was three to four feet across the center line into plaintiff's lane. In order to avoid defendant, plaintiff pulled the

right side of his vehicle onto the right shoulder of the road and applied brakes. Despite this maneuver, he was struck by defendant and the impact sent plaintiff's vehicle over an embankment.

Defendant's evidence tended to show that he was travelling in a southeasterly direction at about 30 to 35 miles per hour on the right hand side of the road. He had already gone around the aforementioned curve when he first saw plaintiff. Plaintiff was about 100 feet away when he first saw him and was in continuous view until the time of the collision. In defendant's opinion, plaintiff was travelling about 60 to 65 miles per hour. Plaintiff went off to the side of the road on his right. Plaintiff pulled back onto the road and thereupon struck defendant.

Issues of negligence, contributory negligence and damages were submitted to the jury, which found no negligence on the part of defendant. From judgment entered on the verdict, plaintiff appealed.

West and Groome by Ted G. West for plaintiff appellant.

Patton, Starnes and Thompson by Thomas M. Starnes for defendant appellee.

VAUGHN, Judge.

[1] Plaintiff assigns as error the admission of testimony by the defendant as to the speed of plaintiff's vehicle. Whether or not this type of evidence is admissible depends, to a large degree, on the witness' opportunity for observation and what advantage he takes of that opportunity. The evidence as to plaintiff's speed went only to the issue of contributory negligence. "The verdict on the first issue, *i.e.*, that the male defendant was not guilty of any actionable negligence, necessarily required that judgment be entered against the plaintiff, and rendered the issue of contributory negligence and the instructions thereon immaterial." *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; see also, *Key v. Woodlief,* 258 N.C. 291, 128 S.E. 2d 567; *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440. Assuming, without deciding, that the testimony as to plaintiff's speed would have been inadmissible over proper objection, its admission in the present case did not constitute prejudicial error.

[2] Plaintiff further assigns as error the trial court's denial of his motion to set aside the verdict as being contrary to the greater weight of the evidence. "A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed in the absence of showing of abuse." *Chalmers v. Womack,* 269 N.C. 433, 152 S.E. 2d 505; see also, *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872; *Roberts v. Mills, Inc.,* 8 N.C. App. 612, 175 S.E. 2d 289. No abuse of discretion appears in this case. In the trial from which plaintiff appealed, we find no prejudicial error.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. GRADY EUGENE CAMBPELL

No. 7222SC401

(Filed 24 May 1972)

Automobiles § 134— indictment charging larceny of automobile — conviction of temporary larceny

The unlawful taking of an automobile in violation of G.S. 20-105 is not an included lesser degree of the offense of larceny, and a defendant may not be convicted of such offense on a plea of guilty when tried upon an indictment charging larceny.

APPEAL by defendant from *Martin, Judge, (Robert M.),* of the 10 January 1972 Session of IREDELL Superior Court.

The defendant was charged in two separate bills of indictment, each containing two counts with (1) felonious larceny and (2) receiving stolen property knowing same to have been feloniously stolen.

Upon the call of the cases for trial, the court-appointed counsel for the sixteen-year-old defendant tendered a plea of guilty of "temporary larceny of an automobile" in each case. The Solicitor thereupon accepted the pleas and took a nol pros with leave in the receiving count of each bill of indictment.

The defendant was then questioned by the presiding judge as to his understanding of the pleas of guilty tendered and whether or not he had freely and voluntarily submitted such pleas. The court then adjudicated that the pleas of guilty were freely, understandingly and voluntarily made without undue influence, compulsion or duress and without any promise of leniency and thereupon ordered the plea and adjudication filed and recorded.

In one bill of indictment the defendant was charged with the felonious larceny of a 1962 Chevrolet automobile, therein more particularly described, of a value of $250.00 and being the property of Hubert Gregory. In the other bill of indictment the defendant was charged with the felonious larceny of another 1962 Chevrolet automobile, therein more particularly described, being the property of Mrs. Bruce Gaither and of the value of $250.00.

The evidence on behalf of the State indicated that the defendant and another juvenile on 10 August 1971 went by a parking lot in the City of Statesville and observed a Chevrolet automobile in the lot with the switch unlocked. They got in the automobile and drove it until it ran out of gas. They then started walking towards their home about 10:00 p.m. when they saw the second Chevrolet parked with the switch unlocked. They got in it and drove around for about 30 minutes and then left it parked on the street and went on home. The investigating officer testified that on both occasions the defendant and his companion were joyriding until they ran out of gas and got tired of driving. No damage was done to either automobile. From a sentence of 18 months the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Henry T. Rosser for the State.

Frank and Lassiter by Jay F. Frank for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the signing and entering of the judgment.

We think this assignment of error is good but not for the reasons argued in the brief.

The defendant tendered a plea of guilty of "temporary larceny of an automobile," a purported violation of General Statutes 20-105, "Unlawful taking of a vehicle." He was not charged with such violation and he could not be convicted of this statutory offense upon trial on a bill of indictment for larceny. *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739 (1965).

As stated in *State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967): "Under our decisions, the statutory criminal offense defined in G.S. 20-105, sometimes referred to as 'temporary larceny,' is not an included less degree of the crime of larceny; and a defendant may not be convicted of a violation of G.S. 20-105 when tried upon a bill of indictment charging the crime of larceny. . . ."

Reversed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. BASS PASS, JR.

No. 7214SC99

(Filed 24 May 1972)

1. Criminal Law § 33; Robbery § 3— vagueness in testimony

Where a motel restaurant cashier positively testified that a check she had cashed for a fellow employee was in a cash box taken in a robbery of the motel night clerk, uncertainty in her testimony as to the date she actually cashed the check was immaterial and did not render testimony about the check incompetent to prove defendant's guilt of the robbery.

2. Criminal Law § 33; Robbery § 3— vagueness in testimony

Testimony by the operator of a grocery store as to the date he cashed a check taken in a robbery of a motel for a person he identified as the defendant was not so vague and conjectural as to render it incompetent to prove defendant's guilt of the robbery, where the operator testified that he knew he cashed the check in the same month as the robbery, on a Friday, since that is the day of the week a soft drink company services his store, and he gave them the check in payment upon his bill on the same day he cashed it for defendant.

3. Criminal Law § 34— evidence that defendant was on parole — absence of prejudice

Defendant was not prejudiced by testimony of a State's witness that a person with whom he had talked to find out if defendant was employed on the date of a robbery was a parole officer, where defendant subsequently testified and freely admitted that he had been released from prison on parole prior to the robbery.

ON *Certiorari* to review judgment of *Bowman, Judge,* 9 June 1969 Session of Superior Court held in DURHAM County.

Defendant was tried on his plea of not guilty to an indictment charging him with armed robbery. The prosecuting witness, who was a night clerk at the Eden Rock Motel in Durham, testified that defendant came into the motel shortly after midnight on 17 December 1968, threatened him with a pistol, forced him to lie face down on the floor, and then took his wallet and the cash from the motel's cash drawer at the counter. This witness also testified that following the robbery a locked metal cash box was missing from the desk in the motel office. This box contained receipts from the previous night's operations of the motel restaurant. The cashier of the restaurant identified State's Exhibit 5 as a payroll check which she had cashed for a fellow employee and placed in the cash box on the night of the robbery. The operator of a small grocery store testified that defendant was the person who cashed State's Exhibit 5 at the store after representing himself to be the payee.

The jury found defendant guilty as charged. From judgment imposing a prison sentence, defendant gave notice of appeal but failed to perfect the appeal in apt time and the appeal was dismissed. On 17 November 1971 we granted defendant's petition for certiorari in lieu of an appeal to review defendant's trial and the judgment imposed against him.

Attorney General Robert Morgan by Staff Attorney Donald A. Davis for the State.

Pearson, Malone, Johnson & Dejarmon by C. C. Malone, Jr., for defendant appellant.

PARKER, Judge.

Defendant contends error was committed in overruling his objections to evidence concerning State's Exhibit 5. In sup-

port of this contention he argues that the testimony of the cashier of the motel restaurant as to the date she placed the check in the cash box and the testimony of the operator of the grocery store as to the date he cashed the check for the person he identified as the defendant was so "vague and conjectural" as to render any evidence concerning the check irrelevant to prove defendant was the person who perpetrated the robbery. We do not agree.

[1] The check was dated 13 December 1968, which was on Friday, a payday at the motel restaurant. It was a payroll check payable to one of the waiters at the restaurant. The cashier of the restaurant testified she cashed it for the payee, either on Friday, 13 December, or Monday, 16 December 1968. She testified that after cashing the check, she placed it in the cash box and that it was in the cash box on the night of 16 December 1968, when she delivered the box to the night clerk of the motel. The robbery occurred a few hours later, in the early morning of 17 December 1968. In view of the cashier's positive testimony that the check was in the cash box on the night of 16 December 1968 when she delivered it to the night clerk, any uncertainty in her testimony as to the date she actually cashed it for her fellow employee was immaterial.

[2] Similarly, we find no such vagueness as defendant contends in the testimony of the grocery store operator as to the date he cashed the check for the person he positively identified as the defendant. He testified that he knew that he cashed the check in December 1968, on a Friday, since that is the day of the week when the Seven-up people service his store, and he gave them the check in payment upon his bill on the same day he cashed it for defendant. The night clerk of the motel testified he identified defendant as the robber in a line-up at the police station on 22 December 1968. From all of the evidence the jury could find that defendant was in possession of the check and presented it to the grocery store operator to be cashed on Friday, 20 December 1968. The evidence concerning the check was relevant and competent to prove that defendant was the person who committed the robbery.

[3] On cross-examination of the State's witness, King, a detective with the Durham Police Department, defendant's counsel brought out the fact that the witness, in attempting to find

out if defendant was employed on 16 December 1968, had talked with a Mr. Justice. On redirect examination the solicitor was permitted, over defendant's objection, to have the witness identify Mr. Justice as a State Parole Officer. Defendant contends that this was error in that the jury could infer that he had previously been convicted of a crime. We find it unnecessary to decide whether error was committed or whether defendant's counsel had himself opened the door to the evidence to which he now objects, since defendant in this case suffered no prejudice. He subsequently testified and freely admitted that he had been released from prison on parole on 22 November 1968.

Defendant's remaining assignments of error have not been brought forward or discussed in his brief and are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals. Nevertheless, we have carefully reviewed the entire record and find no prejudicial error. The indictment was in proper form to charge the offense of armed robbery. Defendant was positively identified by the victim of the robbery, who had ample opportunity to observe him at the time the robbery was committed. No objection has been made to the lineup identification, which took place at the police station on 22 December 1968 in the presence of defendant's counsel. The sentence imposed was within statutory limits. In defendant's trial and the judgment imposed we find

No error.

Chief Judge MALLARD and Judge MORRIS concur.

EUEL ATKINSON v. TARHEEL HOMES & REALTY CO., INC.

No. 723DC172

(Filed 24 May 1972)

1. Pleadings § 1; Rules of Civil Procedure § 3— extension of time to file complaint — insufficiency of motion and order

Order granting defendant an additional 20 days within which to file his complaint was invalid where plaintiff did not state the nature and purpose of his action in his motion for extension of time to file his complaint and the order granting the extension did not state the nature and purpose of the action as required by G.S. 1A-1, Rule 3.

2. Rules of Civil Procedure § 6— failure to file complaint within extended time — additional enlargement — excusable neglect

Where plaintiff failed to file his complaint within the additional 20 days allowed by the clerk's order, but filed the complaint three days after that time expired, the trial court erred in the denial of defendant's motion to dismiss and in enlarging the time allowed plaintiff to file his complaint by an additional three days under G.S. 1A-1, Rule 6(b), where no request for enlargement was made before the expiration of the period of extension, no motion based on excusable neglect was made after the period of extension expired, no evidence as to excusable neglect appears in the record, and the judgment contains no findings upon which excusable neglect could be predicated.

APPEAL by defendant from *Wheeler, Judge,* 18 October 1971 Civil Session, District Court, PITT County.

On 9 July 1971, plaintiff filed the following "APPLICATION AND MOTION":

"NOW COMES, Euel Atkinson, through counsel and respectfully shows unto the Court that:

FIRST: That he is a citizen and resident of Pitt County, North Carolina.

SECOND: That the defendant is a duly incorporated business, existing and trading under the laws of the State of North Carolina.

THIRD: That the plaintiff is about to file a Complaint against the defendant.

FOURTH: That a necessary exhibit of the plaintiff is not available.

WHEREFORE, the plaintiff respectfully requests that the Court cause a summons to issue and to allow the plaintiff twenty (20) additional days within which to file a Complaint."

The clerk, on 9 July 1971, entered an order granting plaintiff "an additional twenty (20) days within which to file his Complaint." Plaintiff's complaint was filed 30 July 1971.

Defendant moved, in writing, for dismissal under Rule 3 of the North Carolina Rules of Civil Procedure. The following order was entered:

"The Court in its discretion herewith denies the motion of the defendant to dismiss, on the grounds of excusable

neglect as provided by in Rule 6(b) of the North Carolina Rules of Civil Procedure and hereby in its discretion enlarges the time allowed the plaintiff in which to file his complaint by an additional 3 days.

The defendant is hereby allowed 30 days in which to file his answer.

This the 18th day of October, 1971."

Defendant excepted and appealed.

David T. Greer for plaintiff appellee.

Gaylord and Singleton, by A. Louis Singleton, for defendant appellant.

MORRIS, Judge.

Defendant's appeal is premature under the provisions of Rule 4, Rules of Practice in the Court of Appeals of North Carolina. We have, however, chosen to treat the appeal as a petition for certiorari which we have granted and proceed to discuss the matter on the merits.

Decision in this matter is governed by G.S. 1A-1, Rule 3 and G.S. 1A-1, Rule 6(b), hereinafter referred to as Rule 3 and Rule 6(b). Rule 3 provides that:

". . .

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

Rule 6(b), in pertinent part, provides:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect."

Morris v. Dickson, 14 N.C. App. 122, 187 S.E. 2d 409 (1972), is not applicable to the facts of this case.

[1, 2] In this case, plaintiff did not state the nature and purpose of his action in his motion for extension of time within which to file his complaint, nor did the order granting the extension state the nature and purpose of the action as required by Rule 3. The complaint was not filed within the 20 days granted. Even if the other requirements of Rule 3 had been met, plaintiff is not saved by Rule 6(b), because no request was made before the expiration of the period of extension. No motion based on excusable neglect was made after the period of extension expired. No evidence as to excusable neglect appears in the record, nor does the judgment contain any findings upon which excusable neglect could be predicated.

It appears obvious that plaintiff has failed completely to comply with the Rules of Civil Procedure. The judgment must be reversed.

Reversed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT DIXON COFFEY

No. 7219SC194

(Filed 24 May 1972)

Criminal Law § 138— appeal from district court — increased sentence in superior court

Upon appeal to the superior court from conviction in the district court, a defendant's constitutional rights are not violated by the imposition of a greater sentence in the superior court than that imposed in the district court.

APPEAL by defendant from *Copeland, Judge,* August 1971 Session of Superior Court held in CABARRUS County.

Defendant was tried upon a warrant, proper in form, charging him with the misdemeanor of operating a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquor in violation of G.S. 20-138. Defendant was first tried on 29 September 1970 in the Recorder's Court for Cabarrus County and was found guilty. From the judgment of the recorder's court imposing a sentence of imprisonment for six months, suspended for twelve months upon condition that he not operate a motor vehicle on the highways of North Carolina for twelve months and that he pay a fine of $100 and costs, the defendant appealed to the superior court. Upon trial de novo in superior court and a jury verdict of guilty, the defendant was sentenced to imprisonment for a term of six months, suspended for three years upon the following conditions: that he be placed on probation for three years, that he pay a fine of $500 and costs, that his operator's license be surrendered for revocation, and that he not operate a motor vehicle for two years. From the foregoing judgment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Assistant Attorneys General Melvin and Ray for the State.

Henry T. Barnes for defendant appellant.

MALLARD, Chief Judge.

The evidence for the State tended to show that on the date alleged in the warrant the defendant was arrested while operating a motor vehicle on a public highway in Cabarrus County, and that at the time thereof he was under the influence of in-

toxicating liquor. Approximately an hour after he was arrested, the defendant took a breathalyzer test that showed that the percentage of alcohol by weight in his blood was eighteen-hundredths percent. The defendant offered no evidence.

Defendant's sole contention is that the judge of the superior court committed error in imposing a more severe sentence than that imposed in the recorder's court. Defendant states in his brief that he is aware of the decision of the Supreme Court of North Carolina in *State v. Speights,* 280 N.C. 137, 185 S.E. 2d 152 (1971) holding that upon appeal to the superior court from the district court a defendant's constitutional rights are not violated by the imposition of a greater sentence after conviction in superior court than that imposed in the district court. The defendant argues, however, that this is contrary to the holding of the United States Supreme Court in the case of *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969). We do not agree. We hold that the rule set forth in *Speights* is applicable and controls. In the trial we find no error.

No error.

Judges CAMPBELL and BROCK concur.

IN THE MATTER OF: DIANE REGINA COLSON

No. 7218DC369

(Filed 24 May 1972)

Infants § 10— juvenile delinquency petition — signature and verification

Copy of juvenile deliquency petition certified by the clerk of court shows that the original petition was signed and verified as required by law. G.S. 7A-281.

APPEAL by respondent from *Gentry, District Judge,* 17 December 1971 Session of District Court held in GUILFORD County.

This juvenile proceeding was instituted against respondent, a 15-year-old child, by the filing of a verified petition in Greensboro District Court on 12 November 1971. The petition charges that respondent is a delinquent child as defined by G.S. 7A-278(2). In support of this charge the petition contains

specific allegations tending to show that on 10 November 1971 respondent committed larceny.

After a hearing, pursuant to G.S. 7A-277, *et seq.*, the court found, among other things, that on 10 November 1971 respondent went to a laundry owned by Mrs. Sherry Mercer and while there opened the cash register and removed $34.00 which respondent appropriated to her own use.

The court concluded that respondent's conduct constituted a violation of law, adjudged her a delinquent child in need of discipline and supervision by the State, and ordered her placed in the custody of the State Board of Youth Development.

Attorney General Morgan by Assistant Attorney General Weathers for the State.

J. Dale Shepherd, Assistant Public Defender, Eighteenth Judicial District, for respondent appellant.

GRAHAM, Judge.

Respondent made a motion in this Court in arrest of judgment on the grounds the petition was not signed nor verified as required by G.S. 7A-281.

The record which respondent's counsel filed in this Court fails to show that the petition on which respondent was tried was signed or verified. However, upon motion of the State, a copy of the original petition, duly certified by the clerk as a "true copy of the original on file in this office," was ordered reproduced as an addendum to the record. This copy plainly shows that the original petition was signed and verified as required by law.

We are afforded no explanation as to why the copy of the petition included in the original record did not show that it was executed or verified. The Assistant Public Defender who filed respondent's brief in this Court also appeared for respondent at the trial. The record shows that he tendered the original record on appeal to the solicitor. The solicitor accepted the record without filing exceptions or a countercase.

Inaccurate records continue to be a source of concern in this Court. Needless to say, we are particularly perplexed when appellant's counsel seeks relief on grounds appearing solely

because the record which he prepared is inaccurate or incomplete. *State v. Lindsey,* 14 N.C. App. 266, 188 S.E. 2d 7.

There are other assignments of error which we deem unnecessary to discuss. However, we have reviewed all assignments of error and the complete record. We find that respondent was afforded a fair trial free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN GORE

No. 725SC131

(Filed 24 May 1972)

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

In this felonious larceny prosecution wherein defendant waived counsel and represented himself at the trial, the trial court did not express an opinion on the credibility of defendant's evidence in asking questions of defendant and some of his witnesses for the purpose of assisting defendant in presenting his defense of alibi.

2. **Criminal Law § 171— indictment charging one crime — trial for two crimes — sentence — harmless error**

Any error which may have resulted from proceeding as if the indictment contained felonious breaking and entering and felonious larceny counts when the indictment was sufficient to charge only the single offense of felonious larceny was not prejudicial where defendant was sentenced only for felonious larceny.

APPEAL by defendant from *Fountain, Judge,* 25 October 1971 Criminal Session of Superior Court held in NEW HANOVER County.

Defendant was tried and convicted of the offense of larceny committed after feloniously breaking and entering a building in violation of G.S. 14-54. G.S. 14-72(b) (2).

Attorney General Morgan by Assistant Attorney General Satisky for the State.

Herbert J. Zimmer for defendant appellant.

GRAHAM, Judge.

[1] The only assignment of error argued on appeal relates to certain questions asked defendant and some of his witnesses by the trial court. Defendant contends that in propounding the questions the court inadvertently expressed an opinion on the credibility of his evidence. We disagree.

We deem it unnecessary to set forth the questions subject to exception. Suffice it to say we have carefully examined each of them and we conclude that no prejudice to defendant could have resulted.

Defendant waived counsel and represented himself at the trial. The questions asked by the trial court appear to have been for the purpose of assisting defendant in presenting his defense of alibi. The answers elicited tended to clarify defendant's contentions.

[2] A review of the record, including the court's charge, discloses that defendant was tried for felonious breaking and entering and felonious larceny. In our opinion the bill of indictment contained in the record is sufficient to charge only the single offense of felonious larceny. The judgment in the record shows that defendant was only sentenced for this offense. Under these circumstances, any error which may have resulted from proceeding as if the bill of indictment contained two counts was not prejudicial.

No error.

Judges MORRIS and VAUGHN concur.

MYRA JEAN MABRY, BY AND THROUGH HER GUARDIAN AD LITEM, LELA H. BOWEN v. CURTIS CARL BOWEN

No. 728SC302

(Filed 24 May 1972)

Parent and Child § 2— parental immunity — negligence — stepparent

An unemancipated minor child is precluded by the doctrine of parental immunity from mainting an action against a stepparent standing *in loco parentis* for personal injuries negligently inflicted.

APPEAL by plaintiff from *Tillery, Judge,* 22 November 1971 Session of Superior Court held in LENOIR County.

Mabry v. Bowen

Civil action to recover for personal injuries sustained by minor plaintiff as a result of the alleged negligence of defendant.

Defendant moved for summary judgment on the ground that minor plaintiff, an unemancipated 12-year-old child, is defendant's stepchild, resides with defendant, and is totally supported by him. The motion was allowed and plaintiff appeals.

Turner and Harrison by Fred W. Harrison for plaintiff appellant.

Whitaker, Jeffress & Morris by Thomas H. Morris for defendant appellee.

GRAHAM, Judge.

It has long been the rule in North Carolina that an unemancipated minor child cannot maintain an action against his parent for personal injuries negligently inflicted. *Watson v. Nichols,* 270 N.C. 733, 155 S.E. 2d 154; *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12; *Evans v. Evans,* 12 N.C. App. 17, 182 S.E. 2d 227, *cert. den.* 279 N.C. 394, 183 S.E. 2d 242.

Plaintiff candidly concedes the existence of the rule and agrees that it extends to a stepparent standing *in loco parentis,* which is the case here. She argues, however, that the time has come for North Carolina to join the growing list of states abandoning the parental immunity rule.

In answering a similar contention in the case of *Evans v. Evans, supra,* Judge Parker noted that it is for our Legislature or the Supreme Court to determine whether parental immunity in North Carolina should be abolished. Plaintiff's logic and arguments are persuasive. However, this Court does not have the authority to overrule decisions of the Supreme Court. *Lehrer v. Manufacturing Co.,* 13 N.C. App. 412, 185 S.E. 2d 727.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES C. ROBERTS

No. 7214SC316

(Filed 24 May 1972)

Larceny § 4— indictment — ownership of property

An indictment for larceny of property of "Ken's Quickie Mart" is fatally defective in failing to allege the ownership of the property in a natural person or a legal entity capable of owning property.

APPEAL by defendant from *McKinnon, Judge,* 4 October 1971 Session of Superior Court held in DURHAM County.

The defendant James C. Roberts was charged in a three count bill of indictment with breaking or entering, larceny, and receiving. The defendant pleaded not guilty. The jury found the defendant not guilty on the count charging breaking or entering and guilty on the count charging larceny. From a judgment entered on the verdict imposing a prison sentence of six to ten years, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Louis W. Payne, Jr., for the State.

Thomas F. Loflin III for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the Court's denial of his motion in arrest of judgment in the count charging the defendant with larceny.

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. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970).

The second count in the bill of indictment attempted to charge the defendant with felonious larceny in the following language:

". . . That James Clifford Roberts, on the 4th day of August, 1971, with force and arms, at and in the County aforesaid, after having unlawfully, willfully and feloniously broken into and entered a certain dwelling house and building occupied by one Ken's Quickie Mart with intent to

steal, take and carry away the merchandise, chattels, money, valuable securities and other personal property located therein, 139 cartons various brands cigarettes, 90 8-track Stereo Tapes; 1 Harrington Richardson .22 cal. pistol with holster serial #AC4851 of the value of $1,470.00 dollars, of the goods, chattels and moneys of the said Ken's Quickie Mart then and there being found unlawfully, willfully and feloniously did steal, take and carry away. . . ."

Citing *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901 (1960), and *State v. Biller,* 252 N.C. 783, 114 S.E. 2d 659 (1960), defendant contends the second count of the bill of indictment charging him with felonious larceny is fatally defective because it did not sufficiently allege that the owner of the property allegedly stolen was either a natural person or a legal entity capable of owning property.

In his brief the Attorney General states, "In short, the State cannot distinguish the cases cited by defendant, which cases appear to dictate a finding of error in this case." An indictment for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective. *State v. Thompson,* 6 N.C. App. 64, 169 S.E. 2d 241 (1969); *State v. Biller, supra; State v. Thornton, supra.*

The bill of indictment in the present case does not allege that "Ken's Quickie Mart" is a corporation or other legal entity capable of owning property; nor does the name import that it is a corporation, and it is certainly not a natural person. The Court erred in not allowing the defendant's motion to arrest the judgment. The State, if it so desires, may proceed against the defendant upon a sufficient indictment. *State v. Thornton, supra.*

Judgment arrested.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES AUGUSTUS SHEILDS

No. 725SC229

(Filed 24 May 1972)

Criminal Law § 171— error as to one count — absence of prejudice

Defendant was not prejudiced by the denial of his motion to dismiss a count charging receiving stolen property or by the court's statement that the case was being submitted to the jury on counts charging larceny and receiving, where it is clear that the court actually submitted only the larceny count to the jury, and defendant was convicted of larceny only.

APPEAL by defendant from *Fountain, Judge,* 26 October 1971 Session of Superior Court held in NEW HANOVER County.

The defendant was charged in a three count bill of indictment proper in form with felonious breaking or entering, larceny, and receiving. The defendant pleaded not guilty. The State offered evidence tending to show that on 25 August 1971 Hosea Keith removed a window and knocked the door loose at Horrell's Grocery and took merchandise consisting of meat, property of R. J. Horrell, and placed it on the back porch of the store. The defendant drove to the store, and while he unlocked the trunk Keith and some others took the meat from the porch of the store and put it in defendant's automobile. The defendant told Keith that he was going to sell the meat. About 30 minutes later the defendant returned and gave Keith $23 as his share of the proceeds of the sale. Hosea Keith testified that he was a drug addict and that he stole the meat to get money for cocaine.

The defendant testified and denied any participation in the crime. He stated that on the night in question he and his wife went out to dinner, went to a movie, and then returned home.

The jury found the defendant guilty of felonious larceny and from a judgment imposing a prison sentence of three to five years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene Hafer for the State.

O. K. Pridgen II for defendant appellant.

HEDRICK, Judge.

The defendant contends the Court erred in denying his motion to dismiss the count charging felonious receiving, and in stating that the case was submitted to the jury on the counts charging larceny and receiving. Since the defendant was convicted only on the count charging felonious larceny, no prejudicial error is shown by the fact that the Court did deny the defendant's motion to dismiss the count charging receiving, and in stating that the case was being submitted to the jury on the counts charging larceny and receiving. It is clear that the Court submitted the case to the jury on the single count charging felonious larceny. The judge instructed the jury that it could return one of two verdicts, guilty of felonious larceny or not guilty of felonious larceny.

We have carefully reviewed the entire record and hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

HATTIE LUCAS BRANCH v. CLARENCE BRANCH

No. 726DC62

(Filed 24 May 1972)

Appeal and Error § 36— failure to serve case on appeal — appellate review

Where no statement of the case on appeal was ever served on appellee's counsel as required by G.S. 1-282, the appellate court will review only the record proper and determine whether error of law appears on the face thereof.

APPEALED by defendant from *Maddrey, District Judge,* 4 August 1971 Session of District Court held in HALIFAX County.

No counsel for plaintiff appellee.

James R. Walker, Jr., for defendant appellant.

HEDRICK, Judge.

This is an appeal from a judgment of absolute divorce entered on 4 August 1971.

The record on appeal discloses that a "Notice of Appeal" in the instant case was mailed to the plaintiff Hattie Lucas Branch by defendant's counsel on 11 August 1971 and a "Bill of Specific Exceptions" was mailed to plaintiff's counsel Jones, Jones, and Jones, Ahoskie, North Carolina, on 13 August 1971.

The record further indicates that District Judge Maddrey signed the appeal entries on 13 August 1971 allowing the defendant 30 days in which to prepare and serve his case on appeal and plaintiff 15 days thereafter to serve exceptions or countercase.

Although the record on appeal was docketed in this Court within 90 days of the date of the judgment appealed from in accordance with Rule 5 of the Rules of Practice in the Court of Appeals, the record fails to indicate that a statement of the case was ever served on plaintiff's counsel as required by G.S. 1-282. In *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), cert. den., 275 N.C. 137, this Court said: "In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof." Accordingly, we have reviewed the record proper and find no error on the face thereof. The judgment appealed from is affirmed.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JOHNNY HENRY LONG AND JAMES M. SMITH

No. 7226SC61

(Filed 24 May 1972)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury in a prosecution of two defendants for the armed robbery of a motel night auditor.

2. **Criminal Law § 132— motion to set aside verdict**

A motion to set aside the verdict as being against the weight of the evidence is within the discretion of the trial court, and denial of the motion is not reviewable on appeal.

ON *certiorari* to review judgment of *Anglin, Judge,* entered at the 13 April 1970 Session of MECKLENBURG Superior Court.

By separate indictments defendants were charged with the armed robbery of Robert H. House (House) on 27 December 1969 and feloniously taking $100 in cash from him. Defendants pled not guilty, were found guilty as charged and from judgments imposing prison sentences of not less than 16 nor more than 20 years on each defendant, they appealed.

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

A. A. Coutras and Arthur Gooodman, Jr., for defendants appellants.

BRITT, Judge.

[1] Defendants contend that the court erred in denying their motions for nonsuit interposed at the conclusion of the State's evidence and renewed at the close of all the evidence. Briefly summarized the evidence for the State tended to show:

On 27 December 1969 at about 6:35 a.m. House was on duty as night auditor at the TraveLodge Motel on South Tryon Street in the City of Charlotte. Defendants entered the office where House was working behind a counter. Defendant Long drew a gun on House and said, "Don't say anything. Just get back." Defendant Smith then went over the counter, pushed House backward causing him to fall on the floor in a sitting position.

The gun went off, a bullet striking House in his side. Defendant Long kept the gun pointed toward House and defendant Smith proceeded to take money from the motel cash register and put it in his pocket. After taking the money, defendant Smith then advanced toward House with a knife. House raised his right leg and defendant Smith stuck the knife in House's knee. After shooting and cutting House and getting the money, defendants left the motel. House summoned help and was taken to a hospital. He positively identified defendants as the men who shot, cut and robbed him. The witness Jacquelyn Chisholm testified that defendants twice entered the motel shortly before 7:00 a.m.; that defendant Long told her that he and Smith robbed the motel and got $50.00.

The evidence was more than sufficient to survive the motions for nonsuit.

[2] Defendants contend that the court erred in denying their motions to set the verdict aside as being against the weight of the evidence. It is well settled that such motion is within the discretion of the trial court and its refusal to grant the motion is not reviewable on appeal. 3 Strong, N. C. Index 2d, Criminal Law, § 132, pp. 55-56.

Defendants received a fair trial free from prejudicial error and the sentences imposed were within the limits permitted by statute. G.S. 14-87.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOSEPH T. CROCKER

No. 7214SC323

(Filed 24 May 1972)

Criminal Law § 23— guilty plea — failure to advise defendant of possible fine

Where the court informed defendant of the maximum sentence of imprisonment he could receive on his plea of guilty, failure of the court to advise defendant that he could also be fined up to $2,000 did not render the plea of guilty invalid.

State v. Crocker

APPEAL by defendant from *McKinnon, Judge,* 4 October 1971 Session of DURHAM Superior Court.

Defendant was charged in a bill of indictment with (1) possessing heroin and (2) transporting heroin. Through his privately employed counsel he tendered a plea of guilty to the charges. After due inquiry regarding the plea, the court found facts and determined that the plea of guilty was freely, understandingly and voluntarily made, without undue influence, compulsion, or duress, and without any promise of leniency. After hearing evidence presented by the State and defendant, the court entered judgment that defendant be imprisoned for a term of two years. Thereafter defendant gave notice of appeal and following a finding that defendant was then indigent, his trial counsel was appointed to represent him on appeal.

Attorney General Robert Morgan by Donald A. Davis, Staff Attorney, for the State.

Kenneth B. Spaulding for defendant appellant.

BRITT, Judge.

Defendant's only assignment of error is that the trial judge in advising defendant as to the consequences of his guilty plea stated that he could be imprisoned for as much as ten years but failed to advise defendant that he could be fined up to $2,000. The question raised was answered by this court contrary to defendant's contention in the case of *State v. Harris,* 12 N.C. App. 576, 183 S.E. 2d 864 (1971), in an opinion by Chief Judge Mallard. No worthwhile purpose would be served by repeating the reasoning and authorities set forth in that opinion.

The judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLIFTON RAY JONES

No. 7226SC83

(Filed 24 May 1972)

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

Appeal is dismissed for failure to docket the record on appeal within the extended time allowed by order of the trial court. Court of Appeals Rule 5.

APPEAL by defendant from *McLean, Judge,* 18 June 1971 Schedule A Criminal Session, MECKLENBURG Superior Court.

The bill of indictment against defendant charged him with (1) felonious breaking and entering and (2) larceny of merchandise valued at $2,470. Defendant pled not guilty, the jury found him guilty of both offenses and from judgments imposing prison sentences to run concurrently with other specified sentences, defendant appealed.

Attorney General Robert Morgan by Walter E. Ricks III, Associate Attorney, for the State.

Thomas E. Cummings for defendant appellant.

BRITT, Judge.

The judgments appealed from were entered on 18 June 1971 and the record on appeal was docketed in this court on 12 November 1971. Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina requires that the record on appeal be docketed within 90 days after the date of the judgment, order, decree, or determination appealed from unless the trial tribunal, for good cause, extends the time not exceeding 60 days for docketing the record on appeal. An addendum to the record in this case discloses that the trial court entered an order on 13 September 1971 allowing defendant 20 days in addition to the original 90 days within which to docket his case on appeal. Thus, the appeal was docketed 36 days late and because thereof this court *ex mero motu* dismisses the appeal. *State v. Boyette,* 13 N.C. App. 252, 184 S.E. 2d 927 (1971); *State v. Bennett,* 13 N.C. App. 251, 185 S.E. 2d 7 (1971); *State v. Davis,* 12 N.C. App. 174, 182 S.E. 2d 662 (1971); *State v. Locklear,* 12 N.C. App. 36; 182 S.E. 2d 200 (1971).

Although we are dismissing the appeal, we have carefully considered the assignments of error brought forward and dis-

cussed in defendant's brief but find them to be without merit. Defendant received a fair trial, free from prejudicial error, and the sentences imposed were well within the limits prescribed by statute.

Appeal dismissed.

Judges CAMPBELL and GRAHAM concur.

LEO KEITH STEINER III v. RUTH B. STEINER

No. 7226DC242

(Filed 24 May 1972)

Divorce and Alimony § 18— alimony pendente lite — counsel fees — amount

The trial court did not abuse its discretion with respect to the amount of an award to the wife of alimony *pendente lite* and counsel fees.

APPEAL by plaintiff from *Stukes, District Judge,* 1 November 1971 Session of District Court held in MECKLENBURG County.

Plaintiff instituted action for divorce. Defendant filed answer and cross-action seeking alimony *pendente lite,* permanent alimony and counsel fees. When the cause came on for hearing on the question of alimony *pendente lite* and counsel fees, the parties stipulated as follows:

> "It is stipulated for the purpose of this hearing, and this hearing only, that the plaintiff abandoned the defendant without just cause or excuse and that no inquiry need be made into the facts thereof and the same be found as a fact by the Court."

The parties then proceeded to introduce evidence as to the estates, earning capacity, accustomed standard of living of the parties and other facts of the case. From the order awarding alimony *pendente lite* and counsel fees, plaintiff appealed.

Sanders, Walker and London, by Alvin A. London and Larry Thomas Black for plaintiff appellant.

Warren C. Stack for defendant appellee.

VAUGHN, Judge.

The only real question before this court is whether there was an abuse of discretion on the part of the trial judge with respect to the amount of the award for alimony *pendente lite* and counsel fees. In all candor, we are constrained to observe that the amounts set out in the order appear to be bountiful. On the record before us, however, we cannot hold that there was, as a matter of law, an abuse of discretion. If and when the matter comes on for hearing on the question of permanent alimony, plaintiff may be well advised to document his contentions as to the relative financial circumstances of the parties through the utilization of accepted accounting procedures. The order from which plaintiff appealed is affirmed.

Affirmed.

Judges BROCK and HEDRICK concur.

IN RE: SERGEANT B. E. WINKLER

No. 7226SC132

(Filed 24 May 1972)

1. **Municipal Corporations § 11— discharged policeman — civil service hearing — remand to board — error**

The superior court erred in remanding a civil service proceeding on the dismissal of a police officer to the civil service board for a hearing *de novo*, where there is nothing in the record to suggest that the dismissed policeman either desired or was entitled to offer additional evidence, and the record discloses that the findings and conclusions of the civil service board were supported by competent, material and substantial evidence.

2. **Municipal Corporations § 11— civil service hearing — credibility and weight of testimony**

The character and credibility of the witnesses in a civil service hearing and the weight to be given their testimony are matters to be considered and determined by the board.

APPEAL, treated as petition for certiorari, by Civil Service Board of the City of Charlotte from *Friday, Judge,* 30 August 1971 Session of Superior Court held in MECKLENBURG County.

After a proper hearing, the Civil Service Board of the City of Charlotte found, among other things, that B. E. Winkler, a

police officer, had violated the following rule of the police department:

> "Rule 500-7(bb): Neglecting to turn over all property taken from persons arrested, or found, or seized, to the proper officer without unnecessary delay."

The Board ordered Winkler dismissed from employment. The attorney who represented Winkler at the hearing subsequently filed a petition in the Superior Court of Mecklenburg County seeking judicial review. On 6 September 1971, Judge Friday, entered an Order, in pertinent part, as follows:

> "And the Court having heard the arguments of counsel for both the petitioner and respondent and having reviewed the transcript of the proceedings on file in this cause, *including statements of counsel that no criminal charge had been preferred;*
>
> And petitioner in open court having stated to the Court that he raised no objections to the notice provisions of the proceedings before the Administrative Agency;
>
> And the Court, after having reviewed the matters and things heretofore set forth, being of the opinion that the proceeding in its entirety should be remanded to the Charlotte Civil Service Board for a hearing de novo for the reason that said Board's findings of fact are not supported by competent, material, and substantial evidence in view of the entire record as submitted to this Court, *and particularly the substantive evidence of good character of the petitioner and further evidence of credibility of the petitioner who took the witness stand in the Administrative proceeding.*
>
> NOW, THEREFORE, IT IS ORDERED that this cause be remanded to the Charlotte Civil Service Board for a hearing de novo within 30 days from the date of this Order and that said Board give petitioner due notice of the time and place of said hearing."

From the entry of the above Order, the Charlotte Civil Service Board appealed.

No counsel for B. E. Winkler, appellee.

W. A. Watts for Civil Service Board of the City of Charlotte, appellant.

VAUGHN, Judge.

[1, 2] It was error to enter the Order remanding the proceeding for hearing *de novo*. There is nothing in the record to suggest that Winkler either desired or was entitled to offer additional evidence. The record discloses that the findings, conclusions and decision of the Civil Service Board were supported by competent, material and substantial evidence. The character and credibility of the witnesses, including Winkler, and the weight to be given their testimony were matters to be considered and determined by the Board.

Winkler's prior unblemished record tends to invoke the compassion of the Court as it undoubtedly did that of the able trial judge. The question of leniency is, however, quite properly for determination first, by those charged with the considerable responsibilities and duties of administering the police department and finally, by the Civil Service Board.

The Order from which the Civil Service Board appealed is reversed and the cause is remanded to the Superior Court of Mecklenburg County for entry of a judgment consistent with this opinion.

Reversed and remanded.

Judges BROCK and HEDRICK concur.

MARVIN SHULER AND FAYE G. SHULER v. BRUCE D. BRYANT

No. 7230DC111

(Filed 24 May 1972)

1. Claim and Delivery § 5— failure to prosecute — damages

Failure to prosecute an action in which property is taken under a writ of claim and delivery is a breach of the bond, and defendants in that action may maintain an independent action against the plaintiff and the surety on his bond.

2. Claim and Delivery § 5— wrongful taking of property — action for damages

The trial court erred in dismissing on the ground of *res judicata* an action against the surety on a claim and delivery bond, the claim and delivery proceedings having been dismissed, where there was no showing of a prior adjudication of plaintiffs' claim for the alleged wrongful taking of their property.

APPEAL by plaintiff from *Horner, District Judge,* 29 September 1971 Session of District Court held in SWAIN County.

This is an action instituted on 7 July 1970 against the surety on a claim and delivery bond. The claim and delivery proceedings had been dismissed previously in favor of defendants (plaintiffs in this action) apparently because no summons or complaint had been duly filed. In the prior judgment of dismissal dated 24 July 1969, there appears the following:

"8. That this action should be dismissed in toto and as a part of the same, the said Affidavit in Claim and Delivery is hereby quashed; and

9. This cause shall be placed on the Civil Docket for the purposes of deciding the damages to the defendants herein at the next sitting of this Court."

At the close of plaintiffs' evidence in the trial from which the present appeal is taken, defendant moved to amend his answer to assert "a Plea in Bar of res judicata" asserting as reason therefore a ruling on some motion made in the earlier action of 3 April 1970. At the same time he moved for a directed verdict "on the grounds that there has been an election of remedies already had and such election constitutes res judicata on this present action." Neither the motion nor the Order of 3 April 1970 are included in the record on appeal. There is some suggestion that the 3 April 1970 Order was to the effect that since the original action had been "quashed and dismissed" there was no action pending in which the then defendants (plaintiffs in the present action) could assert their claim of damages for the wrongful taking of their property. The Court allowed defendant's motion to amend. The Court also allowed defendant's motion for a directed verdict and entered judgment dismissing the action. Plaintiffs appealed.

McKeever and Edwards by George P. Davis, Jr., for plaintiff appellant.

Stedman Hines for defendant appellee.

VAUGHN, Judge.

[1, 2] Failure to prosecute an action in which property is taken under a writ of claim and delivery is a breach of the bond. The defendants in that action may maintain an independent action for damages against the plaintiff in the former action and the surety on his bond. *Davis v. Wallace,* 190 N.C. 543, 130 S.E. 176. There is no showing in this record that there has been a prior adjudication of plaintiffs' claim for the alleged wrongful taking of their property. It was error, therefore, to enter a directed verdict for defendant on that ground and for this reason the judgment from which plaintiffs appeal is reversed.

Since the question was not raised by either party, at trial or on appeal, we will allow plaintiffs to chart their own course in their suit against the surety on his liability to pay such sums as "may be recovered against the plaintiff" when in fact the plaintiff in the claim and delivery action is not a party and, as far as we can determine from the record before us, there has been no prior determination as to the extent of the liability, if any, of the plaintiff in that action. See *Moore v. Humphrey,* 247 N.C. 423, 429; 101 S.E. 2d 460.

Reversed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. MERRILL LANE ANDREWS

No. 7210SC288

(Filed 24 May 1972)

Criminal Law § 131— newly discovered evidence — motion for new trial

Defendant's motion for a new trial by reason of newly discovered evidence contains nothing which entitles him to the relief sought.

PURPORTED appeal by defendant, treated as petition for certiorari, from *Bailey, Judge,* 11 January 1972 and from *Canaday, Judge,* 26 January 1972, Sessions of WAKE Superior Court.

No counsel for appellant.

Attorney General Robert Morgan by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

VAUGHN, Judge.

At the 29 March 1971 Session of Wake Superior Court, defendant was convicted of the crime of conspiracy to force open a safe and vault. No error was found in the trial from which he appealed. *State v. Andrews*, 12 N.C. App. 421, 184 S.E. 2d 69, appeal dismissed 279 N.C. 727, 185 S.E. 2d 704.

On 10 December 1971, defendant filed a motion for new trial by reason of newly discovered evidence. We have examined the motion filed by defendant. It contains nothing which entitles defendant to the relief sought.

Affirmed.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. JERRY FOSTER

No. 7223SC299

(Filed 24 May 1972)

Assault and Battery § 14— felonious assault — sufficiency of evidence

The evidence was sufficient for the jury in this prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries.

APPEAL by defendant from *Crissman, Judge,* 6 December 1971 Criminal Session of Superior Court held in WILKES County.

Defendant was indicted for assault with a deadly weapon, to wit: a .25 caliber automatic pistol, with felonious intent to kill one Sherman Love, inflicting serious injuries upon the said Sherman Love by shooting him in the stomach. Defendant pleaded not guilty. The jury returned a verdict finding defendant guilty as charged in the bill of indictment. From judgment imposing a prison sentence, defendant appealed.

Attorney General Robert Morgan by Associate Attorney General Walter E. Ricks III for the State.

Brewer & Bryan by Joe O. Brewer for defendant appellant.

PARKER, Judge.

Appellant's only assignments of error are that the court erred in denying his motion for nonsuit and in entering its judgment against him. There was ample evidence to require submission of the case to the jury and to support the verdict rendered. The judgment was supported by the verdict and was within statutory limits. In his brief on this appeal appellant's counsel states he is unable to find prejudicial error committed by the trial court. We have carefully reviewed the entire record and find

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT LEE McLEAN

No. 7212SC255

(Filed 24 May 1972)

APPEAL by defendant from *Hall, Judge,* 13 September 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery. He was charged in a second bill of indictment, proper in form, with a felonious assault. The two charges were consolidated for trial.

The State's evidence tended to show the following: At about one o'clock a.m. on 23 June 1971 the victim, David McCoy, was returning home after a visit with his cousin. As he walked along Mann Street in the City of Fayetteville, he was approached by defendant and one Joseph Simmons. McCoy had known defendant for more than two years. While holding a pistol in his hand, defendant told McCoy to empty his pockets and take off his shoes. McCoy complied. He put a ten dollar bill and a pack of cigarettes on the ground and then took off

his shoes. Defendant then started shooting at McCoy; he was hit twice in the leg and once in the chest. After being shot, McCoy ran a short distance to a Rest Home from which the police were called. McCoy then collapsed and was carried to the hospital.

Defendant's evidence tended to show the following: At the time in question defendant and Joseph Simmons saw McCoy walking along the street. Simmons handed the pistol to defendant who put it in his hip pocket. Simmons asked McCoy if he had any money and McCoy handed defendant forty-three cents. McCoy then drew a knife and defendant pulled out the pistol and started shooting. Defendant did not plan to rob McCoy.

The jury found defendant guilty as charged in each bill of indictment. Judge Hall consolidated the two cases for purpose of judgment and sentenced defendant to one term of not less than fifteen nor more than thirty years. Defendant appealed.

Attorney General Morgan, by Assistant Attorney General Magner, for the State.

James Godwin Taylor, Twelfth District Assistant Public Defender, for defendant.

BROCK, Judge.

The Assistant Public Defender, with appropriate candor, states that he is unable to find prejudicial error and asks this court to review the record for possible error. We have carefully reviewed the record proper and find that the indictments were proper in form and sufficient to charge the offenses for which defendant was placed on trial. The trial court was duly organized and had jurisdiction of defendant and the offenses charged. The evidence against defendant was overwhelming and unequivocal. The judgment pronounced was within the statutory limits (G.S. 14-87).

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. LARRY DENNIS HINTON

No. 7210SC270

(Filed 24 May 1972)

APPEAL by defendant from *Brewer, Judge,* 15 November 1971 Session of Superior Court held in WAKE County.

Defendant was charged in a bill of indictment, proper in form, with felonious larceny and receiving. The State took a *nol pros* on the receiving charge and prosecuted defendant, who entered a plea of not guilty, only upon the larceny charge.

The State's evidence tended to show that a step-van-type Chevrolet truck was taken from the premises of Fisher's Bakery and Sandwich Company in Raleigh during the early morning hours of 10 July 1971. The stolen truck was stopped by a police officer, who was suspicious because of the hour of the morning; defendant was found to be the operator. Defendant had his driver's license and the vehicle registration was posted in the truck; therefore, the officer had no cause for arrest, because there had been no stolen vehicle report filed on this truck at the time. However, when the same truck was later found abandoned, the officer remembered defendant and defendant's name.

Defendant's evidence tended to establish an alibi.

From a verdict of guilty and judgment entered, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Safron, for the State.

Sanford, Cannon, Adams & McCullough, by John H. Parker, for defendant.

BROCK, Judge.

We have carefully examined the record, the evidence, and the judge's instructions to the jury. The bill of indictment is sufficient to charge defendant with the offense for which he was tried. The trial court was duly organized and had jurisdiction of the defendant and the offense charged. The State's evidence fully required submission of the case to the jury. The jury was instructed upon the appropriate principles of law. The punish-

ment imposed was within the statutory limits. In our opinion defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. JAMES E. MELTON

No. 727SC200

(Filed 24 May 1972)

APPEAL by defendant from *Cowper, Judge,* 29 November 1971 Regular Session, WILSON Superior Court.

By separate indictments proper in form defendant was charged with (1) first-degree burglarly and (2) assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death. When the cases were called for trial defendant through his attorney tendered pleas of the lesser offenses of felonious breaking and entering, wrongful entry and assault with a deadly weapon inflicting serious injury. The trial judge conducted an inquiry as to whether the pleas were freely, understandingly and voluntarily made. Defendant, orally and in writing, answered questions relating to the inquiry following which the court made appropriate findings of fact and adjudicated that the guilty pleas were freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

The court thereupon entered judgments imposing an eight years prison sentence on the breaking and entering charge and a two years prison sentence on the other charges. Defendant appealed from the judgments.

Attorney General Robert Morgan by Ralf F. Haskell, Associate Attorney, for the State.

Narron, Holdford and Babb by Henry C. Babb, Jr., for defendant appellant.

BRITT, Judge.

Defendant's court appointed counsel states that he has carefully examined the record and proceedings in this case and is unable to assign any error. We too have carefully reviewed the record and find that it is free from error.

The judgments appealed from are

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES WALTER BLACK

No. 7219SC284

(Filed 24 May 1972)

APPEAL by defendant from *Johnston, Judge,* 3 January 1972 Session of CABARRUS Superior Court.

Defendant was charged in one bill of indictment with felonious breaking and entering, felonious larceny, and feloniously receiving stolen property. He was charged in a second bill of indictment with felonious assault with a deadly weapon.

When the cases were called for trial defendant tendered pleas of guilty to nonfelonious breaking, entering and larceny and assault with a deadly weapon. After due inquiry, the court found and concluded that the pleas of guilty were freely, understandingly and voluntarily made without undue influence, compulsion or duress, and without promise of leniency. The guilty pleas were accepted, the cases consolidated for purpose of judgment and a twelve months prison sentence was imposed. Defendant appealed.

Attorney General Robert Morgan by Herbert Lamson, Jr., Associate Attorney, for the State.

Cecil R. Jenkins, Jr., for defendant appellant.

BRITT, Judge.

Defendant's court appointed counsel concedes that he is unable to find any error in the record but asks that this court

review the record for possible error. This we have done and conclude that the record is free from prejudicial error.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. GLENN EDWARD DARNELL

No. 7228SC385

(Filed 24 May 1972)

APPEAL by defendant from *Falls, Judge,* 25 October 1971 Session of Superior Court held in BUNCOMBE County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felony of common-law robbery. From a jury verdict of guilty as charged and judgment of imprisonment of not less than seven years nor more than ten years, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Haskel for the State.

William E. Anderson for defendant appellant.

MALLARD, Chief Judge.

We have carefully considered the record in this case, and no prejudicial error is made to appear; nor is there error on the face of the record proper.

No error.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. MARVIN DAVID PENNELL

No. 7221SC364

(Filed 24 May 1972)

APPEAL by defendant from *Kivett, Judge,* 25 October 1971 Session of Superior Court, held in FORSYTH County.

Defendant entered a plea of guilty to the crime of using explosives to forcibly open a safe. The court duly adjudged that the defendant's plea was freely, understanding and voluntarily made.

From a judgment imposing a prison sentence of not less than 15 nor more than 17 years, defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Ralph Moody for the State.

Teeter, Parrish and Yokley by D. Blake Yokley and Wilson and Morrow by Harold R. Wilson for defendant appellant.

VAUGHN, Judge.

As requested by defendant's counsel we have reviewed the record on appeal for any errors of law which might appear therein. We find none.

No error.

Judges MORRIS and GRAHAM concur.

MRS. MARIETTA FROMM FOSTER, WIDOW; MRS. MARIETTA FROMM FOSTER, GUARDIAN OF THOMAS ALLEN FROMM AND MICHELLE JEANETTE FROMM, MINOR CHILDREN OF DANIEL FROMM, DECEASED v. HOLLY FARMS POULTRY INDUSTRIES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY

No. 7223IC447

(Filed 28 June 1972)

1. **Master and Servant § 94— workmen's compensation — findings of Industrial Commission — appellate review**

The findings of fact of the Industrial Commission are conclusive on appeal only when supported by the evidence, and the appellate court may review the evidence to determine whether there is any evidence to support the findings of fact.

2. **Master and Servant § 60— workmen's compensation — death of employee attending convention — personal mission**

The death of a scientific director of a poultry company who was attending a convention and was shot to death during a robbery after he left the convention hotel to go get a cup of coffee at 1:00 a.m. did not arise out of and in the course of his employment by the poultry company, where the evidence shows that he was invited to the convention as a result of his accomplishments while previously employed as a university professor, that the employer would not benefit from the employee's attendance at the convention, that the employer paid expenses for the trip as a fringe benefit or gesture of good will, and that the employee was on a personal mission when he was shot.

APPEAL by defendants from the North Carolina Industrial Commission Opinion and Award dated 3 February 1972.

Plaintiff instituted this claim before the North Carolina Industrial Commission to recover benefits allegedly due under the North Carolina Workmen's Compensation Act (G.S. 97) for the death of her husband, Dr. Daniel Fromm.

Dr. Fromm was employed by defendant-employer on June 1, 1969, as a Scientific Director. He had previously been a Professor of Poultry Science at North Carolina State University. In September Dr. Fromm received a letter, dated 26 September 1969, inviting him to attend a convention of the Agricultural Research Institute to be held in Washington, D. C. on October 14 and 15. A vice president of defendant-employer, Mr. Kendrick, testified that Dr. Fromm requested permission to attend the convention. There was testimony that the Agricultural

Research Institute invitation was of an honorary nature for scientific achievements accomplished in Dr. Fromm's work at North Carolina State University. Kendrick testified that the convention had no connection with Fromm's work at Holly Farms and that Holly Farms would not benefit from Fromm's attendance at the convention. Kendrick did grant permission to attend the convention and Holly Farms was to pay his expenses. He remained on salary while at the convention. This was explained as being a fringe benefit extended to management level employees.

At the meeting Dr. Fromm encountered an associate, Dr. Kurnick, from New Jersey. They attended the first day's sessions together. They then went to a bar in the Shoreham Hotel, where the convention was being held. At about 1:00 a.m. the two men decided to get some coffee. They discovered that the Shoreham Coffee Shop was closed. A doorman directed them to an all-night coffee shop about a block from the hotel. On the way they were held up by two men and Dr. Fromm was shot. He died on December 29, 1969 of injuries resulting from the gunshot wound. Dr. Fromm remained on salary until his death and all his hospital bills were paid by defendant-employer.

The Hearing Commissioner found as a fact that, "[h]e sustained, at the time complained of, an injury by accident arising out of and in the course of his employment which resulted in his death."

The Commission concluded as a matter of law that plaintiff was entitled to recover under the Workmen's Compensation Act and benefits were awarded.

Defendants appealed to the Full Commission. On review the Full Commission adopted the Opinion and Award of the Hearing Commissioner.

From the decision of the Full North Carolina Industrial Commission, defendants appealed.

McElwee & Hall by John E. Hall for plaintiff appellees.

W. G. Mitchell for defendant appellants.

CAMPBELL, Judge.

Defendants assign as error the Findings of Fact and Conclusions of Law made by the Hearing Commissioner and

adopted by the Full Commission. It is contended that there is no evidence to support the finding of fact and conclusion of law that deceased was acting in the course of his employment at the time of the injury and that the injury arose out of the employment.

[1] The findings of fact of the Industrial Commission are conclusive on appeal only when supported by the evidence and the court, on appeal, may review the evidence to determine whether there is any evidence to support the findings of fact. *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951). Findings of fact not supported by the evidence may be set aside. *McRae v. Wall,* 260 N.C. 576, 133 S.E. 2d 220 (1963).

The law relating to injuries to employees while the employees are traveling has been summarized in a lucid opinion by the North Carolina Supreme Court. We believe that the rules set forth in *Lewis v. Tobacco Co.*, 260 N.C. 410, 132 S.E. 2d 877 (1963) are applicable to the case before us and we therefore refer to the following quotation from that opinion:

> "To obtain an award of compensation for an injury under the Workmen's Compensation Act it must be shown that the employee suffered a personal injury which *arose out of* and in the course of his employment. *Anderson v. Motor Co.*, 233 N.C. 372, 374, 64 S.E. 2d 265. The purpose of the act is to provide compensation benefits for industrial injuries; it is not intended to be general health and accident insurance. To be compensable the injury must spring from the employment. *Duncan v. Charlotte,* 234 N.C. 86, 66 S.E. 2d 22. An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. It is not compensable if the acts are performed solely for the benefit or purpose of the employee or a third person. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. The fact that a pleasure trip for the benefit of the employee is without expense to the employee does not entitle him to compensation for injury received while on such trip even if all or a portion of the expense is borne by the employer as a gesture of good will. *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97; *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294. Where an employee at the time of his injury is performing acts for his

> own benefit, and not connected with his employment, the injury does not arise out of his employment. This is true even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680. If employee's acts are not connected with his employment but are for the benefit of himself and third persons at the time of his injury, he is not entitled to compensation even if he is injured while he is required by his employer to be away from his home and place of regular employment for a period of time on a mission for his employer. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218."

[2] In the case before us the evidence is that Dr. Fromm was invited to attend the convention as a result of his accomplishments while a professor at North Carolina State University; that any benefit to be attained would inure solely to Dr. Fromm and not to defendant employer; and that defendant paid expenses for the trip as a "fringe benefit" or gesture of good will.

There is no evidence that the fatal injury arose out of or in the course of Fromm's employment nor is there any evidence that defendant-employer would have received any benefit from Fromm's attendance at the convention.

In addition to what has been said above, we point out that the evidence discloses that all of the convention activities were held in the Shoreham Hotel. When Dr. Fromm left the hotel at 1:00 a.m. to get a cup of coffee, a block from the hotel, it was purely a personal mission and in no way connected with his employment. The factual situation in the instant case is clearly distinguishable from that in *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969).

We are of the opinion that the evidence does not support the Findings of Fact and Conclusions of Law made by the Industrial Commission. We hold that under the evidence in this case the fatal injuries did not arise out of and in the course of Fromm's employment.

This case is remanded to the Industrial Commission for entry of an order denying compensation.

Reversed and remanded.

Chief Judge MALLARD and Judge BROCK concur.

State v. Wright

STATE OF NORTH CAROLINA v. GEORGE WRIGHT, JR.

No. 7215SC399

(Filed 28 June 1972)

1. **Homicide § 21; Indictment and Warrant § 17— date of shooting — date of death — variance**

There was no fatal variance between an indictment alleging that defendant killed decedent on May 24 and evidence that decedent died on June 4 from a shotgun wound inflicted by defendant on May 24.

2. **Criminal Law § 75— voluntary statement — absence of written waiver of counsel**

No written waiver of counsel was required by former G.S. 7A-457 for the admission of testimony by the sheriff that defendant walked into the sheriff's office and voluntarily stated that he had shot decedent.

3. **Homicide § 21— self-defense — jury question**

The State's evidence did not establish as a matter of law that defendant acted in self-defense when he shot the victim, that being a question for the jury, where it tended to show that defendant and the victim had an argument, that defendant told the victim not to come in his yard, that the victim went to the front door of his house trailer and told his girl friend "to hand him his 38," that the victim reached his hand into the trailer, that the victim was not seen then or later with a pistol in his hand or on his person, that the victim then came back toward defendant's yard and told the defendant that he was going to kill defendant or defendant was going to kill him, that defendant went into his house trailer and got his shotgun, and that defendant shot the victim when the victim stepped into defendant's yard.

APPEAL by defendant from *Hobgood, Judge,* 1 November 1971 Session of Superior Court held in ORANGE County.

Defendant was charged in a bill of indictment with the felony of murder in the first degree in the killing of Chester Daye on 24 May 1971. Upon his plea of not guilty, he was tried by jury.

The State's evidence tended to show the following: On 24 May 1971, Chester Daye (Chester) lived in a house trailer in Hillsborough, parked upon a lot adjacent to the house trailer in which defendant lived. During the morning of 24 May 1971, Chester and defendant were at the home of one James Henderson drinking gin. Chester began to argue with defendant about two dollars that Chester claimed defendant's brother owed him. Defendant told Chester he had nothing to do with

that. Chester cursed defendant and defendant cursed Chester. Chester threatened to kill defendant.

Later in the morning, Chester and defendant returned to their respective house trailers. Chester stood in the front yard of his house trailer and cursed defendant who was standing outside the front door of his house trailer. Chester started into defendant's yard and defendant told him not to come into the yard. Chester went to the front door of his house trailer and told his girl friend "to hand him his 38 out of there." Chester reached his hand into the trailer, but he did not go in. Chester was not seen then or later with a pistol in his hand or on his person. Chester then came back toward the edge of defendant's yard and "told George [defendant] he was going to kill him or George was going to kill him one." Defendant went into his house trailer and got his shotgun. He told Chester not to come into the yard. Chester kept coming forwards and stepping back. Chester stepped over into defendant's yard and defendant shot him.

Immediately thereafter, defendant walked to Sheriff Knight's office and told the sheriff he had killed Chester Daye. The rescue squad carried Chester to Watts Hospital in Durham. Extensive surgery was performed on Chester in an effort to repair the wound, but three days later it was required that his entire right leg be amputated at the hip joint. Chester's condition deteriorated until he expired on 4 June 1971. In the opinion of Dr. James Fuchs, the treating surgeon, the primary cause of death was kidney failure brought about because of massive shotgun wound injury. In the opinion of Dr. John T. Dailey, the examing pathologist, the cause of death was a shotgun wound with subsequent development of pneumonia and kidney failure.

Defendant offered no evidence.

From a verdict of guilty of voluntary manslaughter and a prison sentence of not less than fourteen nor more than eighteen years, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Giles, for the State.

Everett, Everett & Creech, by Robinson O. Everett and James B. Craven III, for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge allowed medical testimony of events subsequent to 24 May 1971, the date of the homicide as alleged in the indictment, and that the trial judge failed to dismiss all charges of homicide because of fatal variance between the indictment and the State's evidence. The point of defendant's assignment of error is that the indictment alleges that defendant killed Chester Daye on 24 May 1971, but that the State's evidence shows that Chester Daye died on 4 June 1971.

Defendant acknowledges that the decisions of the Supreme Court of North Carolina in *State v. Baker,* 46 N.C. 267 (1854) and in *State v. Pate,* 121 N.C. 659, 28 S.E. 354 (1897) are squarely in point and are against his contentions. Defendant, nevertheless, argues that the rationale of these two cases should be reexamined. We have given considerable study to the matter and are convinced that there is no fatal variance between the indictment and the proof. The indictment alleges the date upon which defendant fired the shot which injured Chester Daye. The evidence tended to show that defendant fired the shot and injured Chester Daye on the date alleged in the indictment. The fact that Chester did not die from the wound until eleven days later does not create a fatal variance. The only conduct of which the State complains was defendant's conduct on 24 May 1971 as alleged in the indictment. This assignment of error is overruled.

[2] Defendant assigns as error that the trial judge permitted Sheriff Knight to relate defendant's inculpatory statement without first obtaining a written waiver of counsel in accordance with the holding in *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561.

The present case does not fall within the prohibition of *Lynch.* Here, the defendant walked into the office and, without prompting, stated to Sheriff Knight that he had shot Chester Daye. The only testimony given by the sheriff in the presence of the jury was the statement volunteered by defendant. There was no duty upon the sheriff to anticipate that defendant was going to step into his office and admit he had shot Chester Daye. Defendant was not under investigation, nor was he interrogated, until after his voluntary statement. The police are under no duty to stop a person from spontaneously stating

that he has committed a particular crime. This assignment of error is overruled.

[3] Defendant assigns as error the failure of the trial judge to dismiss the charges. Defendant contends the State's evidence shows as a matter of law that he acted in self-defense.

While it is true that the State's evidence raised an issue of self-defense for defendant, it did not as a matter of law excuse his conduct. In this case, the reasonableness of defendant's apprehension was a question for jury consideration. See, *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279. This assignment of error is overruled.

We have carefully considered defendant's remaining assignments of error, which are to the charge of the court to the jury, or its failure to charge. In our opinion, the case was submitted to the jury upon all of the issues raised by the evidence and upon applicable principles of law.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

BUILDERS SUPPLIES COMPANY OF GOLDSBORO, NORTH CAROLINA, INC. v. NORWOOD A. GAINEY

No. 728SC150

(Filed 28 June 1972)

1. **Mines and Minerals § 1— commercial gravel**

Commercial gravel is not regarded as a mineral under the mining laws of North Carolina.

2. **Mines and Minerals § 1— sand and gravel**

Generally sand and gravel are considered part of the soil and not minerals which possess exceptional qualities or value.

3. **Deeds § 14; Mines and Minerals § 1— profit a prendre — appurtenant — in gross**

Profits a prendre may be held "appurtenant" to other land or may exist "in gross."

4. **Deeds § 14; Mines and Minerals § 1— profit a prendre — in gross — appurtenant**

If a *profit a prendre* is "in gross," it may be used for the benefit of the individual owner and does not have to be used solely for the

benefit of the dominant estate as would be the case were it "appurtenant."

5. Deeds § 14; Mines and Minerals § 1— reservation of right to remove sand and gravel — profit a prendre in gross

Grantor's reservation in a deed conveying 331 acres of the right to go on the land and remove sand and gravel from 35 acres to be laid out by the grantor constituted a *profit a prendre* in gross.

6. Deeds § 14; Mines and Minerals § 1— reservation of right to remove sand and gravel — nature of right

The reservation of the right to go on land and remove sand and gravel from 35 acres to be selected by the grantor did not convey an interest in or right to the sand and gravel in place, which under mining law would create a severable and independent legal estate in the land; under such *profit a prendre*, the substances must be severed from the ground before title to the substances passes.

7. Deeds § 14; Equity § 2; Mines and Minerals § 1— reservation of right to remove sand and gravel — profit a prendre — laches

Where a deed reserved to the grantor the right to go on 331 acres conveyed by the deed and remove sand and gravel from 35 acres to be laid out by the grantor, the lapse of 15 years between execution of the reservation and the time the grantor's successor tried to exercise the privilege, when coupled with evidence that the grantee made numerous improvements to the 35-acre tract laid off by the grantor in the mistaken belief that the grantor and its successor had abandoned all claims to the *profit a prendre*, that the grantee paid taxes on all 331 acres while the grantor's successor has never listed the 35-acre parcel for tax purposes, and that the grantee has removed topsoil from five acres of the 35-acre tract in order to make removal of the sand possible, *held* sufficient to prevent the grantor's successor from removing sand and gravel from the grantee's land.

APPEAL by plaintiff from *Bone, Emergency Judge,* 27 September 1971 Session of Superior Court of WAYNE County.

Plaintiff originally brought this action on 30 November 1967. At trial the court granted defendant's motion for directed verdict at the close of plaintiff's evidence. On appeal new trial was granted. *Builders Supplies Co. v. Gainey,* 10 N.C. App. 364, 178 S.E. 2d 794, (1971), cert. denied 278 N.C. 300, 180 S.E. 2d 178 (1971).

Plaintiff brought this action to obtain an adjudication as to ownership of a 35-acre tract of land, to restrain defendants from interfering or attempting themselves to remove any sand and gravel therefrom, and for damages. Defendant denied generally the allegations of the complaint and pleaded as one of its defenses the doctrine of laches.

On 18 April 1952, Bryan Rock and Sand Company, Inc., conveyed a 331-acre tract of land to defendant but reserved "the right to lay out and stake off 35 acres of the above described land wherever it desires and to take therefrom all sand, gravel and sand and gravel it so desires with the right of ingress, egress and regress over any part of said land for the purpose of removing said sand or gravel." After the death of James E. Bryan, the President of Bryan Rock and Sand Company, Inc., the corporation was dissolved and its real property conveyed to a successor business association in the form of a limited partnership which in turn re-conveyed the land to a newly organized corporation, Bryan Rock and Sand Company. On 31 July 1959, Bryan Rock and Sand Company conveyed to American-Marietta Company seven tracts of land including all right, title and interest reserved to Bryan Rock and Sand Company in all deposits of sand and gravel and specifically referred to the 1952 deed which conveyed 331 acres to defendant subject to the above-quoted reservation of sand and gravel. On 11 May 1964, Martin-Marietta Corporation assigned to plaintiff, Builders Supplies Company, all of its interest in sand and gravel in 35 acres which had been created by reservation in the earlier 1952 deed of 331 acres to defendant.

The plaintiff's evidence tends to show that Bryan Rock and Sand Company sent its representatives on the land in 1958 or 1959 to make a survey and stake off the 35-acre tract. Thereafter an employee of Bryan Rock and Sand Company and its successors went on to the land about every six months to make inspections. No sand, "except possibly three or four truck loads" was removed from the inside of the perimeter of the 35-acre tract before 1965 when it was re-surveyed. In 1967 when plaintiff's representative last went on the 35-acre tract to take samples, he was ordered off the premises by defendant. Plaintiff's representative testified that no additional sand was dug and removed from the 35-acre tract between 1965 and 1967. The evidence does tend to show, however, that defendants removed large quantities of sand from the area surrounding the 35-acre tract by pumping up to the boundaries originally staked off by Bryan Rock and Sand Company.

The defendant's evidence tends to show that the 35-acre tract in dispute was staked off in 1953 shortly after the death of the President of Bryan Rock and Sand Company, Inc., Mr.

James E. Bryan. Defendant cleared the 35-acre tract of all trees and bushes and built the only road from the highway to it, a distance of at least one-half mile. He planted beans and corn on the tract in years past, as well as using it as pasturage. Defendant had livestock on the disputed tract every year since he acquired the 331-acre tract and had fenced all but one acre of the 35-acre parcel. Defendant once removed from five to eight feet of topsoil from the disputed parcel, and only the defendant has ever removed any dirt, sand or gravel from the 35-acre tract of land.

The jury returned a verdict finding that plaintiff was barred by laches from asserting any claim to the sand and gravel in the 35-acre tract and that plaintiff was not entitled to remove said sand and gravel, and the trial court entered judgment accordingly.

From the dismissal of the action, plaintiff gave notice of appeal.

Smith and Everett, by James N. Smith, for plaintiff appellant.

Taylor, Allen, Warren and Kerr, by John H. Kerr III, for defendant appellee.

MORRIS, Judge.

[1, 2] When this case was first presented for review on appeal, we simply labeled the interest involved as an "easement" for purposes of that decision. However, determination of this appeal requires, we think, a re-examination of the interest reserved in the 1952 deed. While commercial gravel belongs to the mineral kingdom in that it is inorganic and formed by nature alone, it is not regarded as a mineral under the mining laws of North Carolina. *Lillington Stone Co. v. Maxwell,* 203 N.C. 151, 165 S.E. 351 (1932). (But see G.S. 74-49(6), effective 11 June 1971.) Generally sand and gravel are considered part of the soil and not minerals which possess exceptional qualities or value. 54 Am. Jur. 2d, Mines and Minerals, § 8, p. 193. Thus when discussing the interest in sand and gravel reserved herein, we cannot—as appellant contends we must—apply as authority the case law dealing with mineral rights, which recognizes severance of the legal estate in the minerals from that of the legal estate in the surface, and establishes that one cannot

abandon such rights by mere nonuse. *Hoilman v. Johnson,* 164 N.C. 268, 80 S.E. 249 (1913); see 5 Strong, N. C. Index 2d, Mines and Minerals, § 1, p. 519.

[3, 4] "A right that is closely akin to the easement is the *profit a prendre,* which is a right created in its owner to take a part of the soil or the products of the soil from the land of another person." Webster, Real Estate Law in North Carolina, § 309, p. 372. Black's Law Dictionary, 4th Ed., defines *profits a prendre* as:

> " . . . A right exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof. A right to take part of the soil or produce of the land. . . . The term includes the right to take soil, gravel, minerals, and the like from another's land . . . *Profits a prendre* differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience without profit. . . . " (Citations omitted.)

See also 28 C.J.S., Easements, § 3(f), p. 631; 25 Am. Jur. 2d, Easements and Licenses, § 4, p. 419; 54 Am. Jur. 2d, Mines and Minerals, § 120, p. 303; 1 Thompson on Real Property, §§ 135-140, pp. 508-529 (1964). "*Profits a prendre* are closely analogous to easements in most respects and the principles applicable to one are generally applicable for the other." Webster, *supra,* at p. 374. For example, under the provision of the Restatement of the Law of Property, § 399, p. 2343, the term "easement" includes "profits"; and as is the case with easements, *profits a prendre* may be held "appurtenant" to other land or may exist "in gross" meaning they may be held independently of any ownership in other land and that it does not pass with the transfer of any land. If a *profit a prendre* is "in gross," it may be used for the benefit of the individual owner and does not have to be used solely for the benefit of the dominant estate as would be the case were it "appurtenant." 1 Thompson on Real Property, § 136, pp. 516-517.

[5] The leading authority in North Carolina dealing with *profits a prendre* is *Council v. Sanderlin,* 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922), wherein the owner conveyed land but reserved for himself, his heirs and assigns the right to hunt on the uncleared and uncultivated portions and to protect the game thereon against trespass of persons except the

grantee, his executors, administrators, and assigns. There our Supreme Court said:

> "*Profit a prendre* is created by grant; it cannot be created by parol. If enjoyed by reason of holding certain other estate it is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual (as in this case), distinct from any ownership of other lands, it takes the character of an estate in the land itself, rather than that of an easement therein." 183 N.C., at p. 275.

We conclude that in the case at bar the personal right to go on the land to remove sand and gravel was not exclusively for the enjoyment of a dominant estate; was distinct from any ownership of other lands; and was, therefore, a *profit a prendre* in gross.

[6] The present reservation was merely the right to go on the land and remove sand and gravel as opposed to the right to sell sand and gravel in place, the critical distinction being that the substances must be severed from the ground before title to the substance passes. See 1 Thompson on Real Property, § 136, p. 519. The reservation here does not convey an interest in or right to the sand and gravel in place which under mining law would create a severable and independent legal estate in the land. *Vance v. Pritchard,* 213 N.C. 552, 197 S.E. 182 (1938). Instead, the *profit a prendre* merely reserves the privilege of entering ["right of ingress, egress and regress over any part of said land"] to remove the sand and gravel, and no right exists in the material until it is severed.

[7] Appellant assigns as error the submission to the jury of appellee's equitable affirmative defense of laches. We think the issue was properly submitted. The facts in the case sub judice are similar to the facts in *Matthews Slate Co. v. Advance Industrial S. Co.,* 185 App. Div. 74, 172 N.Y. Supp. 830 (1918). There a *profit a prendre* was reserved by the grantor in the accumulating waste slate of a quarry which was conveyed to the grantee. No one removed the waste slate for 33 years and there was little use for it until a new process of roof-surfacing was discovered. The Court held the evidence of nonuse accompanied by other circumstances showing an intention to abandon was sufficient to prevent the grantor from exercising the rights

reserved in the conveyance. See also *Council v. Sanderlin, supra;* "Servitudes-Appurtenant or In Gross," 29 Yale Law Journal 218 (1919); compare *Gerhard v. Stephens,* 68 Cal. 2d 864, 442 P. 2d 692, 69 Cal. Rptr. 612 (1968).

Here appellee raised the defense of laches in his pleadings, and there is sufficient evidence to support such a charge in defense of appellant's claim for injunctive relief and damages. 7 Strong, N. C. Index 2d, Trial, § 40, pp. 351-352. Nor do we find error in the court's charge concerning this issue.

> " . . . The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief. 'Laches' has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar in equity.
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> . . . The idea of laches is embodied also in the words 'acquiescence,' 'election,' 'estoppel,' 'abandonment,' and 'ratification.' " 27 Am. Jur. 2d, Equity, § 152, pp. 687-688; see also 3 Strong, N. C. Index 2d, Equity, § 2, p. 551; *Howell v. Alexander,* 3 N. C. App. 371, 165 S.E. 2d 256 (1969).

We do not find any merit in the appellant's contention that appellee has not been prejudiced when the evidence clearly tends to show that appellee made numerous improvements to the 35-acre tract in the mistaken belief that appellant and its predecessors had abandoned all claim to the *profit a prendre;* that appellee paid taxes on all 331 acres while appellant has never listed the 35-acre parcel for tax purposes; and that appellee has dug from five to eight feet of topsoil from five acres of the 35-acre tract in order to make removal of the sand possible.

The lapse of approximately 15 years between the time of the execution of the reservation by deed and the time appellant tried to exercise that privilege was sufficient, when coupled with the other facts of this case, to prevent appellant from removing any sand and gravel from appellee's land.

Although we do not discuss the remaining assignments of error, we have considered them and find them to be without merit.

Affirmed.

Judges VAUGHN and GRAHAM concur.

JOHN E. TREADWELL, CHAIRMAN, AND GEORGE H. JORDAN, JR., MEMBERS OF, COMPRISING THE WAKE COUNTY BOARD OF ALCOHOLIC CONTROL v. E. GARLAND GOODWIN

No. 7210DC315

(Filed 28 June 1972)

1. **Rules of Civil Procedure § 50— directed verdict**

The trial judge may direct a verdict only when the issue submitted presents a question of law based upon admitted facts.

2. **Landlord and Tenant § 13— option to renew lease — written notice — waiver**

In an action for summary ejectment, the evidence was sufficient to raise the question of whether the conduct of the lessor, the lessee, and the purchaser of the property in question constituted a waiver of a requirement of the lease that the lessee notify the lessor by registered mail at the appropriate time of his intention to renew or extend the original lease for an additional five years, where there was evidence that the lessee has continued to hold over and pay rent since the expiration of his original one-year term, and that prior to the expiration of the original term the lessee told the lessor of his intention to remain in possession and received the lessor's permission to make improvements on the property.

APPEAL by defendant from *Preston, District Judge,* 22 November 1971 Session of District Court held in WAKE County.

Plaintiffs (sometimes referred to hereinafter as "ABC Board") instituted this civil action for summary ejectment before a magistrate on 12 February 1972, and from the judgment of the magistrate for plaintiffs, defendant appealed to the district court for trial de novo. The matter was set for trial but was dismissed on plaintiffs' motion for voluntary dismissal pursuant to Rule 41(a)(1) of the Rules of Civil Procedure. The present action for summary ejectment was brought 10 September 1971. At the close of all the evidence and the argu-

ments to the jury, plaintiffs moved for a directed verdict under Rule 50(a) of the Rules of Civil Procedure, and the motion was allowed. Defendant appealed to the Court of Appeals.

Maupin, Taylor & Ellis by Charles B. Neely, Jr., for plaintiff appellees.

Hatch, Little, Bunn, Jones & Few by William P. Few for defendant appellant.

MALLARD, Chief Judge.

The only question for decision on this appeal is whether the trial court erred in granting a directed verdict in favor of the plaintiff ABC Board, a question which requires some examination of the facts as were established by the pleadings, admissions and stipulations of the parties or indicated by the testimony and exhibits introduced at trial.

The evidence for the plaintiffs tended to show the following: On 29 September 1967, one E. L. Riggs and wife (Riggs) were the owners of the property located at 2732 South Wilmington Street in Raleigh, North Carolina, which property is the subject of the controversy in this case. On that date, Riggs, as lessor, entered into a lease agreement with the defendant Goodwin. This lease was for an initial term of one year renewable at the option of the lessee for two successive five-year periods. The portions of the leasing agreement pertinent to this appeal provide as follows:

> "That in consideration of the rent and mutual agreements hereinafter set forth, the Lessors have this day rented to the Lessee for the term of one year beginning the 1st day of September, 1967 and ending at midnight, 31st day of August, 1968, together with the options to renew this lease, as hereinafter set forth, the ground and building known as 2732 South Wilmington Street, City of Raleigh, Wake County, North Carolina.
>
> This lease and agreement is upon the following terms and conditions:
>
> * * *
>
> 2. The Lessee shall have the right and option to renew this lease for an additional period of five years beginning the 1st day of September, 1968 at the same monthly rental

price as the original one year term; and if the Lessee elects to lease and does lease these premises for the above referred to five year term; it shall then have the further right and option to extend and renew this lease for an additional term of five (5) years at the expiration of the above mentioned five year term. If the Lessee shall elect to renew this lease for either or both additional terms as hereinabove set out and provided for, he may do so by notifying the Lessors of his intention to do so AT LEAST THIRTY (30) DAYS prior to the beginning of such additional period of terms by notifying said Lessors by registered mail.

* * *

10. It is agreed that in the event that the Lessee shall do any repairs or remodeling on said building, then the same shall be done at the expense of the said Lessee but shall be done with the approval of the said Lessors; that in the event that in said remodeling or repairing the said Lessee shall damage the roof, exterior walls, or any other portion of the said building, then the same shall be replaced at the expense of the Lessee."

At the time this lease was made, Riggs was not represented by an attorney, but the defendant had desired to have a written agreement and therefore had caused a local attorney of his own choosing to prepare the leasing agreement signed on 24 September 1967. In November of 1968, Riggs decided that he wanted to sell the property and informed the defendant that he "had taken an option" to do so. Riggs further testified:

"During the time that Mr. Goodwin has occupied the property, neither he, his lawyer or anybody in his behalf has sent me notice by registered mail or any other mail that he wanted to renew his lease. He has never told me orally that he wanted to renew the lease. He has just stayed on the property."

Riggs, with the aid of an attorney, did proceed with his plans to sell the property, and in fact did sell it to the plaintiff ABC Board by warranty deed dated 15 December 1970. Riggs, however, accepted at least one monthly rental check "after the A.B.C. Board purchased the property." He testified, "Mr. Goodwin gave me the check and I took it." The defendant has been in possession of the property continuously since September 1967.

The General Manager for the ABC Board testified that at the time of the purchase of the property, he knew that the defendant was in possession of the premises, and that on 31 December 1970, pursuant to a resolution of the elected members of the ABC Board, he wrote a letter to defendant notifying him to vacate the premises within thirty days from the date of receipt. The defendant did not reply to this letter and did not vacate the premises; whereupon he was notified "that his rent was increased about $1,000 a month." The witness also testified on cross and redirect examination:

> "I am not sure whether or not the January 1971 rent on the property went to Mr. Riggs or to A.B.C. Board. It may have. The A.B.C. Board has received the rent in the amount of $220 every month since that time. When I read the lease, I assumed that it was for a period of ten years, or for a shorter time. I did not have a copy of the lease prior to December 15, 1970. Nor did the A.B.C. Board. We were advised that there was a lease recorded on the property when I first started negotiating for the property. That must have been in November of 1970. The Board was advised of that fact also. The Board and I knew that there was a recorded lease on the premises prior to December 15, 1970, or as I said, sometime in November, 1970. Mr. Treadwell, a member of the A.B.C. Board, and I stopped by Mr. Goodwin's one day and talked maybe two or three minutes with Mr. Goodwin. That was after we wrote Mr. Goodwin asking him to vacate the property. That is the only time that I know of any member of the A.B.C. Board talking to Mr. Goodwin. I did not at that time tell Mr. Goodwin that we would give him $5,000 for his lease. There was not anything like that said in my presence.
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> * * *
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> I asked our attorneys to write a letter on behalf of the board in February of this year in respect to Mr. Garland Goodwin occupying this property. I told the board's attorney to raise the rent on the Goodwin property to $750 per month. Mr. Goodwin never paid the increase in rent."

Defendant's evidence, to the extent that it supplemented or conflicted with that of the plaintiffs, tended to show that after taking possession of the premises at 2732 South Wilming-

ton Street, the defendant had made a number of repairs and alterations in the process of preparing to operate and then operating a combination grocery and sporting goods store, and that in May of 1968 he had asked for and received permission from Riggs to build an ice house onto the existing building on the property at his own expense (approximately $700 for building materials and $1600 for an ice-making machine). The defendant Goodwin testified that at this time, approximately three months prior to the expiration of the original one-year lease:

> " . . . I made a statement to Mr. Riggs which was my attempt to renew my lease for an additional five years. I told him that I will definitely be here. I've got too much money invested now and with his permission, I would like to build an icehouse. Of course, he knew that was at my expense, and he said whatever I wanted to do would be alright. It would be an improvement to the building. These statements were made in the presence of Mr. Jose Raynor. *Mr. Riggs has never made any statement to me that my lease had not been renewed and he accepted the rent for the months of September and October, 1968 without qualification and he continued to accept the rent thereafter."* (Emphasis added.)

Goodwin also testified, on cross-examination, that he had desired a "new lease" rather than an assignment of the lease of a former tenant, and that he had had his own lawyer prepare the lease that both he and Riggs subsequently signed and which is an exhibit in the present case. At no point did the defendant testify that he had attempted to renew the lease by notifying the lessor by registered mail as provided for in paragraph 2 of the lease, above quoted.

[1] We hold that in light of all the evidence adduced at this trial, it was error for the trial judge to direct a verdict for the plaintiffs and to order, on 29 November 1971, that plaintiffs were entitled to "immediate possession" of the demised premises. "The judge may direct a verdict *only* when the issue submitted presents a question of law based upon admitted facts." (Emphasis added.) *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961). See also, *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971).

[2] It is true that there is no evidence that the defendant Goodwin notified Riggs by registered mail at the appropriate

time of his intention to renew or extend the original lease; however, we think that the evidence is sufficient to raise the question of whether or not the conduct of Riggs and the defendant and the ABC Board constituted a waiver of this requirement. In 50 Am. Jur. 2d, Landlord and Tenant, § 1186, pp. 73, 74, it is said:

> "It is well settled that the the lessor may waive the requirement in a lease of notice by the lessee of renewal at or within a certain time, even though it is a condition precedent that timely notice be given. As a general rule, the lessor's acceptance, without objection, and his acting upon a notice not given within the required time, constitute a waiver. *A waiver will be implied where the lessee remains in possession and pays the rent to the lessor with the acquiescence of the latter.* (Citing *Coulter v. Capitol Finance Company,* 266 N.C. 214, 146 S.E. 2d 97.) Also, a provision that notice of the exercise of the privilege or option of renewing the lease should be given to the lessor in a certain mode, *as in writing or by mail or registered mail, or within a certain time before the termination of the lease, may be waived. Such waiver has been held to result where expense and labor had been incurred by the lessee, and plans had been laid out for the future,* which the lessor could hardly fail to know would not have been incurred and entered upon if the lessee had not been relying on a renewal of the lease. Whether there has been a waiver of written notice is a *question of fact* to be determined by the circumstances indicating the intention of the parties.
>
> In several cases it has been held that the circumstances did not show a waiver of the required notice. * * * A purchaser of rented property does not waive a provision in the lease for 30 days' notice of intention to renew by stating to the lessee after his purchase that he knew all about the terms of the lease." (Emphasis added.)

See also, *Kearney v. Hare,* 265 N.C. 570, 144 S.E. 2d 636 (1965); *Duke v. Davenport,* 240 N.C. 652, 83 S.E. 2d 668 (1954) and 5 Strong, N. C. Index 2d, Landlord and Tenant, § 14, to the effect that where a tenant in possession under a lease for a year or longer holds over and continues to pay the specified rental, which the landlord continues to accept unconditionally,

there is a rebuttable presumption that the tenancy is one from year to year. An extension or renewal of the original lease may or may not be effected by the conduct of the parties.

In the case before us Goodwin continued since the expiration of his original one-year term on 31 August 1968 to hold over and to pay rent. There is some evidence that he told Riggs of his intention to remain in possession and that Riggs allowed him to make certain improvements to the property. A jury trial was demanded. We think that there were triable issues of fact as to the nature and duration of the defendant's tenancy and that it was error to direct the verdict.

Reversed.

Judges CAMPBELL and BRITT concur.

GLENN R. HAYMORE AND WIFE, REVA S. HAYMORE, AND JOE C. HAYMORE AND WIFE, CLEO B. HAYMORE v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7217SC207

(Filed 28 June 1972)

1. **Eminent Domain § 2— access to highway — service road**

A landowner is entitled to no compensation for the restriction of access where he is provided with a freely accessible service road connecting with the highway on which his property formerly abutted.

2. **Eminent Domain § 2— access to highway — service road**

Landowners suffered no compensable loss of access to a highway where they have been provided a fully accessible service road which runs the length of their property, and northbound travelers are required to travel a distance of .76 miles and southbound travelers a distance of .83 miles to reach their property.

3. **Eminent Domain § 2— denial of access — service road — connection with existing road**

There is no merit in landowners' contention that they have been deprived of reasonable access to a highway because the service road does not connect directly with a ramp leading onto the highway, but connects with an existing road, which in turn leads onto the highway.

4. **Eminent Domain § 2— right of access**

While an abutting landowner's entire access to a highway may not be cut off, such landowner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway.

5. **Eminent Domain § 2— right of access — reasonable means of ingress and egress**

When the State interferes with the access of a property owner, the question is always whether a reasonable means of ingress and egress remains or is provided.

6. **Eminent Domain § 2— driveway permit — regulatory action**

The granting of a driveway permit does not vest an irrevocable property right in the landowner which may not thereafter be taken without compensation, since the granting of a driveway permit is not a contract but is a regulatory action taken by the State for the purpose of assuring that a proposed driveway will be constructed in a safe manner and so as not to endanger travel upon the highway. G.S. 136-18(5).

7. **Eminent Domain § 2— right-of-way agreement — access at particular point**

Compensation must be paid where under a right-of-way agreement the owner retains the right of access at a particular point and is subsequently refused access at that point.

8. **Eminent Domain § 2; Highways and Cartways § 7— construction of highway — damage to abutting land — stipulation**

Trial court's refusal to find that plaintiffs' property was permanently damaged during construction of a highway was supported by a stipulation that the highway project was constructed "entirely within the previously existing right of way belonging to the State Highway Commission."

9. **Eminent Domain § 6— change in access — loss of profits — irrelevancy**

Where the only issue in a reverse condemnation proceeding was whether there had been an actual taking of plaintiffs' right of access, evidence of whether a change in the access afforded plaintiffs to the highway had caused a loss of profits was not relevant.

10. **Eminent Domain § 6— comparison of profits — remoteness**

Where plaintiffs in a reverse condemnation proceeding sought to compare profits made seven years before a highway project was started with profits made after the project was completed, the remoteness in time of the comparison dates rendered the evidence of no probative value.

APPEAL by plaintiffs from *Seay, Judge,* 29 March 1971 Session of Superior Court held in SURRY County.

Haymore v. Highway Comm.

Reverse condemnation action in which plaintiffs allege their right of access to Highway 52 was taken by defendant without just compensation. G.S. 136-89.53.

Between 26 November 1968 and 27 November 1970, U.S. Highway 52 in Surry County was converted from a two-lane noncontrolled access highway to a four-lane controlled access facility. Plaintiffs own a three-acre tract of land abutting the highway right-of-way on the east. A restaurant, service station with truckers' facilities, and a storage warehouse are located on plaintiffs' property. Before the conversion project, plaintiffs had direct access onto the highway. After the project, their direct access to the highway was denied; however, they were afforded access onto a service road which was constructed as a part of the project.

The service road is a 20-foot wide asphalt two-way road which runs along the entire frontage of plaintiffs' property and dead ends approximatetly 1,000 feet to the southeast thereof. It intersects with Holly Springs Road a short distance north of plaintiffs' property. Holly Springs Road crosses Highway 52. An interchange system at this point provides free access to both the northbound and southbound lanes of the highway.

In order to reach plaintiffs' property, traffic traveling north along Highway 52 must now exit at the interchange and travel a total distance of .76 miles along the exit ramp, Holly Springs Road and the service road. Traffic going in a southerly direction must travel .83 miles. Egress from plaintiffs' property onto Highway 52 is along similar routes and the distance is approximately the same.

After hearing the evidence of plaintiffs and defendant, the court made findings of fact and concluded that the service road provides plaintiffs' property with reasonable access to the through lanes of travel for U. S. Highway 52 and that there has been no compensable taking of plaintiffs' property. Judgment was entered dismissing the case and plaintiffs appealed.

White, Crumpler and Pfefferkorn by James G. White for plaintiff appellants.

Attorney General Morgan by Assistant Attorney General Cole for defendant appellee.

GRAHAM, Judge.

The principal question raised in this appeal is whether the court erred in determining that the service road now furnishes plaintiffs with reasonable access to Highway 52. We hold that there was no error.

"The question of what constitutes a taking of a landowner's right to access has been the subject of numerous decisions in this jurisdiction, all to the effect that while a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking. Such reasonable restriction is within the police power of the sovereign and any resulting inconvenience is *damnum absque injuria.*" *Highway Comm. v. Yarborough,* 6 N.C. App. 294, 301, 170 S.E. 2d 159, 164, and cases cited.

[1] It has been held repeatedly in this State that a landowner is entitled to no compensation for the restriction of access where he is provided with a freely accessible service road connecting with the highway on which his property formerly abutted. *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772; *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664; *Highway Comm. v. Rankin,* 2 N.C. App. 452, 163 S.E. 2d 302.

[2] Plaintiffs insist that even though they have been provided a fully accessible service road which runs the length of their property, their access to the highway has nevertheless been unreasonably diminished because of the substantial distance of travel now required to reach Highway 52. We answer this simply by noting that the distance here involved, and the inconvenience to plaintiffs, is no greater than that present in various cases in which the Supreme Court has held that the property owner was afforded reasonable access. See for example, *Highway Commission v. Nuckles, supra; Moses v. Highway Commission, supra.*

[3] Plaintiffs also contend they have been deprived of reasonable access because the service road does not connect directly with a ramp leading onto Highway 52, but connects with an existing road, Holly Springs Road, which in turn leads onto the interchange. We find this of little significance. There is

a distance of only 600 feet from the point where the nearest ramp enters Holly Springs Road to the point where the service road enters Holly Springs Road. Sound engineering practice undoubtedly required that a reasonable distance separate the nearest ramp and the service road. Otherwise, traffic moving in a northerly direction along the ramp and onto the service road would be required to make an immediate 180 degree turn in order to enter the service road. This type of maneuver would be dangerous and inconvenient, if not altogether impossible.

[4, 5] A right-of-way agreement for the construction of a portion of Highway 52 was acquired from plaintiffs in 1953. Plaintiffs argue that since no access rights were conveyed by them in the agreement, they retained these rights. We agree. Had plaintiffs surrendered all right of access under the agreement, defendant would have been under no obligation to construct the service road or otherwise arrange for plaintiffs' access to Highway 52 when it was converted to a controlled access facility. The point is that while entire access may not be cut off, an abutting landowner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway. *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732. When the State interferes with the access of a property owner the question is always whether reasonable means of ingress and egress remains or is provided. *Highway Comm. v. Yarborough, supra.* This question has been resolved against plaintiffs by findings of fact which are supported by the evidence.

[6] Plaintiffs point out that before Highway 52 was upgraded, defendant issued several permits for driveways to be constructed onto plaintiffs' property. Plaintiffs argue that these permits granted easements of entry which could not thereafter be taken without compensation.

The State Highway Commission has authority under G.S. 136-18(5) to make rules, regulations and ordinances for the use of, and to police traffic on, the State highways. Pursuant to this authority, the Commission requires driveway permits for the purpose of assuring that a proposed driveway will be constructed in a safe manner and so as not to endanger travel upon the highway. This is an exercise of the general police power, and the granting of the permit does not vest an irrevocable property right in the property owner.

[7] It is true that compensation must be paid where under a right-of-way agreement the owner retains the right of access at a particular point and is subsequently refused access at that point. *Petroleum Marketers v. Highway Commission,* 269 N.C. 411, 152 S.E. 2d 508; *Kirkman v. Highway Commission,* 257 N.C. 428, 126 S.E. 2d 107; *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782; *Realty Co. v. Highway Comm.,* 1 N.C. App. 82, 160 S.E. 2d 83. In such instances, the right of continuing access at a particular point is a property right acknowledged by the State as a part of the consideration for the right-of-way agreement. The granting of an application for a driveway permit is not a contract. It is a regulatory action taken by the State for safety purposes and cannot be compared with a right-of-way agreement in which the property owner reserves access at a particular point.

[8] Plaintiffs say that the court erred in failing to find that their property was permanently and temporarily damaged during construction. The parties stipulated that the project was constructed "entirely within the previously existing right of way belonging to the State Highway Commission. . . . " This stipulation supports the court's refusal to find that any permanent damages accrued to plaintiffs' property. There was testimony tending to indicate some minimal and temporary entry by defendant onto plaintiffs' property during construction. However, the court obviously rejected this testimony, which it was entitled to do.

[9, 10] Finally, plaintiffs assign as error the court's refusal to allow testimony tending to show that the volume of sales from businesses located on plaintiffs' property was greater in 1961 than in 1970. No evidence was tendered concerning sales in the intervening years. A loss of profits may be a proper item to be considered in determining whether a taking of property for eminent domain has diminished the value of the land remaining. *Kirkman v. Highway Commission, supra.* The question of damages was not before the court here, however. The issue was whether there had been an actual taking. Therefore, whether a change in the access afforded plaintiffs to Highway 52 has caused a loss of profits was not relevant. Moreover, the evidence as tendered would have been inadmissible even if an issue of damages had been before the court. Plaintiffs sought to compare profits made seven years before the highway project

was started with profits made after the project was completed. The remoteness in time of the comparison dates rendered the evidence of no probative value.

Affirmed.

Judges MORRIS and VAUGHN concur.

R. H. ALLEN AND WIFE, JANICE S. ALLEN v. THE CONSERVATIVE HUNTING CLUB, A NONPROFIT CORPORATION

No. 722DC108

(Filed 28 June 1972)

1. **Quieting Title § 2; Trespass to Try Title § 2— removal of cloud from title — burden of proof**

In an action to remove cloud from title, the burden is upon plaintiffs to prove title good against the whole world or against the defendant by estoppel.

2. **Ejectment § 7; Trespass to Try Title § 2— superior title from common source — burden of proof**

In order to establish superior title from a common source, plaintiffs must not only trace title to a common source, but they must trace title to the land in controversy to a common source.

3. **Ejectment § 7; Trespass to Try Title § 2— superior title from common source — fitting description to the land**

In an action to remove cloud on title in which plaintiffs claim superior title from a common source, plaintiffs must fit the descriptions in their chain of title and in defendant's chain of title to the land claimed and show that the land claimed is embraced within their respective descriptions.

4. **Trespass to Try Title § 2— superior title from common source — insufficiency of evidence**

Plaintiffs failed to establish superior title to the land in controversy from a common source where there is nothing in the record, other than vague and indefinite descriptions and recitals contained in two deeds to defendant, to show that the land claimed by defendant is either the land described in the complaint or the land claimed by plaintiffs, or to connect either the defendant or the land to which it claims title to the common source.

APPEAL by defendant from *Manning, District Judge,* 12 July 1971 Session of District Court held in HYDE County.

This is a civil action to remove a cloud on the title to land allegedly owned by the plaintiffs and claimed by the defendant. In their complaint, the plaintiffs allege they are the owners and in possession of a tract of land in Currituck Township, Hyde County, North Carolina, and that the defendant claims an estate and interest in said land which claim constitutes a cloud on plaintiffs' title. The defendant filed answer denying the material allegations of the complaint. Trial was before the judge without a jury. The plaintiffs offered evidence and the defendant offered no evidence. The defendant's motion for an involuntary dismissal, made pursuant to Rule 41(b) on the grounds that upon the facts and the law the plaintiffs had shown no right to relief, was denied. The Court made the following findings and conclusions:

"1. That by deed dated May 15, 1968 . . . Milburn Respess and wife, Jane L. Respess, conveyed to plaintiffs . . . the lands described in the complaint.

2. That by deed dated June 15, 1959 . . . James H. Dunbar conveyed to Milburn M. Respess the lands described in the complaint.

3. That by deed dated August 2, 1956 . . . Edith B. Linton and husband, M. G. Linton, Wilber P. Dunbar and wife, Mary A. Dunbar, W. B. Dunbar, C. J. Dunbar and wife, Ethel D. Dunbar, Anna D. Allen and husband, W. E. Allen, Edward Wilson Dunbar, R. M. Harris, V. O. C. Harris, Earl D. Harris and wife, Lenora B. Harris, Marion A. Harris and wife, Lois Harris, Robert R. Harris and wife, Edith H. Harris, Milton Harris and wife, Gladys S. Harris, William G. Harris and wife, Pauline Harris, Alice H. Ramness and husband, O. A. Ramness, conveyed to James H. Dunbar the lands described in the complaint.

4. That the Grantors, other than their spouses, in the deed set out in No. 3 above . . . are the heirs at law of W. P. Dunbar.

5. That by deed dated April 24, 1903 . . . A. N. Dunbar and wife, Sarah C. Dunbar, conveyed to W. P. Dunbar, the land described in the complaint.

6. That by deed dated March 3, 1943 . . . George P. Davis, Commissioner, conveyed to Hyde County, a Municipality,

lands which included the lands described in the complaint of the plaintiffs.

7. That by deed dated May 7, 1951 . . . Hyde County, a Municipal Corporation, conveyed to the Conservative Hunting Club, Inc., lands which included the lands described in the plaintiffs' complaint.

8. That the defendants in the tax foreclosure action which resulted in the conveyance . . . from George T. Davis, Commissioner, to Hyde County, were the heirs at law of A. N. Dunbar.

CONCLUSIONS OF LAW

. . . .

1. That the plaintiffs and the defendant claim ownership to the tract of land shown in the complaint from a common source of title, to wit: A. N. Dunbar.

2. That the plaintiffs have introduced evidence sufficient to establish ownership of and title to the lands described in the complaint."

From a judgment declaring the plaintiffs the owners of the lands described in the Complaint free and clear of the claim of the defendant, the defendant appealed.

R. C. deRosset, Jr., for plaintiff appellees.

McMullan, Knott & Carter by W. B. Carter, Jr., for defendant appellant.

HEDRICK, Judge.

[1-3] The defendant contends the court erred in denying its timely motion for involuntary dismissal. Defendant's motion for an involuntary dismissal in an action tried by the Court without a jury challenges the sufficiency of the plaintiffs' evidence to establish the right to relief. *Wells v. Insurance Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971). In an action to remove cloud from title, the burden is upon plaintiffs to prove title good against the whole world or against the defendant by estoppel. *Walker v. Story*, 253 N.C. 59, 116 S.E. 2d 147 (1960). "The plaintiff may safely rest his case upon showing such facts and such evidences of title as would establish his right to recover, if no further testimony was offered. This *prima facie*

showing of title may be made by either of several methods." *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889). In this action, plaintiffs attempted to connect the defendant with a common source of title, and show in themselves a better title from that source. *Mobley v. Griffin, supra.* To so establish *their* title, plaintiffs must not only trace title to a common source, but they must trace title to the land in controversy to that source. *Taylor v. Scott* and *Lewis v. Scott,* 255 N.C. 484, 122 S.E. 2d 57 (1961). The plaintiffs must fit the descriptions in their chain of title and in the defendant's chain of title to the land claimed and show that the land claimed is embraced within their respective descriptions. *Seawell v. Fishing Club,* 249 N.C. 402, 106 S.E. 2d 486 (1959); *Day v. Godwin* and *Day v. Paper Co.* and *Day v. Blanchard,* 258 N.C. 465, 128 S.E. 2d 814 (1963); *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519 (1967).

[4] In attempting to make out their *prima facie* case, the plaintiffs introduced into evidence the following:

1. Deed dated 15 May 1968 from Respess to Allen. (Exhibit 1)

2. Deed dated 18 June 1959 from James Dunbar to Respess. (Exhibit 2)

3. Deed dated 2 August 1956 from Edith D. Linton and husband, et al to James Dunbar (recital indicates grantors to be all of the heirs of W. P. Dunbar). (Exhibit 3)

4. Deed dated 24 April 1903 from A. N. Dunbar and wife to W. P. Dunbar. (Exhibit 4)

5. Deed dated 7 May 1951 from Hyde County to the Conservative Hunting Club, Inc. (Exhibit 5)

6. Deed dated 2 March 1943 from George T. Davis, Commissioner, to Hyde County. (Exhibit 6)

In their Complaint plaintiffs allege they are the owners, and the defendant claims an interest, in the following:

> "(a) certain tract or parcel of land in the County of Hyde, in Currituck Township, and more particularly described as follows:

> BEGINNING in the Eastern margin of New Lake in the Northwestern corner of the tract denominated W. P. Dunbar on the Richmond Cedar Works Map on record in the office of the Register of Deeds of Hyde County, where a double ditch intersects the margin of said Lake; thence running South 87 degrees 40 minutes East to an iron pin in the West Virginia Pulp & Paper Company line; thence running North 17 degrees East 9.79 chains with the line of the West Virginia Pulp & Paper Company; thence running North 87 degrees 40 minutes West to the shore line of New Lake; thence running Southeastwardly with the shoreline of New Lake to the point of BEGINNING."

Plaintiffs' evidence tended to show that the land claimed by the plaintiffs was described in exhibits 1, 2, and 3 as follows:

> "FIRST TRACT: Bounded on the North by the A. N. Dunbar land; bounded on the East by the Richmond Cedar Works land now owned by West Virginia Pulp Company; bounded on the South by the Sarah C. Dunbar lands now owned by _____, and land now owned by _____; bounded on the West by the shore line of New Lake, containing Thirty-Three (33) Acres, more or less."

The description in exhibit 4 is as follows:

> "Beginning in a cypress stump at the lake and running east 200 poles to a bay, thence north twenty-three and half poles to a maple, thence west 200 poles to a gum at the lake, thence with the lake to the beginning, containing one hundred and fifty acres to the same, more or less."

Plaintiffs offered additional evidence attempting to trace their title to the land in controversy to A. N. Dunbar, but our decision makes it unnecessary to recite this evidence. In their Complaint plaintiffs alleged that the defendant's alleged claim to the land in controversy was based solely on Tract 3 described in exhibit 5 which is as follows:

> "THIRD TRACT: That certain tract or parcel of land, known as the 'A. N. Dunbar Heirs' tract, the same is bounded on the North by the 'B. L. S. Dunbar' land, now owned by Mary Radcliff; bounded on the East by the lands of Richmond Cedar Works; bounded on the South by the 'W. P.

Dunbar' land, and the 'E. R. Windfield' land, and bounded on the West by Alligator or New Lake and the 'W. P. Dunbar' heirs tract, containing 130 acres, more or less.

This tract of land is shown on 'Map of the Richmond Cedar Works Holdings in Fee Tyrrell and Hyde Counties, North Carolina' as prepared by John Farrer, C.E., June, 1921, in Registration of Land Titles Book 2, page between 350 and 351, as three tracts designated 'Sarah C. Dunbar No. 184, A. N. Dunbar No. 185,' and a tract adjacent to New Lake is marked 'A. N. Dunbar'. All three tracts are contingent.

Reference is made to Deed from A. N. Dunbar and wife to Hughey F. Dunbar and others, dated January 26, 1898, recorded in the Register's Office of Hyde County, North Carolina, in Deed Book 23, page 315, for description of the tract adjacent to New Lake.

A. N. Dunbar and wife, Sarah C. Dunbar, left surviving them as their sole heirs at law: Hattie Gaylord; Prucie Baynor; Maggie Armstrong, wife of Matus Armstrong, Lessie Watson, R. A. Dunbar, Hughey Dunbar, Ernest Dunbar; Rosa Dunbar and Norfleet Dunbar.

The interest in this 'Third Tract' being hereby conveyed is that which was conveyed to Hyde County by Geo. T. Davis, Commissioner, by deed dated March 3, 1943, which is recorded in Register's Office of Hyde County, North Carolina, in Deed Book 59, page 274."

Defendant admitted that it claimed an interest in the land described in the Complaint but denied that its claim was based solely on Tract 3 in exhibit 5. If it can be said that the plaintiffs have offered sufficient evidence to show that the land described in the Complaint embraces the land to which plaintiffs claim title by virtue of exhibit 1, and that plaintiffs have offered sufficient evidence tracing their title to such land to A. N. Dunbar, we think the plaintiffs have failed to offer sufficient evidence (1) to show that the land claimed by the defendant is the land in controversy and (2) to connect the land claimed by the defendant to the common source, A. N. Dunbar. Other than the vague and indefinite descriptions and recitals contained in exhibits 5 and 6, there is nothing in this record to show that the land claimed by the defendant is either

the land described in the Complaint or the land claimed by the plaintiffs, or to connect either the defendant or the land to which it claims title to the common source, A. N. Dunbar. Because the plaintiffs failed to offer sufficient evidence to make a *prima facie* case on their theory of tracing their title and the defendant's title to the land in controversy to a common source and proving better title in themselves, *Mobley v. Griffin, supra,* the Court erred in not allowing the defendant's motion for involuntary dismissal, however, this does not have the effect of adjudicating title to the land in controversy in the defendant, *Taylor v. Scott, supra.* The judgment appealed from is

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE HORSTON TAYLOR

No. 7216SC266

(Filed 28 June 1972)

1. **Criminal Law § 155.5— extension of time for service of case on appeal — authority of judge**

A judge who was not the trial judge did not have authority to sign an order extending the time for service of the case on appeal. Court of Appeals Rule 50.

2. **Criminal Law § 155.5— record on appeal — time for docketing**

Service of the case on appeal, service of any countercase or exceptions, and, if necessary, settlement of the case on appeal by the trial judge must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed by Court of Appeals Rule 5.

3. **Criminal Law § 155.5— record on appeal — extension of time for docketing — authority of judge**

As used in the rule relating to the authority to extend the time for docketing the record on appeal, the words "trial tribunal" include any judge. Court of Appeals Rules 2 and 5.

4. **Criminal Law § 155.5— record on appeal — extension of time for docketing**

Where the judgment appealed from was dated 3 September 1971, the time for docketing the record on appeal could be extended only for a maximum of an additional 60 days after 2 December 1971.

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

Appeal should be dismissed where the record on appeal was not docketed within the time allowed by the rules.

APPEAL by defendant from *Blount, Judge,* 30 August 1971 Session of Superior Court held in ROBESON County.

Defendant was indicted for the felony of being an accessory after the fact to the murder of Tommy C. Hunt by Algean Taylor. He pleaded not guilty. The jury found him guilty to being accessory after the fact to the felony of manslaughter. From judgment on the verdict imposing a prison sentence of not less than 12 nor more than 18 months, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Burley B. Mitchell, Jr., for the State.

W. Earl Britt for defendant appellant.

PARKER, Judge.

The judgment appealed from was dated 3 September 1971. On the same date, Judge Blount, the trial judge, signed appeal entries allowing defendant 60 days to prepare and serve case on appeal. On 18 November 1971, Judge Thornburg, the judge presiding over the courts of the Sixteenth Judicial District, signed an order providing as follows:

> "[T]hat defendant be, and he is hereby allowed sixty additional days after 3 December, 1971, to prepare and serve case on appeal upon the State, and the State is allowed twenty days thereafter to prepare and serve countercase."

[1, 2] We call attention to the fact that Judge Thornburg, who was not the trial judge, did not have authority to sign an order extending the time for service of the case on appeal. Rule 50 of the Rules of Practice in the Court of Appeals, which was adopted by our Supreme Court in February 1969, grants that authority only to the *trial judge. State v. Lewis,* 9 N.C. App. 323, 176 S.E. 2d 1. Further, we direct attention to the express provision in Rule 50 that the authority therein granted "does not alter the provisions of Rule 5 relating to the docketing of the record on appeal." It is still necessary, therefore, that service of the case on appeal, service of any countercase or exceptions, and, if necessary, settlement of the case on appeal by

the trial judge, must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed by Rule 5. (In 1969 the General Assembly amended G.S. 1-282 to make it compatible with Rule 50, and expressly provided that "all additional time or times granted in such order or orders of extension must terminate within sufficient time to enable appellant to docket the record on appeal in accordance with the requirements of the rules of the appellate court.") Judge Thornburg's order, even had it been signed by the trial judge, purported to grant extensions of time for preparing and serving the case on appeal and countercase thereto to a time beyond that allowed by Rule 5 for docketing the record on appeal.

[3-5] Rule 5 provides that if the record on appeal is not docketed within 90 days after the date of the judgment appealed from, the case may be dismissed, "provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal." (The words "trial tribunal" as used in the rules include *any* judge. Rule 2.) In this case, Judge Thornburg signed a separate order dated 18 November 1971, which was within the initial 90-day period after the date of the judgment appealed from, providing that "the time for docketing this appeal be and the same is hereby extended for sixty days after 3 December, 1971." The judgment appealed from in this case was dated 3 September 1971 and the initial 90-day period thereafter expired on 2 December 1971. Therefore, Judge Thornburg had authority under Rule 5 to extend the time for docketing only for a maximum of an addiitonal 60 days after 2 December 1971 and could not grant such an extension for an additional 60 days after 3 December 1971. The maximum extension of time for docketing permitted by Rule 5, being 60 days after 2 December 1971, expired on Monday, 31 January 1972. The time for docketing as purportedly allowed by Judge Thornburg's order expired on Tuesday, 1 February 1972. The case on appeal was not docketed in the Court of Appeals until Thursday, 3 February 1972. For failure to docket within the time permitted by the rules of this Court, the appeal should be dismissed. *State v. Boyette,* 13 N.C. App. 252, 184 S.E. 2d 927; *State v. Bennett,* 13 N.C. App. 251, 185 S.E. 2d 7; *State v. Cook,* 11 N.C. App. 439, 181 S.E. 2d 172; *State v. Burgess,* 11 N.C. App. 430, 181 S.E. 2d 120; (cert. denied, 279 N.C. 350).

Nevertheless, we have carefully reviewed the record with particular reference to the assignments of error brought forward and argued in defendant's brief, and are of the opinion that no prejudicial error is made to appear.

Appeal dismissed.

Chief Judge MALLARD and Judge MORRIS concur.

JOSEPH MICHAEL PINYATELLO v. STATE OF NORTH CAROLINA

No. 7210SC514

(Filed 28 June 1972)

1. **Criminal Law § 138— time in custody awaiting trial and pending appeal — credit on sentence — nonretroactivity of statutes**

Statutes requiring that credit be given on a prison sentence for time spent in custody awaiting trial and pending appeal from a conviction are not retroactive. G.S. 15-176.2 and G.S. 15-186.1.

2. **Criminal Law § 138— time in custody awaiting trial and pending appeal — nonretroactivity of statutes — discrimination**

Statutes requiring that credit for time spent in custody awaiting trial and pending appeal be given on sentences imposed in trials commenced after the effective dates of the statutes do not create an unlawful discrimination between defendants tried subsequent to their enactment and those tried prior thereto, since the General Assembly has the right to change the laws relative to the punishment for conduct it describes as crimes and to say when the punishment shall begin.

ON *Certiorari* to review order of *Canaday, Judge,* at the 14 February 1972 Session of Superior Court held in WAKE COUNTY.

Joseph Michael Pinyatello (petitioner) filed a petition in this court for a writ of certiorari, which was allowed. The facts are set forth in the opinion.

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

Tharrington & Smith by Roger W. Smith for petitioner.

MALLARD, Chief Judge.

Petitioner was charged in a bill of indictment, proper in form, returned at a January 1967 Session of Superior Court

held in Wake County, with the violation of the safecracking and safe robbery statute on 21 November 1966. This statute reads as follows:

> "Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary." G.S. 14-89.1.

During the second week of a session of superior court which began in May 1967 in Wake County, the petitioner was tried and found guilty as charged. At that time, he was represented by his own privately retained attorney. From a judgment of imprisonment of not less than twenty years nor more than twenty-five years, the petitioner, on 8 June 1967, appealed to the Supreme Court, and an appearance bond of $20,000 and a cost bond of $200 were set. In its opinion filed 12 January 1968 and reported in 272 N.C. 312, 158 S.E. 2d 596 (1968), the Supreme Court of North Carolina found no error in his trial. Commitment was issued on 18 January 1968 and petitioner began serving the sentence.

Petitioner *pro se* filed a motion dated 9 February 1972 in the Superior Court of Wake County in which he alleged that as a matter of law he was entitled, under the provisions of G.S. 15-186.1, to "credit as time served on the sentence imposed June 7, 1967 of 20 to 25 years of the time from June 7, 1967 until January 18, 1968, a total of seven (7) months and eleven days spent in physical custody and confinement awaiting the determination of the appeal taken in this cause to the Supreme Court of North Carolina." He further alleged that he was arrested and placed in jail on 23 November 1966 for the offense resulting in his conviction and remained in physical custody and confinement until 7 June 1967, a period of six months and fifteen days, and that he was entitled to credit for this time as time served on the prison sentence imposed. He alleged that G.S. 15-176.2, enacted with an effective date of 19 July 1971, creates "an unlawful discrimination forbidden by the Equal Protection of the Law clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution, between those defendants tried after its enactment and those tried prior to its enactment, see the rationale

of *Cole v. North Carolina,* 419 F. 2d 127 (4th Cir, 1969), wherein a similar statute (G.S. 15-186.1 at that time) was declared to create an unlawful discrimination forbidden by constitutional case law principles." In this "motion" the petitioner does not assert that the reason he did not give bond was because of indigency; however, the defendant is now an indigent and is represented by court-appointed counsel.

Without making any findings of fact, Judge Canaday, after hearing the matter on the motion, entered an order dated 14 February 1972 containing the following:

> "It appearing to the Court that the Statute (G.S. 15-186.1) upon which petitioner relies, is not retroactive; the Court concludes that the petitioner's petition should be and the same is herewith, denied."

This court allowed certiorari on 7 March 1972.

G.S. 15-184 provides that "(t)he sentence shall begin as of the date of the issuance of the commitment." This statute was in effect on 18 January 1968 when the defendant was committed to prison.

G.S. 15-184 was amended by Section One of Chapter 266 of the Session Laws of 1969. This amendment related to a defendant receiving credit toward the satisfaction of a sentence imposed upon him for the time he had spent in custody *pending* appeal and contained the following: "This provision shall apply to all trials commenced after the ratification of this amendment." It was ratified on 22 April 1969.

Also, at the 1969 Session of the General Assembly, Section One of said Chapter 266 was stricken in Chapter 888 of the 1969 Session Laws and G.S. 15-186.1 was enacted. The pertinent parts of G.S. 15-186.1 were as follows:

> "* * * In the event the defendant had not been admitted to bail pending the appeal, he shall receive credit towards the satisfaction of the sentence for all the time he has spent in custody *pending the appeal,* except when the sentence is death or life imprisonment. * * * This provision *shall apply* to *all trials commenced after* the *ratification* of this Section." (Emphasis added.)

This Act was amended in 1971 and the foregoing language was deleted.

By Chapter 957 of the Session Laws of 1971, the General Assembly enacted a new section of the General Statutes codified as G.S. 15-176.2. The pertinent parts of this section read:

> "The term of a definite sentence or the minimum and maximum term of an indeterminate sentence shall be credited with and diminished by the amount of time the defendant spent in confinement prior to the commencement of such sentence as a result of the charge that culminated in the sentence. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences. * * * Upon sentencing, the Judge presiding shall determine the credits to which the defendant is entitled, and the clerk of court in which the defendant is sentenced shall transmit to the Department of Correction or to the sheriff of the county, together with the commitment, a statement of pretrial credits to which the defendant shall be entitled. * * * *This provision shall apply to all trials commenced after the ratification of this section.*" (Emphasis added.)

[1] It is clear from the language used in the enactment of the foregoing laws that the General Assembly of 1969 and 1971 did not intend for G.S. 15-186.1 and G.S. 15-176.2 to have retroactive effect. Both of these statutes were enacted after this petitioner had been tried and sentenced and appealed from his conviction (which was upheld by the Supreme Court of North Carolina) and after commitment had issued on 18 January 1968.

[2] The argument that these two statutes (G.S. 15-176.2 and G.S. 15-186.1) create an unlawful discrimination between defendants tried subsequent to their enactment and those tried prior thereto is, in our opinion, without merit. The General Assembly of North Carolina has the right to change the laws relative to the punishment for conduct it describes as crimes, and has the right to say when the punishment shall begin, unless prohibited by the Constitution of the United States. See *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 26 L.Ed. 2d 234, 90 S.Ct. 1739 (1970). We are not aware of any constitutional prohibition upon the power of the General Assembly of North Carolina to declare safecracking and safe robbery a crime and to fix the punishment therefor and the time such punishment shall begin. It is expressly provided in the Tenth

Amendment to the United States Constitution that "(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

In *State v. Walker,* 277 N.C. 403, 177 S.E. 2d 868 (1970), the Supreme Court of North Carolina specifically held that a defendant is not entitled to credit for time spent in custody awaiting trial, and that G.S. 15-186.1 has no retroactive effect. We hold that the law applicable to the retroactivity of G.S. 15-186.1, as applied in *State v. Walker, supra,* and *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970), is also applicable to the provisions of G.S. 15-176.2 and that this statute does not have retroactive effect.

Petitioner, in support of his contentions, cites *Cole v. North Carolina,* 419 F. 2d 127 (4th Cir. 1969), where the federal court, with the apparent approval and at the suggestion of the Attorney General of North Carolina, ordered that the appellant there be given credit for time spent in custody while unable to secure his release on bail pending final disposition of his appeal from a conviction of manslaughter in the courts of North Carolina. *Cole v. North Carolina, supra,* was filed on 24 November 1969, and since then, the Supreme Court of North Carolina has twice held that G.S. 15-186.1 has no retroactive effect, and that under North Carolina law prior to the effective date of G.S. 15-186.1, a defendant is not entitled to credit for time spent in custody awaiting trial. See *State v. Walker, supra,* filed 16 December 1970, and *State v. Virgil, supra,* filed 30 January 1970. Further, the Attorney General of North Carolina in his brief filed in the case before us argues that these holdings of the Supreme Court of North Carolina, and the holdings of the North Carolina Court of Appeals in the case of *State v. Walker,* 7 N.C. App. 548, 172 S.E. 2d 881 (1970), *aff'd.,* 277 N.C. 403, and *State v. Lewis,* 7 N.C. App. 178, 171 S.E. 2d 793 (1970), should be followed and that the provisions of G.S. 15-176.2 should not be given retroactive application.

When the petitioner began to serve the sentence imposed on him, the law of North Carolina provided for the sentence to begin as of the date of the issuance of the commitment. G.S. 15-184. By G.S. 15-176.2 and G.S. 15-186.1, both of which were enacted after the petitioner started serving his sentence, the General Assembly has now provided a means for a defendant,

whose trial commences after ratification of these Acts, to obtain credit for the amount of time spent in custody prior to trial on the charge and pending appeal from a conviction. We hold that by enacting these two statutes, the General Assembly of North Carolina did not unlawfully discriminate against this petitioner. It was the intent of the General Assembly to give certain credits to all persons sentenced to prison and that this credit was to apply to trials commenced after the ratification of the respective acts and not to trials already completed. This had the effect of giving all persons, whether released on bond or not, credit on a sentence required to be served for all time spent in custody on the charge resulting in the sentence. This provision applied to all persons convicted of crime and required to serve sentences; it does not discriminate against this petitioner.

Moreover, it is noted that Judge Canaday was the trial judge, as well as the judge who denied petitioner's motion for credit on the time of imprisonment for time spent in custody prior to commitment, and inasmuch as the petitioner could have been sentenced to life imprisonment, we assume that Judge Canaday, in imposing the original sentence of only twenty to twenty-five years, took into consideration all of the circumstances surrounding the case, including the circumstances that petitioner had been in custody since his arrest, if such was the fact. The petitioner has not been punished twice for this crime.

The judgment of Judge Canaday dismissing the motion of petitioner is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

In re Estate of Overman

IN THE MATTER OF THE ESTATE OF WILLIAM OVERMAN, DECEASED

No. 7215SC341

(Filed 28 June 1972)

1. **Executors and Administrators § 4— resignation or removal of administratrix — recital in order appointing administrator d/b/n**

The recital in an order purporting to appoint an administrator d/b/n that "the widow of the decedent was present, the widow having previously served as administratrix of the estate and having been fully discharged from these duties pursuant to order of this Court" did not amount to a resignation by the administratrix pursuant to G.S. 36-10, and did not constitute a removal or revocation of her letters of administration pursuant to G.S. 28-32.

2. **Executors and Administrators § 4— final accounting by administratrix — subsequent appointment of administrator d/b/n**

Although the administratrix of an estate had filed a final account which had been approved and confirmed, the Clerk of Court had no jurisdiction thereafter to appoint an administrator d/b/n of the estate, where the original administratrix was living and had not resigned, been removed, had her letters of administration revoked, or been otherwise discharged according to law.

3. **Executors and Administrators § 4— appointment of administrator d/b/n — consent of administratrix**

The fact that an administratrix purportedly agreed and consented to the appointment of an administrator d/b/n and that she did not appeal from the order purporting to appoint an administrator d/b/n does not validate the appointment of the administrator d/b/n, since jurisdiction cannot be conferred either by waiver or consent.

4. **Executors and Administrators § 5— insurer sued by administrator d/b/n — standing to challenge appointment**

An insurance company which was sued by an administrator d/b/n purporting to act for an estate had standing to challenge the validity of the appointment of the administrator d/b/n.

APPEAL by James B. Craven III, respondent, from *Hobgood, Judge,* September 1971 Session of Superior Court held in ORANGE County.

This is an appeal from an order of the Superior Court entered in a proceeding instituted before the Clerk of the Superior Court of Orange County by motion of Nationwide Insurance Co. (Nationwide) to vacate and set aside an order of the Clerk appointing James B. Craven III (Craven) Administrator d/b/n of the estate of William Overman (Overman). The following facts are uncontroverted: On 25 February 1966, the

Clerk duly appointed Overman's widow, Doris P. Overman, Administratrix of his estate; and on 12 October 1966, Mrs. Overman as Administratrix, filed with the Clerk a final account and:

> "Order was entered that date by the Clerk providing:
>
> 'The foregoing Account has been audited by me, the vouchers submitted in support thereof examined, and the Account is hereby approved and confirmed. Let the Account, together with this Order be recorded and filed.' "

At the time of his death Overman was the defendant in a civil action wherein Stanley Wright sought to recover damages for personal injuries and on 13 October 1966, ". . . upon Petition filed by Everett, Attorney for Wright, Order was entered by the Clerk substituting Doris P. Overman, Administratrix, as Defendant in the action instituted by Wright against Overman." On 5 April 1967, a judgment in the amount of $50,000 was entered in the Superior Court of Orange County in favor of Wright against Overman's estate and the defendant gave notice of appeal. Thereafter on 30 June 1967, Nationwide paid into the office of the Clerk on the said judgment $5,000 plus interest and costs and the Administratrix executed a waiver of appeal. On 19 March 1970 upon petition of the judgment creditor and his attorney, Everett, the Clerk entered an order purporting to appoint Craven Administrator d/b/n of Overman's estate; and as such, Craven instituted suit in the United States District Court for the Middle District of North Carolina against Nationwide to recover $45,000 for the said estate. Nationwide then filed a motion before the Clerk of Superior Court for Orange County to have Craven's appointment as Administrator d/b/n vacated and set aside. On 11 March 1971, after a hearing, the Clerk made findings of fact and denied the motion. Nationwide filed specific exceptions to the Clerk's findings and order and appealed to the Superior Court. After a hearing de novo in the Superior Court, Judge Hobgood concluded that Nationwide had "status and standing" to challenge the Clerk's order purporting to appoint Craven Administrator d/b/n of Overman's estate and that the Clerk under the circumstances of this case on 19 March 1970 lacked jurisdiction to appoint an administrator d/b/n of Overman's estate.

From an order of the Superior Court reversing the Clerk's denial of Nationwide's motion to vacate and set aside Craven's

appointment and remanding the proceeding to the Clerk with directions to vacate and set aside his appointment, Craven appealed to this Court.

Newsom, Graham, Strayhorn, Hedrick & Murray by James L. Newsom for Nationwide Insurance Company, movant, appellee.

Robinson O. Everett for James B. Craven III, Administrator d/b/n, respondent appellant.

HEDRICK, Judge.

Appellant assigns as error the Court's conclusion that the Clerk did not have jurisdiction to appoint Craven as Administrator d/b/n of Overman's estate, and that Nationwide had standing to challenge his appointment. In 34 C.J.S., Executors and Administrators, § 1018, it is stated:

> "To warrant the appointment of an administrator de bonis non, it is absolutely essential that the previous incumbency should have actually ended, and, if there is no vacancy, the appointment is void for lack of jurisdiction."

In 21 Am. Jur., Executors and Administrators, § 774, it is stated:

> "To warrant the appointment of such an administrator (administrator de bonis non) the office of administrator must be vacant; a vacancy is a jurisdictional fact; an appointment of an administrator de bonis non when there is no vacancy is absolutely void and may be so declared, even in a collateral proceeding."

In *Edwards v. McLawhorn*, 218 N.C. 543, 11 S.E. 2d 562 (1940), Justice Winborne, speaking for the North Carolina Supreme Court, said:

> "The general rule is that, after an executor or administrator is appointed and qualified as such, his authority to represent the estate continues until the estate is fully settled, unless terminated by his death, or resignation, or by his removal in some mode prescribed by statute, or unless the letters be revoked in a manner provided by law.
>
> It is also an established principle of law that to warrant the appointment of an administrator de bonis non, or de

bonis non, cum testamento annexo, the office of administrator or executor must be vacant. Vacancy is a jurisdictional fact, and an appointment of either an administrator de bonis non, or an administrator de bonis non, cum testamento annexo, when there is no such vacancy is absolutely void, and may be so declared, even in a collateral proceeding."

Appellant contends that the discharge of Mrs. Overman as the administratrix of her husband's estate was "validly accomplished" by the order of the Clerk dated 19 March 1970, purporting to appoint Craven as Administrator d/b/n. We do not agree.

[1-3] There is nothing in this order to suggest that the Clerk did anything more than attempt to appoint Craven Administrator d/b/n. The recital in the order that " . . . the widow of the decedent [was] present, the widow having previously served as Administratrix of the estate and having been fully discharged from these duties pursuant to order of this Court" does not amount to Mrs. Overman's resignation as Administratrix pursuant to G.S. 36-10 nor to her removal and revocation of her letters of administration pursuant to G.S. 28-32. The principle that every court, where the subject matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings has no application in this case where the record affirmatively shows that the original administratrix, duly appointed by the Clerk, was living, had not resigned, had not been removed, had not had her letters of administration revoked, or had not been otherwise discharged according to law. *In re Davis,* 277 N.C. 134, 176 S.E. 2d 825 (1970); *Marshall v. Fisher,* 46 N.C. 111. The fact that Mrs. Overman purportedly agreed and consented that an Administrator d/b/n be appointed and that she did not appeal from the order purporting to appoint Craven as such administrator, does not validate Craven's appointment since jurisdiction may not be conferred by either waiver or consent. *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108 (1941); *Springer v. Shavender,* 118 N.C. 33, 23 S.E. 976 (1896).

[4] The suggestion that Nationwide does not have "status or standing" to challenge Craven's appointment is meritless, since "any party interested or affected by a void judgment may attack it collaterally, in a proper case, or by a direct proceeding to have it stricken from the record as a nullity." *Reynolds v.*

Cotton Mills, 177 N.C. 412, 99 S.E. 240 (1919). Obviously, Nationwide, having been sued by Craven purporting to act in behalf of Overman's estate, has a clear right to inquire as to whether plaintiff is entitled to sue.

We hold that the office of administrator of Overman's estate was not vacant on 19 March 1970, and the Clerk had no authority to appoint Craven as Administrator d/b/n. The judgment of the Superior Court is

Affirmed.

Judges BROCK and MORRIS concur.

IRENE C. CANNON v. SAM B. CANNON

No. 7218DC400

(Filed 28 June 1972)

1. **Divorce and Alimony § 18— alimony pendente lite — needs of dependent spouse**

In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. G.S. 50-16.5.

2. **Divorce and Alimony § 18— dependent spouse — ownership of more property than supporting spouse**

The trial court did not err in determining that plaintiff wife was a dependent spouse even though she had more extensive property assets than defendant husband.

APPEAL by defendant from an Order entered by *Washington, District Judge,* 4 February 1972, following a hearing at the 2 September 1971 Session of District Court held in Guilford County.

Plaintiff-wife, Irene B. Cannon, instituted this action for alimony without divorce, alimony *pendente lite,* and attorney fees. She alleged that defendant abandoned her and offered her such indignities as to render her condition intolerable and her life burdensome; that, furthermore, the defendant was an excessive user of alcohol so as to render her condition intolerable and her life burdensome, all without justification.

Defendant-husband, Sam B. Cannon, denied the material allegations of the complaint, and further answered as a defense that plaintiff abandoned the defendant and offered him such indignities as to render his condition intolerable and his life burdensome.

The order, which was entered after evidentiary hearing before the District Judge, contained the following:

"(3) That one year after their marriage it appeared expedient for the defendant to give up the position he then had and to take another position which would permit him to maintain his headquarters in High Point, N. C., which was the home of the plaintiff; . . . that plaintiff and her first husband owned a beautiful home in the City of High Point, and defendant moved into said home with the plaintiff . . . .

"That the home has a market value of between $60,000 and $65,000; . . . that the home is solely owned by the plaintiff, and it is clear of mortgages and indebtedness except for annual taxes which amount to approximately $1,200, and the expense of repairs from time to time and maintenance; . . . that plaintiff's said [former] husband and herself owned a vacant lot at Holden's Beach, N. C., and approximately forty-one acres of vacant mountain land adjoining the Blue Ridge Parkway in Mitchell and McDowell Counties as estate by the entirety; that the balance of his property, consisting of stocks and bonds, was left in trust for their two sons, with the income payable to the plaintiff for her life . . . . [T]hat plaintiff's gross ordinary income for 1970 was approximately $3,800, which included interest of $754.04 from a note and deed of trust given as part of the purchase price of the sale of part of the Holden Beach property, and it is anticipated that her income for 1971 will be approximately the same.

" . . . [T]hat in addition plaintiff has put all her income into a joint bank account with the defendant which has been used each year toward the payment of their living expenses; that plaintiff introduced an itemized statement of her estimated expenses per month for the year 1971 totaling $757, . . . and estimated that her total minimum

expenses per month would be $1,000, which the court finds is not unreasonable; that the plaintiff, since her separation from her husband, has tried diligently to obtain employment, but has been unable to do so because of her age and lack of experience; . . . that the only way in which the plaintiff can meet her current expenses and to subsist during the prosecution of this suit and to defray the necessary expenses thereof would be for her to sell her home or stocks which would further deplete her annual income, or sell her remaining beach property or her mountain property, which she testified would not be advisable or expedient at this time, and which the court finds she should not be forced to do.

"(4) The court finds as a fact that the plaintiff is actually substantially dependent upon the defendant for her maintenance and support, or is substantially in need of maintenance and support from the defendant, and is a 'dependent spouse' within the meaning of G.S. Sec. 50-16.1. The court further finds that the plaintiff has not sufficient means whereon to subsist during the prosecution of this suit and to defray the necessary expenses thereof within the meaning of G.S. Sec. 50-16.3.

"(5) . . . 'In the year 1970 he [defendant] made approximately $13,000 in gross income' and that 'During the year 1971, based on commissions thus far received, he expects to have a gross income of between $15,000 and $16,000, before deducting business expenses;' . . . that the defendant owns no real property, and possesses no stocks, bonds, or securities; that the only personal property he owns are his personal effects and a new automobile on which he is making payments of $111.37 per month . . . .

"(6) The court finds that the defendant is a 'supporting spouse' under the provisions of G.S. Sec. 50-16.1, and was, at the time of the separation and the institution of this action, and at the time of this hearing, able to comply with the terms of this order.

* * *

"(11) That the court finds as a fact that the defendant has abandoned the plaintiff; that he has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome; that the defend-

ant is an excessive user of alcohol so as to render the position of plaintiff intolerable and the life of the plaintiff burdensome, under the provisions of G.S. 50-16.2(4), (7), (9).

"(12) The court finds that James B. Lovelace, attorney for the plaintiff, spent 29½ hours in his office in the preparation of this cause for hearing, and ½ day in court before the hearing was continued, and 1 and ½ additional days in the hearing in this cause, and that a fee of $750 is a reasonable attorney fee to be paid for representing the plaintiff."

Based on its findings of fact, the District Court ordered that defendant pay the sum of $50 per week to plaintiff as alimony *pendente lite* and that defendant pay to plaintiff's attorney the sum of $750 for representing the plaintiff.

From the foregoing order defendant appealed.

Lovelace & Hardin, by James B. Lovelace, for plaintiff-appellee.

Lambeth & Rogers, by Charles F. Lambeth, Jr., for defendant-appellant.

BROCK, Judge.

The defendant through his counsel of record has moved that his brief be amended in the following respects:

"On page 2 of the brief, following the word ARGUMENT in the center of the page, the following words should be inserted:

(Defendant's Exception No. 2, Rpp. 17-18, 26, and Assignment of Error # 2, Rp. 27)."

We have allowed this motion.

Also the plaintiff through her counsel of record has moved that the case be dismissed. This motion is denied.

The assignment of error brought forward on this appeal by defendant challenges the court's determination in paragraph number 4 of the order that the plaintiff is a "dependent spouse" and has not sufficient means to subsist during the prosecution of this action and to defray the necessary expenses thereof.

In G.S. 50-16.3(a) it is provided that a dependent spouse, who is a party to an action for alimony without divorce, shall be entitled to an order for alimony *pendente lite* when:

"(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

This Court has held that a "dependent spouse" is entitled to an award of alimony pendente lite only when the above two conditions are met. *Davis v. Davis,* 11 N.C. App. 115, 180 S.E. 2d 374; *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138.

The defendant on this appeal does not question the District Court's finding that the plaintiff has made out a *prima facie* case for relief—the first of the above conditions for an award of alimony *pendente lite.* He only contends that the evidence does not support a determination that the second condition is met—that the plaintiff is a dependent spouse.

A "dependent spouse" is defined in the statute, G.S. 50-16.1(3), as follows:

"(3) 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

Defendant asserts in his brief that plaintiff was not actually substantially dependent upon him and that she was not substantially in need of maintenance and support from him, because she had some income and had more extensive property assets than defendant.

[1, 2] In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. G.S. 50-16.5; *Peeler v. Peeler,* 7 N.C. App. 456, 172 S.E. 2d 915. In the present case, the District Court weighed all the evidence relating to the above circumstances to be considered and made

detailed findings relating to these circumstances. We are of the opinion that the court did not commit error in determining that the plaintiff was a dependent spouse, even though there was some disparity between the value of the property owned by the plaintiff and that owned by defendant.

"Alimony pendente lite is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse. The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. *Sayland v. Sayland,* 267 N.C. 387, 148 S.E. 2d 218 (1966)." *Peeler v. Peeler, supra.*

"In *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227 (1964), the following appears: 'Facts found by the judge are binding upon this court if they are supported by any competent evidence notwithstanding the fact that appellant has offered evidence to the contrary.' This rule is applicable in the instant case." *Peeler v. Peeler, supra.* This same principle applies to the case now before us.

The order appealed from is

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

THOMAS POOLE v. MARION BUICK CO., AND GENERAL MOTORS CORPORATION

No. 7229DC42

(Filed 28 June 1972)

1. Uniform Commercial Code § 20— revocation of acceptance — notice

In order to effect a revocation of acceptance, the buyer must notify the seller of such revocation. G.S. 25-2-608.

2. Sales § 13; Uniform Commercial Code § 20— rescission of purchase contract — absence of notice of revocation of acceptance

Plaintiff's evidence was insufficient for the jury in an action to rescind an automobile purchase contract where it failed to show that plaintiff ever gave defendant seller any notice of revocation of his acceptance of the automobile.

3. Rules of Civil Procedure § 50— directed verdict by appellate court

The Court of Appeals could order a directed verdict in favor of defendants where defendants had properly moved for directed verdict at the close of all the evidence and for judgment notwithstanding the verdict.

APPEAL by defendants from *Matheny, District Court Judge,* 26 July 1971 Session, District Court, MCDOWELL County.

This action was instituted for the recovery of $3,309.36 purchase price payments and $1,000.00 loss of use. The plaintiff alleged that on 8 October 1968 he had purchased a 1968 Buick GS400 automobile and had made payments therefor in the total amount of $3,309.36; that immediately after purchase the automobile started leaking water and had had other defects necessitating it being returned to the dealer on numerous occasions; that on 15 April 1969 the automobile was again returned to the defendant dealer for repairs which had not been made. The plaintiff sought recovery for breach of warranty and for a rescission of the purchase contract.

The defendants denied liability, and before trial moved that the plaintiff be required to elect whether he was proceeding for a rescission of the contract or for breach of the contract.

Before the commencement of the trial certain stipulations were entered into to the effect that plaintiff had bought the automobile in question from Marion Buick Company and had paid $3,502.03 therefor which was full payment; that the automobile had been driven 27,000 miles and;

> "Plaintiff's counsel stipulates that he voluntarily elects to rescind the purchase contract under which the 1968 model Buick automobile was purchased and to proceed on the theory that he is entitled to the full purchase price of the said automobile less a fair and reasonable amount to be decided by the jury for the depreciation and use of the said automobile."

The evidence on behalf of plaintiff may be summarized as follows:

On 8 October 1968 plaintiff purchased the automobile. He began having difficulty immediately after purchase. With less than 150 miles on the automobile he returned it to Marion Buick for repair of a water leak and misfiring motor. He con-

tinued to have trouble with the car, particularly a water leak, and subsequently returned the car to Marion Buick for repairs on frequent occasions. In August 1968 when the car had been driven 17,000 miles, plaintiff again returned the car to Marion Buick; and at that time Marion Buick took the motor apart and replaced a number of major parts. Plaintiff testified that the motor continued to misfire and that Marion Buick was never able to get the automobile to run properly. On 15 April 1969 after the plaintiff had had the car eighteen months and had driven it 27,000 miles, the engine "blew" at approximately 1:00 a.m. as the plaintiff was driving on Interstate Highway I-40. Plaintiff had the automobile towed to Marion Buick. Marion Buick had never charged plaintiff for any repairs made up until that time. On this occasion Marion Buick offered to dismantle the engine to determine if the cause of the engine failure was a defect in material or workmanship. If such a defect were found, repairs would be made without charge. If there were no defects in material or workmanship, plaintiff was to pay for the repairs. Plaintiff testified that he authorized Marion Buick to proceed in accordance with this offer and that he had also received a letter from Buick Motor Division of the defendant General Motors Corporation which repeated the offer made by Marion Buick and requested a reply from the plaintiff. Plaintiff testified that he never answered the letter and that the automobile is still at Marion Buick unrepaired.

At the close of plaintiff's evidence, the defendants moved for a directed verdict. This motion was denied. Defendants offered evidence to the effect that the automobile had been in the shop of Marion Buick on numerous occasions; that adjustments and repairs had been made free of charge in order to attempt to satisfy the plaintiff; that the plaintiff had "hot-rodded" the automobile which had caused the motor to overheat and a piston rod to be thrown through the engine, thereby causing the blowup; that defendants had offered to tear down the motor and if any defective parts or workmanship appeared, same would be repaired without charge; but if that was not the cause of the blowup of the motor, then the plaintiff would pay for the work; that the plaintiff had never agreed to this offer.

Defendants again moved for a directed verdict at the close of all the evidence and this motion was denied.

The jury returned a verdict in favor of the plaintiff awarding plaintiff $2,500. The defendants moved for judgment notwithstanding the verdict, and this motion was denied. Judgment in favor of the plaintiff was entered in accordance with the jury verdict, and defendants appealed.

No brief filed for plaintiff appellee.

Story and Hunter by Robert C. Hunter for defendant appellant, Marion Buick Company.

Dameron and Burgin by Charles E. Burgin for defendant appellant, General Motors Corporation.

CAMPBELL, Judge.

Defendants assign as error the denial of their motions for directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence and for judgment notwithstanding the verdict.

This assignment of error presents the single question of the sufficiency of the plaintiff's evidence, when viewed in the light most favorable to the plaintiff, to withstand defendants' motions for directed verdict. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

[1] In accordance with the stipulation entered by plaintiff's counsel at the commencement of the trial, the case was tried upon the theory of rescission of the contract. The statute no longer uses that term, but instead speaks of revocation of acceptance. G.S. 25-2-608. Under this statute, the buyer, in order to effect revocation of acceptance, must notify the seller of such revocation. Until the seller is given notice, there can be no effective revocation of acceptance. *Ibid.*

[2] All of the evidence on behalf of the plaintiff is to the effect that he began having mechanical trouble with the automobile immediately after he purchased it; that he returned the automobile to Marion Buick on numerous occasions and repairs were made free of charge; that the trouble continued until the engine finally blew up eighteen months after the date of purchase and after the automobile had been driven 27,000 miles. Nowhere is there any evidence that plaintiff ever gave defendants notice of his revocation of acceptance.

"Notice of rescission of a contract of sale must be clear and unambiguous, conveying the unquestionable purpose to terminate the contract; and where, from the conduct of the one having the right to rescind, it is not clear whether he has rescinded the contract, he will be deemed not to have done so . . . . " 46 Am. Jur., Sales, § 763.

In the instant case plaintiff merely left his automobile at Marion Buick's place of business. There is a conflict in the evidence as to whether plaintiff instructed Marion Buick to determine if the cause of the engine failure was defective materials or workmanship but it is clear from the evidence that plaintiff never gave Marion Buick any notice of revocation of acceptance. Plaintiff kept and operated the automobile for eighteen months and drove it 27,000 miles. There is no construction of the evidence which would allow a jury to find that defendants had been notified of a revocation of acceptance; therefore, defendants' motions should have been allowed.

[3] Defendants properly moved for directed verdict at the close of all the evidence and for judgment notwithstanding the verdict. It is, therefore, appropriate for this Court to order a directed verdict in favor of defendants. *Nichols v. Real Estate, Inc.*, 10 N.C. App. 66, 177 S.E. 2d 750 (1970).

This cause is remanded to the trial court with the direction that judgment be entered in accordance with the motion of appellants for a directed verdict in their favor.

Reversed and remanded.

Judges BRITT and GRAHAM concur.

W. C. VAIL AND WIFE, MAMIE S. VAIL v. VERMONT MUTUAL FIRE INSURANCE COMPANY

No. 7218SC355

(Filed 28 June 1972)

1. **Insurance § 128— fire policy — insurance adjuster — authority to waive limitation periods**

An insurance adjuster clothed with the authority to adjust and settle a fire insurance loss has the authority to waive the 60-day limitation for filing proof of loss and the 12-month limitation for instituting suit.

2. **Insurance § 128— fire policy — limitation periods — waiver by adjuster**

Evidence tending to show that an insurance adjuster employed by defendant fire insurer to adjust plaintiffs' claim continued to negotiate with plaintiffs for approximately two years after the fire was sufficient to support the trial court's determination that defendant had waived the 60-day limitation for filing proof of loss and the 12-month limitation for instituting suit.

3. **Trial § 57— rules of evidence — non-jury trials**

The ordinary rules as to the competency of evidence which are applicable in a jury trial are to some extent relaxed in a trial before a judge without a jury, since the judge is able to eliminate incompetent and immaterial testimony.

4. **Insurance § 128— fire policy — waiver of limitation period — agency of adjuster — testimony by adjuster**

Testimony by the head of an insurance adjusting company that his company was employed by defendant insurer to adjust plaintiffs' claim was competent to prove that an agency relationship existed between the insurer and the adjusting company for the purpose of waiving the 12-month limitation period within which plaintiffs were required to institute action on a fire policy.

5. **Principal and Agent § 4— proof of agency — declarations of agent — testimony by agent**

While the fact of agency may not be proved by testimony of declarations of the alleged agent, the agent himself may testify at the trial as to the fact of agency.

6. **Appeal and Error § 57— findings of fact — appellate review**

The trial court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed even though there is evidence contra or even though some incompetent evidence may also have been admitted.

APPEAL by defendant from *Armstrong, Judge,* 1 November 1971 Session of GUILFORD Superior Court.

Plaintiffs instituted this action on 13 November 1968 seeking to recover $6,000 for damages to their home and personal property located therein allegedly caused by a furnace explosion and resulting smoke damage on 22 November 1965. The action is based on standard fire insurance policies issued by defendant to plaintiffs.

Defendant answered the complaint, admitting that the policy on the home was in full force and effect on 22 November 1965 but denied that plaintiffs were damaged to the extent alleged in the complaint. (At trial defendant stipulated that the policy on the personal property was also in full force and effect.) Defendant further alleged that plaintiffs did not submit a proof of loss or institute their action within the times provided in the policies.

Jury trial was waived. Following a trial the court found facts favorable to plaintiffs and rendered judgment in their favor for $1,711.62. Defendant appealed.

Sprinkle, Coffield & Stackhouse by Irwin Coffield, Jr., for plaintiffs appellees.

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

BRITT, Judge.

In its first assignment of error defendant contends that the court erred in overruling defendant's demurrer to the complaint, in not allowing defendant's motion for involuntary dismissal pursuant to Rule 41(b), and in signing and entering the judgment.

Defendant concedes in its brief that its demurrer to the complaint (filed 5 December 1968 before the effective date of the new Rules of Civil Procedure) was properly overruled on 17 January 1969 under authority of *Meekins v. Insurance Co.*, 231 N.C. 452, 57 S.E. 2d 777 (1950). Defendant insists, however, that its timely made motions for involuntary dismissal should have been allowed. We disagree.

[1] It appears to be well settled in this jurisdiction that an insurance adjuster clothed with the authority to adjust and settle a fire insurance loss has the authority to waive the 60-day limitation for filing proof of loss and the 12-month limita-

tion for instituting suit. *Horton v. Insurance Co.* and cases therein cited, 9 N.C. App. 140, 175 S.E. 2d 725 (1970); cert. den. 277 N.C. 251 (1970). The evidence in the instant case viewed in the light most favorable to plaintiffs tended to show:

Very soon after the occurrence plaintiffs duly reported the loss and defendant employed R. E. Pratt and Company, insurance claims adjusters, (Pratt) to adjust the claim with plaintiffs. Several months thereafter Pratt's adjuster, Mr. Cottrell, offered plaintiffs $1,156.67 in settlement of their claim. Plaintiffs rejected the offer and refused to sign the proof of loss submitted to them for that amount. On 9 May 1966 Pratt through Mr. Cottrell wrote plaintiffs calling their attention to the provisions of the policies regarding the filing of proof of loss and stated that although by negotiations defendant had waived the 60-day period for filing proof of loss defendant was insisting that the policies be complied with thereafter and enclosed proof of loss blanks. On or about 13 May 1966 plaintiffs submitted proof of loss in amount of $211.62 for damage to personal property and $2,137.12 for damage to real property. On 26 July 1966 adjuster L. G. Graham on behalf of Pratt wrote plaintiffs a letter advising that defendant had rejected the last mentioned proof of loss; the letter further stated: "Mr. R. E. Pratt with whom you discussed this loss recently is out of the State but is expected to return to the High Point area during the first part of August. In the meantime the writer will be happy to discuss this matter with you or your representative." Plaintiffs continued to negotiate with Pratt and around 1 November 1967 Mr. Pratt requested estimates on repairs to the house which were furnished but plaintiffs never received any payment.

[2] The competent evidence before the trial court was plenary to support the findings of fact and conclusions of law that defendant waived the provisions of the policies relative to times for filing proof of loss and institution of action and defendant is now estopped from taking advantage of the provisions to the detriment of plaintiffs. *Horton v. Insurance Co., supra.*

Defendant contends that the court's finding of fact that defendant waived the 12-month limitation for institution of the action was not supported by competent evidence, insisting that much of the evidence introduced was hearsay and that

no agency relationship between defendant and Pratt was proven. We disagree with these contentions.

[3-5] Although the court admitted incompetent testimony, in a trial before the judge without a jury, the ordinary rules as to the competency of evidence which are applicable in a jury trial are to some extent relaxed since the judge, being knowledgeable of the law, is able to eliminate incompetent and immaterial testimony. 7 Strong, N. C. Index 2d, Trial, § 57, pp. 376-377. A review of the evidence discloses that there was sufficient competent evidence to support the findings of fact. With respect to the contention that no agency relationship between defendant and Pratt was proven, among other evidence presented was the testimony of Mr. Pratt himself that his company was employed by defendant to adjust the plaintiffs' claim. It has been held that while the fact of agency may not be proved by testimony of *declarations* of the alleged agent, the agent himself may testify as a sworn witness at the trial as to the fact of agency. *Sealy v. Insurance Co.*, 253 N.C. 774, 117 S.E. 2d 744 (1961).

We have carefully considered the other contentions argued by defendant but find that they have no merit.

[6] It is settled law in this State that the trial court's findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed even though there is evidence contra or even though some incompetent evidence may also have been admitted. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967); *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967); *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966). The findings of fact in the instant case are supported by competent evidence, therefore, they are deemed to be conclusive on appeal.

The judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOSEPH D. DIAZ

No. 728SC196

(Filed 28 June 1972)

1. **Criminal Law § 21— preliminary hearing — indictment**

A preliminary hearing is not an essential prerequisite to a bill of indictment.

2. **Criminal Law §§ 21, 127— preliminary hearing — motion in arrest of judgment**

A motion in arrest of judgment is not the proper method to attack the preliminary hearing, since a judgment in a criminal prosecution may be arrested only when some fatal error or defect appears on the face of the record proper.

3. **Criminal Law § 127— motion in arrest of judgment —— evidence**

Defects which appear only by aid of the evidence cannot be the subject of a motion in arrest of judgment, since the evidence is not a part of the record proper.

4. **Criminal Law § 127— motion in arrest of judgment — defects in preliminary hearing**

The trial court did not err in the denial of defendant's motion in arrest of judgment for alleged defects and irregularities in the preliminary hearing, where defendant was tried on a proper bill of indictment, no error appears on the face of the record proper, and defendant has failed to show he was prejudiced by the alleged errors.

5. **Criminal Law § 88— cross-examination — discretion of court**

While a party has a wide latitude in cross-examining witnesses, the matter and nature of the cross-examination is within the discretion of the trial court, and its ruling should not be disturbed except when prejudicial error is disclosed.

6. **Criminal Law § 169— exclusion of evidence — absence of excluded evidence in record**

The exclusion of evidence cannot be held prejudicial where the record fails to show what the excluded evidence would have been.

7. **Criminal Law § 112— instructions — definition of "beyond a reasonable doubt"**

The trial court did not err in instructing the jury that it must be "satisfied to a moral certainty of the truth of the charge," rather than that the jury must be "satisfied to a moral certainty of the truth of defendant's guilt of the charge," the charge as a whole having encompassed such concept.

APPEAL by defendant from *Bailey, Judge,* 16 August 1971 Criminal Session of LENOIR Superior Court.

The defendant was tried upon an indictment, proper in form, charging the felony of illegal possession of narcotic drugs, to wit heroin, in violation of G.S. 90-88. The evidence of the State tended to show the following: On 5 July 1971 at about 10:30 p.m. two law enforcement officers, Shepard and Howard, observed the defendant walking on the grounds of the Holiday Inn in Kinston, North Carolina. The officers stopped their car and Officer Howard noticed that the defendant had something in his hand. Defendant backed away in the well-lighted lot and when he got close to some bushes dropped what he had in his hand. Officer Shepard picked up what the defendant dropped and found 3 bundles, each containing a number of smaller bundles of a powdery substance. Defendant had walked off, but was stopped again and placed under arrest. It was stipulated that the bundles found by Officer Shepard were found to contain heroin.

The defendant testified in his own behalf and his testimony tended to show the following: He lived in Jacksonville, North Carolina. He had come to Kinston to go to a club on Queen Street. He denied ever seeing the packets of heroin before. He did not have them in his possession that night or any other time.

The jury returned a verdict of guilty as charged. From judgment imposing a prison sentence of five years, defendant gave notice of appeal. Defendant's retained counsel was allowed to withdraw and the court appointed present counsel to perfect this appeal.

Attorney General Robert Morgan by Assistant Attorney General Claude W. Harris for the State.

White, Allen, Hooten & Hines by Thomas J. White III for defendant appellant.

VAUGHN, Judge.

[1-4] Defendant assigns as error the denial of his motion in arrest of judgment for defects and irregularities appearing upon the face of the record with regard to the manner in which the preliminary hearing was conducted. We find no merit in this contention. The record shows that defendant was tried on a proper indictment duly returned by the Grand Jury as a true bill. A preliminary hearing is not an essential prerequisite

to a bill of indictment. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972). In any event, a motion in arrest of judgment is not the proper method to attack the preliminary hearing, because a judgment in a criminal prosecution may be arrested only when some fatal error or defect appears on the face of the record proper. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970) ; *State v. Ray,* 7 N.C. App. 129, 171 S.E. 2d 202 (1969). Defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment since the evidence is not a part of the record proper. *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377 (1966). After a thorough review of the record in the case at bar, we find no fatal error or defect on its face. Moreover appellant has failed to show that the assigned errors were prejudicial to his rights and that a different result, but for the errors, would have likely ensued. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972).

[5-6] Defendant contends the court erred in limiting the defendant's cross-examination of the arresting officers. We find no prejudicial error in the court's rulings. It is true that a party has a right to wide latitude in cross-examining witnesses. However, the matter and the nature of the cross-examination is within the discretion of the trial court and its ruling should not be disturbed except when prejudicial error is disclosed. *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969) ; cert. den. 397 U.S. 1050, 25 L.Ed. 2d 665, 90 S.Ct. 1387. The record clearly shows that after the objections to the questions were sustained there was no attempt to get into the record what the witness would have said. Where the court sustains an objection to evidence, and the record fails to show what the evidence would have been, prejudice is not shown and the exclusion of such evidence cannot be held prejudicial. *State v. Kirby, supra; State v. Price,* 271 N.C. 521, 157 S.E. 2d 127 (1967). We also note that some of trial counsel's questions were clearly argumentative and repetitious.

[7] Defendant contends that the court erred in its instruction to the jury as to the definition or meaning of "beyond a reasonable doubt." The court in defining the phrase, "beyond a reasonable doubt," said, "it is meant that they (the jury) must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge." Defendant contends that the court should have instructed the jury that they must be, "satisfied to a moral certainty of the truth *of the defendant's*

guilt of the charge." When the entire charge is read, it encompasses this concept and there is no prejudicial error in the charge. Taken as a whole it is similar to the charge upheld in *State v. Britt*, 270 N.C. 416, 154 S.E. 2d 519 (1967).

We have carefully considered each of defendant's assignments of error as argued in the brief filed by his able counsel. We find no prejudicial error.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIE EUGENE COLE

No. 7212SC307

(Filed 28 June 1972)

1. **Criminal Law § 66— in-court identification — independent origin — pretrial confrontation**

   Rape and robbery victim's in-court identification of defendant was of independent origin and was not tainted by the fact that she saw defendant being brought into the police station shortly after the offenses occurred and immediately identified him to her husband, where the victim had ample opportunity to observe defendant prior to and during the assault and recognized defendant shortly thereafter as he walked across a street near the scene of the offenses.

2. **Criminal Law § 170— comments and questions by trial court**

   Comments and questions by the trial judge during the course of the trial, while disapproved, did not constitute prejudicial error.

3. **Criminal Law §§ 66, 102— jury argument — defense counsel — tainting of in-court identification by pretrial confrontation**

   Where the trial court had determined that there had been no illegal pretrial confrontation in this case, the court did not err in refusing to allow defense counsel to argue, by reading excerpts from a case dealing with the effect of an illegal pretrial lineup, that the prosecutrix' in-court identification of defendant was tainted by an illegal pretrial confrontation at the police station.

APPEAL by defendant from *Bailey, Judge,* 29 November 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was charged with common law robbery. The prosecutrix, Mrs. Susan Harnage, testified that she was em-

ployed at the Kasbah Lounge in Fayetteville, which is located approximately two blocks from her residence. She went to work on the afternoon of 19 September 1971 and left the lounge at approximately 2:30 a.m. the next morning to walk to her residence. As she crossed a parking lot in the vicinity of the lounge a maroon or red looking car with the letters GTO on the rear window pulled up and the driver, identified as defendant, offered her a ride, which she declined. The car drove off and Mrs. Harnage continued walking. As she approached the entrance to a drive-in theatre "two guys came toward me and kind of looked down." Just as she passed the entrance to the drive-in they grabbed her from behind, one of them placing a hand over her mouth, and dragged her into the enclosed portion of the drive-in theatre. The area was well lighted from the mercury lights on Bragg Boulevard as well as lights from an auto sales lot and a Krispy Kreme diner.

Mrs. Harnage further testified that once inside the theatre area she was assaulted and raped by the two men, defendant and his companion. Defendant then removed two $5.00 bills from her billfold. After taking the money, the pair released her and ran towards the rear of the theatre. The area was well lighted and she had no difficulty seeing the face of defendant. Mrs. Harnage picked up her pocketbook and proceeded to the Krispy Kreme diner where she informed one of the employees of what had taken place. The employee notified the police. In response to the call, Officer R. G. Nordhus proceeded to the Krispy Kreme diner and there talked with prosecutrix. While at the diner, prosecutrix saw defendant cross the street. She yelled "stop him" whereupon defendant started running toward a drive-in theatre.

Officer J. T. West of the Fayetteville Police Department testified that he received information of the assault on his radio and proceeded to the diner. As he approached the scene he observed Officer Nordhus and also saw three or four men running into the drive-in and pursued them. Officer West apprehended defendant in the drive-in, placed him in the rear of the police car, and drove to the diner. He informed Officer Nordhus that he had a suspect and Officer Nordhus told him to take the suspect to the police station.

While waiting at the police station with her husband, prosecutrix observed three police officers and two or three other

men enter the building. Upon seeing these men she grabbed her husband, pointed at the defendant, who was one of the men, and said, "That is him, that is him!"

Defendant offered no evidence. From judgment entered on a verdict of guilty, defendant appealed.

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

Butler, High and Baer by Sneed High for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns errors with respect to the "in-court" identification of defendant. The same are overruled. It is clear that the in-court identification of the defendant was not based on illegal pre-trial procedures and the judge so found. It is clear that the witness had ample opportunity to observe defendant as he passed her just prior to the assault and during the assault. Shortly thereafter the witness recognized defendant as he walked across the street while she was in the diner. Obviously the witness' identification was independent of her sighting of the defendant at the police station where she immediatiely identified him to her husband. *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282.

[2] Several assignments of error are brought forward with respect to certain comments and questions by the trial judge during the course of the trial. For the most part, these comments and questions appear to have been unnecessary and the same are disapproved. It does not follow, however, that every ill-advised comment or question by trial judge must constitute reversible error. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774. On the facts of this case, we hold that the questions and comments by the judge could not have had any effect on the result of the trial.

[3] Counsel for appellant contends that it was error not to allow him "to argue to the jury that the in-court identification made by the prosecuting witness was tainted due to an illegal confrontation between him and the prosecuting witness and was not of independent origin." We disagree. While argument of counsel as to the weakness of testimony relating to identifica-

tion of strangers may have been perfectly proper, the court had determined that there had been no illegal confrontation in this case and the court properly disallowed argument to the contrary especially where, as here, counsel was attempting to do so by reading excerpts from a case dealing with the effect of an illegal pre-trial "lineup."

Defendant was ably represented at trial and on appeal. We find no error which would entitle defendant to a new trial.

No error.

Judges MORRIS and GRAHAM concur.

FANNIE LOUISE YORK TEAGUE v. ASHEBORO MOTOR COMPANY

No. 7219SC330

(Filed 28 June 1972)

1. **Limitation of Actions § 12; Pleadings § 34; Rules of Civil Procedure § 15— wrong defendant — amendment of complaint — correct defendant — relation back**

   Where plaintiff filed a complaint against a corporate defendant not involved in the alleged tort and not in existence at the time of the incident in question, and plaintiff's action was barred by the statute of limitations five days after the complaint was filed, an "amended complaint" naming the correct corporate defendant which was filed after the statute of limitations had run did not relate back to the original complaint, and motion of the correct defendant to dismiss the action was properly allowed. G.S. 1A-1, Rule 15.

2. **Pleadings § 33; Rules of Civil Procedure § 15— amendment of pleading — relation back — notice**

   In order for a claim asserted in an amended pleading to relate back to the original pleading, the claim asserted in the amendment must be against one given notice in the original pleading of the transactions to be proved. G.S. 1A-1, Rule 15(c).

3. **Limitation of Actions § 16; Rules of Civil Procedure § 12— defense of statute of limitations — motion to dismiss**

   The defense of the statute of limitations was properly raised by a motion to dismiss for failure to state a claim for relief.

APPEAL by plaintiff from *Johnston, Judge,* at the 13 December 1971 Session of RANDOLPH Superior Court.

The events leading to this appeal are in chronological order as follows:

Plaintiff alleges that on 25 November 1967 she received personal injuries as a result of the negligence of an automobile dealership at the time operating under the name of Asheboro Motor Co., Inc. On 10 August 1970 Asheboro Motor Company, Inc., changed its corporate name to Rabb & York, Inc., and shortly later on the same day a new corporation assumed the name of Asheboro Motor Co., Inc. The new corporation was an automobile dealership operating from the same location as the former Asheboro Motor Co., Inc., but it was in no way connected to or related to that corporation. Wherever necessary, for purposes of clarity in this opinion, the old Asheboro Motor Co. and Rabb & York, Inc., the same corporation, will be referred to as Corp. I and the new Asheboro Motor Co., a separate entity, will be referred to as Corp. II.

On 20 November 1970 plaintiff instituted an action based on the incident of 25 November 1967. The summons and complaint were, however, addressed to the Asheboro Motor Co. (Corp. II). Asheboro Motor Co. (Corp. II) was the named defendant in the suit and all references in the complaint were to Asheboro Motor Co. (Corp. II). The third anniversary of the incident, out of which the suit arose, occurred on 25 November 1970. Sometime later plaintiff discovered that the suit had been filed against a corporation which was not in existence at the time of the injury and was not in fact the proper defendant. On 7 December 1970 plaintiff filed a document styled "Amended Complaint." This document still named Asheboro Motor Co. (Corp. II) as defendant, but this document and a summons were served on A. C. Rabb, President of Rabb & York, Inc. Certain allegations as to the changes of corporate name and ownership of the corporation were included in a new paragraph in this document. On 7 January 1971 Rabb & York, Inc. (Corp. I) filed a motion to dismiss on the grounds of insufficiency of process, insufficiency of service, and failure to state a claim for relief. On 5 June 1971 Rabb & York, Inc. (Corp. I) filed an amendment to its motion to dismiss setting up the statute of limitations as a bar to the action.

Upon hearing, the motion to dismiss, as amended, was allowed and judgment was filed on 17 December 1971 dismissing the action against Rabb & York, Inc. (Corp. I).

From this judgment, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Coltrane and Gavin by W. E. Gavin for defendant appellee, Rabb & York, Inc.

CAMPBELL, Judge.

[1] The facts set forth above show that plaintiff in this case filed a complaint against a party not involved in the alleged tortious incident and not even in existence at the time of the incident. In essence, plaintiff sued the wrong "defendant." Five days after the complaint was filed, the plaintiff's action was barred by the statute of limitations. Sometime thereafter plaintiff discovered her error and attempted to correct it by filing an "Amended Complaint" and having it served on appellee. Appellee raised the defense of the statute of limitations in a motion to dismiss.

There is a serious question as to whether appellee was effectively served with process. We believe that this case can be disposed of on other grounds and therefore do not reach this question.

The question for decision is whether plaintiff can file a complaint against the wrong party and then after the statute of limitations has run, attempt to bring the correct party into the action by a purported amendment of the complaint.

Plaintiff contends that the action was commenced on 20 November 1970 when the original complaint was filed and that the amended complaint served on appellee on 7 December 1970 related back to the original complaint. This would bring the date the action was commenced within three years of the date of injury and it would not be barred by the statute of limitations. Plaintiff contends that the amendment was merely to correct spelling of the name. We do not agree.

Rule 15(a) of the North Carolina Rules of Civil Procedure (N.C.R.C.P.) allows amendment of pleadings under certain stated conditions. G.S. 1A-1, Rule 15.

Rule 15(c) (N.C.R.C.P.) states the conditions under which a claim asserted in an amended pleading "relates back" to the original pleading. G.S. 1A-1, Rule 15.

Plaintiff urges upon us the rule of liberality of amendment under the Rules of Civil Procedure. She insists that the amendment was merely a correction of spelling and should relate back to the original complaint.

[2] Plaintiff's argument is without merit. Not only was a misnomer used for appellee's name, but, more importantly, the complaint was served on the wrong party. Appellee Rabb & York, Inc., had no notice of the action until the amended complaint was filed on 7 December 1970. Rule 15(c) provides that a claim asserted in an amended pleading relates back to the original pleading, "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." To whom must notice be given? The obvious answer is that the claim asserted in the amendment must be against one given notice in the original pleading of the transactions to be proved. Such notice was not given in this case and we believe that the clear words of the statute prevent the amended complaint from relating back to the original complaint.

While we find no North Carolina cases under the Rules of Civil Procedure on this point, we find a number of Federal cases to which we look for guidance. The established rule is that,

> "If the effect of the proposed amendment is merely to correct the name of a party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint. (Citations omitted.)
>
> "On the other hand, if the effect of the amendment is to substitute for the defendant a new party, or add another party, such amendment amounts to a new and independent clause of action and cannot be permitted when the statute of limitations has run. (Citations omitted) * * * " *Kerner v. Rockmill,* 111 F. Supp. 150 (1953). See also *Sanders v. Metzger,* 66 F. Supp. 262 (1946).

Appellee Rabb & York, Inc. was clearly not in court when the amended complaint was filed. The amendment attempted to substitute Rabb & York, Inc. for the Asheboro Motor Co. (Corp. II), when the complaint named as defendant and upon whom it was served.

[3] The amended complaint filed in this case does not fall within the rules for relation back to the original complaint. The defense of the statute of limitations was properly raised by a motion to dismiss for failure to state a claim for relief. 1A Barron & Holtzoff, § 281, 2A Moore's Federal Practice, § 12.09; 1 McIntosh, N. C. Practice, § 371 (1970 Pocket Part); *Wilson v. Shores-Mueller Co.*, 40 F. Supp. 729 (1941); and *Wright v. Bankers Service Corp.*, 39 F. Supp. 980 (1941), appeal dismissed, 128 F. 2d 865. The trial court was correct in dismissing plaintiff's action.

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

MATTIE H. BARNEY, ADMINISTRATRIX OF THE ESTATE OF BETTY C. HANDY, DECEASED v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7217IC441

(Filed 28 June 1972)

1. **State § 10— tort claim proceeding — appellate review**

In passing upon an appeal from the Industrial Commission in a proceeding under the Tort Claims Act, the scope of the appellate court's review is limited to (1) whether there was any competent evidence to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its legal conclusions and decisions.

2. **State § 8— tort claim proceeding — contributory negligence**

In an action under the Tort Claims Act to recover for the death of plaintiff's intestate in a collision between the intestate's automobile and a Highway Commission motor grader, the evidence supported findings by the Industrial Commission that plaintiff's intestate was contributorily negligent in failing to keep a proper lookout, failing to keep her car under proper control, and driving at an excessive speed under conditions then existing, and that the contributory negligence of plaintiff's intestate was a proximate cause of the accident.

APPEAL by plaintiff from award of North Carolina Industrial Commission entered 18 January 1972.

This action was filed under the provisions of the North Carolina Tort Claims Act. Decedent died as the result of injuries sustained when the automobile which she was driving collided

with a motor grader owned by defendant and being operated by Joseph Marion Hall, an employee of defendant. The Deputy Hearing Commissioner entered an order concluding that defendant's employee Hall was negligent and that deceased was contributorily negligent and denied the claim. The full Commission, after striking one finding of fact, affirmed the Deputy Commissioner's order. Plaintiff appealed.

White and Crumpler, by James G. White, Fred G. Crumpler, Jr., Michael J. Lewis, and G. Edgar Parker, for plaintiff appellant.

Attorney General Morgan, by Associate Attorney Witcover, for the State appellee.

MORRIS, Judge.

The accident occurred slightly east of the intersection of N.C. 704 and S.R. 1600 in Stokes County. This is a "T" intersection. Highway 704 runs generally east and west, and S.R. 1600 forms the base of the "T" in a southerly direction from 704. There were no eyewitnesses and the facts are substantially undisputed. Joseph Marion Hall (Hall) was operating defendant's motor grader engaged in scraping the dirt road 1600 and clearing the intersection and scraping or leveling off the dirt which had been piled onto N.C. 704 from S.R. 1600. The motor grader was 28 feet long, eight feet wide, over ten feet high and weighed some 25,000 pounds. From the ground to the seat where the driver sits is approximately six feet. This portion of the grader where the driver sits is enclosed in part glass and part metal. Glass is to the front and rear. There is an exhaust pipe, about 12 inches in diameter which is positioned about in the middle of the hood and extends almost to the top of the cab. In operating the grader, the driver faces forward when the grader is in forward motion. To operate in reverse and maintain a lookout in the direction of the path of the grader, the operator would have to stand up or twist his body and look back. Hall testified that he had reached the intersection and had made an arc movement backward into 704 preparing to go into 1600. Approximately seven feet of the grader was in the westbound lane of 704. As he started the backward motion he looked back through the glass and saw nothing. Looking back east he had clear vision for some 1000 feet. About the time the grader stopped he felt an impact but never

saw the car deceased was driving until it was stopped and on the shoulder almost against the bank. The grader was equipped with amber lights mounted on the radiator housing, over six feet high, and they are approximately six inches in diameter. They are blinking lights and were in operation immediately before and immediately after the collision.

The highway patrolman who investigated the accident testified that when he arrived at the scene the grader was sitting " . . . crossways 704 with the rear portion of the motor grader across the center of the road. It was diagonal. I would say it would be approximately ten feet or so across, or eight feet, across the center of the road." 704 was a 19-foot road "and there was room between the shoulder and the road for other vehicles to pass at the time, I believe, including the shoulder." The shoulder was approximately four feet. The Handy car was in the right hand ditch up against a bank. The car was damaged on "[t]he left side, left front fender back past the left door; the front end, left front; and the right side, right front fender all the way back to the right door; and then the right rear of the vehicle were damaged. There was some damage on the other side next to the bank. On the left side it was pushed in and also part of it was torn out. The best I can remember, it was cut. These photographs show how far back that went. Looking at the photographs there is a pushed—it is pushed in from the door all the way to the front of the vehicle. Yes, sir, torn away. And some parts of the metal actually torn, but the force of it is all into the car. On the front, the only damage to the front is that the fender is completely torn out. There is no damage to the grille of any significance at all. The damage is all from the side." Debris was found approximately three feet from the right edge of 704 and was scattered down to where the Handy vehicle stopped. Hall had a little over 1000 feet of clear vision. The Handy automobile was about 24 feet west of the grader. The witness found skid marks or tire marks on the road. They were on the right side of 704, traveling west. They began approximately 33 feet from the grader and were bearing just slightly to the right shoulder. There were two skid marks, but they were rather weak or light, not very black. Beyond the point where the debris was found the marks continued about 24 feet. They were darker after the point of the debris. From that point there was one solid skid mark which matched up with the skid on the left. There were corresponding marks on

the shoulder which the right wheel would have made. At the point of the debris the left skid was about four feet on the highway. There were marks in the bank indicating the Handy car hit the bank on its right side and bounced. The posted speed limit was 55 m.p.h. There were no signs to warn anybody of any road work. A person traveling in a westerly direction on 704 toward the point of impact could see the intersection some 1600 feet. There is 1000 feet of straight road " . . . and a distance of 600 feet farther back down N.C. 704 that you have visibility of this intersection." The right rear tire of the grader was struck. "Based on my observation of this right rear tire, it was struck more of a glancing blow. It didn't go right straight into it; sort of glanced off."

There was also evidence that after the accident " . . . for a motor vehicle to pass on the right next to the bank, he would have had to went close to the ditch. But the motor grader rolled backwards after the impact approximately—some. Yes, sir, by rolling backwards, I mean back towards the ditch on the right hand side. You could see the mark on the tire. . . . You could see the spot on the tire and then you could see where it rolled back probably two or three feet. . . . "

Mrs. Handy died immediately after the accident and was never conscious.

[1] In passing upon this appeal from the Industrial Commission in a proceeding under the Torts Claim Act, the scope of our review is limited to (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions and decision. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969); *Mason v. Highway Commission,* 273 N.C. 36, 159 S.E. 2d 574 (1968).

Plaintiff contends that there was no competent evidence before the Commission to support its finding that deceased was contributorily negligent and further that the findings of fact do not justify its conclusions. We do not agree.

[2] The trier of facts found that Hall was negligent in the operation of the motor grader and also found as a fact that "[t]he deceased was contributorily negligent in that she was not keeping a proper lookout, did not have her car under proper

control and was driving at an excessive speed under conditions then existing. The contributory negligence of plaintiff's intestate was one of the proximate causes of the accident." While we agree that a jury could have found otherwise, we are of the opinion that there is competent evidence to support the finding of contributory negligence and that it was a proximate cause of the accident. The findings justify the conclusions and decision.

Affirmed.

Judges VAUGHN and GRAHAM concur.

LOCAL 755, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO v. COUNTRY CLUB EAST, INCORPORATED

J. D. BECK, B. T. BLAIR, B. M. WAGONER, E. W. DELAPP, FRED E. SMITH, W. C. ALBERT, H. J. LEONARD AND S. G. BAILEY v. COUNTRY CLUB EAST, INC.

No. 7221SC455

(Filed 28 June 1972)

1. **Injunctions § 16— damages for wrongful restraint**

In seeking to recover damages arising out of the issuance of a restraining order which has been dissolved, a plaintiff may proceed by motion in the cause for judgment against defendant's injunction bond, or he may bring an independent action if there are grounds to recover damages not within the contemplation of the bond, such as for malicious prosecution, abuse of process or injury to business.

2. **Malicious Prosecution § 1— actions based on civil proceedings**

Actions for malicious prosecution may be based not only upon criminal prosecutions but also civil proceedings which involve an arrest of the person, seizure of property or loss of a legitimately protected right.

3. **Malicious Prosecution § 3— valid process**

In a malicious prosecution action a plaintiff must show that the prior proceedings which form the basis of his action were based upon valid process.

4. **Master and Servant § 17— disobedience of void restraining order**

Disobedience to a void restraining order preventing picketing is not punishable.

5. Malicious Prosecution § 3; Master and Servant § 17— action based on void restraining order

Plaintiffs may not maintain actions for malicious prosecution founded upon the procurement of a restraining order preventing picketing which they concede was void because the order was entered by a court not having jurisdiction.

APPEAL by plaintiffs from *Gambill, Judge,* 31 January 1972 Session of Superior Court held in FORSYTH County.

In August of 1970 the individual plaintiffs, employees of Salem Electric Company in Winston-Salem, participated in a campaign by plaintiff Local 755 to organize employees of the company. Salem refused to recognize the Union as a bargaining agent and on 1 September 1970 plaintiff employees and certain other employees struck and established a picket line near the entrance to an apartment project being constructed by defendant. Defendant had no contract with any of the plaintiffs, but it did have a contract with Salem for the completion of electrical work on the premises. Certain employees of other contractors working on the project refused to cross plaintiffs' picket line.

On 4 September 1970, defendant applied for and obtained from the Honorable Harvey A. Lupton an order temporarily restraining the individual plaintiffs "from striking, picketing, inducing others to strike or to stop work, patrolling, or by any other means, or in any other manner, interfering with or disrupting the normal operation of the plaintiff's apartment construction on said premises. . . . "

Within ten days following the issuance of the temporary restraining order the parties met with Judge Lupton and the matter was continued on motion of the court until 14 September 1970. By that date Salem's work at the construction site had been completed and the threat of interruption on account of picketing by plaintiffs was over. A voluntary dismissal order, dated 14 September 1970, was entered dissolving the temporary restraining order and dismissing the action.

Plaintiffs instituted separate actions for damages allegedly arising out of the issuance and subsequent dismissal of the restraining order. They allege that defendant's action in obtaining the restraining order was wrongful and malicious.

The cases were consolidated for hearing and defendant moved for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c). The court treated the motion as one for summary judgment, considered stipulations entered by the parties as well as the pleadings, and allowed the motion.

Eubanks and Sparrow by Larry L. Eubanks for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

GRAHAM, Judge.

[1] In seeking to recover damages arising out of the issuance of a restraining order which has been dissolved, a plaintiff may proceed by motion in the cause for judgment against defendant's injunction bond, or he may bring an independent action if there are grounds to recover damages not within the contemplation of the bond, such as for malicious prosecution, abuse of process, or for injury to business. *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764.

[2] Plaintiffs here have chosen to bring independent actions for malicious prosecution. In this jurisdiction, actions for malicious prosecution may be based not only upon criminal prosecutions but also civil proceedings which involve an arrest of the person, seizure of property, or loss of a legitimately protected right. *Carver v. Lykes,* 262 N.C. 345, 137 S.E. 2d 139.

The parties are in agreement that under the circumstances presented here the Superior Court did not have jurisdiction to enter the restraining order because the regulation of peaceful picketing in connection with a labor dispute affecting interstate commerce is preempted by provisions of the National Labor Relations Act. *Aircraft Co. v. Union,* 247 N.C. 620, 101 S.E. 2d 800. If this be true, the order was void. "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.,* as if it had never happened." *Hopkins v. Hopkins,* 8 N.C. App. 162, 174 S.E. 2d 103.

Thus, the question becomes: May plaintiffs maintain actions for malicious prosecution founded upon the procurement of a restraining order which they concede was void? We answer in the negative.

[3] This State follows the minority view which holds that in a malicious prosecution action a plaintiff must show that the prior proceedings which form the basis of his actions were based upon valid process. Byrd, *Malicious Prosecution in North Carolina,* 47 N.C. L.Rev. 285, 304; *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729; *Hawkins v. Reynolds,* 236 N.C. 422, 72 S.E. 2d 874; *Carson v. Doggett* and *Ward v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609. While all of these cases involved actions based upon void criminal prosecutions, we know of no reason, and none has been suggested to us, why the same rule is not applicable in actions founded on a void restraining order.

In the case of *Mark v. Hyatt,* 135 N.Y. 306, 31 N.E. 1099, the New York Court of Appeals stated:

> "But here the appellant suddenly shifts his ground and claims that the judgment instead of being merely erroneous and valid until reversed was never valid at all so far as the injunction was concerned, but void utterly at the moment of its rendition. If that be true the damages claimed resulted not from the void process, but from the voluntary and needless act of the appellant in view of its existence. . . . The injunction, if absolutely void, was a nullity; it could not and did not restrain the manufacture. If the appellant ceased work the act was his own, and both voluntary and needless. It originated in no compulsion, for there was nothing to compel and nobody compelling."

[4, 5] Disobedience to a void restraining order is not punishable. *Freight Carriers v. Teamsters Local,* 11 N.C. App. 159, 180 S.E. 2d 461, *cert. denied,* 278 N.C. 701, 181 S.E. 2d 601. If, as plaintiffs concede, the restraining order was entered by a court not having jurisdiction, the order was void and did not restrain them. Consequently, under plaintiffs' own theory of the case, they have no claim for malicious prosecution arising from defendant's procurement of the order. Summary judgment in favor of defendant was proper.

Affirmed.

Judges MORRIS and VAUGHN concur.

E. G. LACKEY AND WIFE JANE LOGAN LACKEY v. W. G. MITCHELL, TRUSTEE, AND THE NORTHWESTERN BANK

No. 7217SC360

(Filed 28 June 1972)

Mortgages and Deeds of Trust § 19— action to restrain foreclosure — denial of preliminary injunction

In an action to enjoin defendants from selling a farm under a deed of trust foreclosure on the ground that the indebtedness which the farm secured had been discharged because of funds received by defendants from three sources, the trial court did not err in the denial of plaintiffs' motion to extend until trial a preliminary injunction restraining defendants from selling the farm, where it appears that plaintiffs would have to prevail on all three of their contentions with respect to the application of funds received by defendants to the indebtedness on the farm in order for such indebtedness to be extinguished, and it is improbable that plaintiffs would prevail on all three of their contentions.

APPEAL by plaintiffs from *Exum, Judge,* in chambers, Greensboro, N. C. From STOKES.

On 30 September 1971 plaintiffs instituted this action seeking to enjoin defendants from selling under deed of trust foreclosure a farm in Stokes County. A temporary restraining order was issued and on 8 October 1971 a preliminary injunction was entered enjoining defendants from selling the farm until 10 December 1971. The injunction was continued by consent until plaintiffs' motion to extend could be heard. On 21 December 1971, following a hearing, the court entered an order denying the motion to extend the preliminary injunction from which plaintiffs appealed. The court entered a separate order continuing the injunction pending plaintiffs' appeal.

Womble, Carlyle, Sandridge & Rice by Linwood L. Davis for plaintiff appellants.

W. G. Mitchell for defendant appellees.

BRITT, Judge.

The record reveals that for several years prior to the institution of this action plaintiffs were heavily indebted to defendant bank. The complaint alleges that beginning in 1964 and up until March of 1970 plaintiffs borrowed a total of $300,500 from defendant bank; that said indebtedness was secured in

various ways including notes and deeds of trust on real estate in Avery and Watauga Counties, note and deed of trust on real estate in Yadkin County, notes secured by assignment of corporate stocks, and a note and deed of trust on real estate in Stokes County. The complaint further alleges that on 18 December 1970 the male plaintiff filed a voluntary petition in bankruptcy in the United States District Court for the Middle District of North Carolina and was duly adjudged bankrupt on 22 December 1970; that a trustee in bankruptcy was appointed on 7 January 1971 and was acting in said capacity at the time of the institution of this action on 30 September 1971.

Plaintiffs based their motion for an order to extend the preliminary injunction on the ground that their indebtedness with defendant bank with respect to the Stokes County farm was discharged. Plaintiffs contend that at the time of instituting this action the indebtedness on said farm was $10,432.18 and that plaintiffs are entitled to have said indebtedness declared discharged because of funds received by defendants from the following three sources:

(1) Defendants foreclosed a deed of trust on certain lands belonging to plaintiffs in Avery and Watauga Counties from which there was a surplus of $3,050.55; that plaintiffs are entitled to have that amount applied to the Stokes County land indebtedness.

(2) Prior to December 1970 plaintiffs owned a farm in Yadkin County on which defendant bank held a deed of trust. Plaintiffs sold said farm to one Jakobsen subject to the indebtedness thereon due defendant bank. Plaintiffs were required to remain liable for the balance of their indebtedness to defendant bank secured by deed of trust on the Yadkin County farm. Defendant bank required plaintiffs to execute a collateral note which included the indebtedness secured by deeds of trust on the Yadkin County property and the Stokes County property; that Jakobsen made certain payments to defendant bank but instead of applying the payments to the collateral note aforesaid, defendant bank applied the payments to another debt which plaintiffs owed defendant bank and which debt was unrelated to the indebtedness secured by deeds of trust on the two farms; that plaintiffs are entitled to have some $6,727 paid by Jakobsen applied to the $10,432.18 indebtedness above set forth.

(3) Defendant bank sold certain corporate stocks belonging to plaintiffs and they are entitled to have $2800.00 received from the sale of the stocks applied to the indebtedness on the Stokes County property.

As to the three contentions of plaintiffs aforesaid, defendants contend:

(1) There is a controversy over the surplus from the sale of the lands in Avery and Watauga Counties; that defendant bank and plaintiffs claim an interest in said surplus. Because of the controversy defendant trustee paid the surplus into the office of the Clerk of Superior Court of Avery County.

(2) The Jakobsen payments were applied by defendant bank to another joint indebtedness of plaintiffs under authority given defendant bank in the collateral note.

(3) There was no agreement between the parties with respect to the sale of the corporate stock; that said stock along with other securities was sold at public sale and the proceeds were properly applied to an indebtedness of plaintiffs other than that secured by deed of trust on the Stokes County farm.

Simple arithmetic discloses that in the trial of this action plaintiffs would have to prevail on all three contentions before the debt would be extinguished and defendant bank declared not entitled to foreclose its deed of trust on the Stokes County farm.

The sole question before us is whether the trial court erred in denying plaintiffs' motion to extend the preliminary injunction until trial. In *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619 (1962) the court said: "It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only." In *Huggins v. Board of Education,* 272 N.C. 33, 157 S.E. 2d 703 (1967) the court held that "(w)hile this Court, upon an appeal from the granting or denial of a temporary injunction, is not bound by the findings of fact in the court below and may review the evidence and make its own finding of fact, the burden is upon the appellant to show error by the lower court." In *U-Haul Co. v. Jones,* 269 N.C. 284, 152 S.E. 2d 65 (1967), we find the following: "Ordinarily, a tem-

porary injunction will be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his 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 plaintiff's rights until the controversy between him and defendant can be determined." See also *Cablevision v. Winston-Salem,* 3 N.C. App. 252, 164 S.E. 2d 737 (1968).

In the case at bar the trial court concluded in effect that it was improbable, if not infeasible, that plaintiffs would prevail on all three of their contentions which would be necessary to extinguish the debt and release the property. After careful consideration of the record before us we too find such an improbability, therefore, the order denying the extension of the preliminary injunction is

Affirmed.

Judges GRAHAM and HEDRICK concur.

OLIVER RAY BARNES v. LACY LEE RORIE AND PEARLIE MAE WALDEN

No. 7219SC230

(Filed 28 June 1972)

1. Appeal and Error § 6— appeal from interlocutory orders — dismissal

The appellate court dismissed as premature plaintiff's attempted appeal from interlocutory orders striking from plaintiff's replies allegations concerning an insurance company and the reputation for wreckless driving and criminal record of defendant automobile driver, and allowing each defendant to file a "Reply to Plaintiff's Reply" alleging that plaintiff had waived his defense of the statute of limitations, since none of the interlocutory orders affected a substantial right and plaintiff will suffer no substantial harm if the trial court's orders are not reviewed by the appellate court prior to the trial of the cause on the merits.

2. Rules of Civil Procedure § 7; Trial § 5— pleadings — reading to jury

Pleadings are not to be read to the jury, unless otherwise ordered by the trial judge. G.S. 1A-1, Rule 7(d).

3. Pleadings § 32; Rules of Civil Procedure § 15— amendment of pleading to conform to evidence

Although the trial court struck plaintiff's allegation that defendant automobile owner was negligent in permitting defendant driver to use her automobile when she knew the driver's reputation for reckless driving, if upon the trial plaintiff offers evidence to support such theory, the court may then allow the pleadings to be amended to conform to the proof. G.S. 1A-1, Rule 15(b).

4. Pleadings § 17; Rules of Civil Procedure § 7— "Reply to a Reply" — counterclaim — statute of limitations — waiver

Although there is no such pleading as a "Reply to a Reply," G.S. 1A-1, Rule 7(a), plaintiff was not prejudiced by an order allowing defendants to file such a document alleging that plaintiff had waived the statute of limitations as a defense to defendants' counterclaims by filing his complaint, where the question of whether defendants' counterclaims are barred by the statute of limitations is appropriately presented and can be decided on the pleadings properly filed in the case.

APPEAL by plaintiff from *Johnston, Judge,* 13 December 1971 Session of Superior Court held in RANDOLPH County.

This civil action was commenced 26 May 1970 to recover $400.00 for damages to plaintiff's automobile resulting from a collision which occurred on 27 May 1967. Plaintiff alleged that an automobile owned by and registered in the name of the defendant, Pearlie Mae Walden, was being driven by the defendant, Lacy Lee Rorie, acting as her agent, when it struck and damaged plaintiff's parked vehicle, and that the collision was caused by the actionable negligence of the defendant driver. On 24 July 1970, within apt time as extended by a consent order, defendants filed answers and counterclaims, in which they admitted that the automobile which struck plaintiff's parked car was owned by and registered in the name of defendant Walden and was being driven by defendant Rorie with her consent, but denied other material allegations of the complaint. Defendants denied negligence on the part of the defendant driver, pleaded contributory negligence on the part of plaintiff in leaving his parked car unlighted and unattended at night on the main traveled portion of the highway, and counterclaimed for damages caused by plaintiff's actionable negligence. In these counterclaims defendant Rorie seeks recovery of $30,000.00 for personal injuries and defendant Walden seeks recovery of $1,200.00 for damages to her car.

Plaintiff filed replies alleging (1) that the counterclaims of defendants were barred by the statute of limitations, G.S. 1-52; (2) that the defendants had been persuaded to file the counterclaims by the agents and adjusters of the Security Insurance Company as a purported defense to plaintiff's claim; and (3) that defendant Walden was negligent in permitting defendant Rorie to use her automobile for the reason that he had the reputation, which was known to defendant Walden, of being reckless in his operation of an automobile. A "list of some of his [defendant Rorie's] criminal violations" was attached to the replies as an exhibit, which plaintiff asked to be incorporated into the replies.

The trial court allowed defendants' motions to strike from plaintiff's replies the allegations concerning the Security Insurance Company and concerning the reputation for reckless driving and the criminal record of defendant Rorie. The trial court also entered orders allowing each defendant to file "a Reply to Plaintiff's Reply," alleging that the counterclaims "arose out of the same cause of action as that in the complaint; and that by the filing of the complaint the Plaintiff waives his defense of Statutes of Limitations to the counterclaim."

To the entry of the orders striking the allegations from his replies and allowing each defendant to file a "Reply to Plaintiff's Reply," plaintiff excepted and gave notice of appeal.

Ottway Burton for plaintiff appellant.

W. Samuel Shaffer II for defendant appellees.

PARKER, Judge.

Rule 4 of the Rules of Practice in the Court of Appeals as adopted by our Supreme Court on 20 January 1971, is as follows:

"4. *Appeals—When Not Entertained.*

The Court of Appeals will not entertain an appeal:

From the ruling on an interlocutory motion, unless provided for elsewhere. Any interested party may enter an exception to the ruling on the motion and present the question thus raised to this Court on the final appeal; provided, that when any interested party conceives that he

will suffer substantial harm from the ruling on the motion, unless the ruling is reviewed by this Court prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order ruling on the motion."

[1] The orders from which plaintiff here attempts to appeal were rulings by the trial judge on interlocutory motions. No petition for writ of certiorari was filed. None of these interlocutory orders affected a substantial right and plaintiff will suffer no substantial harm if the trial court's rulings are not reviewed by this Court prior to the trial of the cause on its merits. Therefore, plaintiff's attempted appeal must be dismissed. *Gardner v. Brady,* 13 N.C. App. 647, 186 S.E. 2d 659.

[2-4] Pleadings are not to be read to the jury, unless otherwise ordered by the trial judge, G.S. 1A-1, Rule 7(d), and if upon the trial plaintiff offers evidence to support his alternative theory that the owner-defendant was liable because of negligence in allowing her car to be driven by a person known by her to be a reckless driver, the court may then allow the pleadings to be amended to conform to the proof, G.S. 1A-1, Rule 15(b). While there is no such pleading as a "Reply to a Reply," G.S. 1A-1, Rule 7(a), we perceive no harm to plaintiff in this case in the order allowing defendants to file such a document. The question of whether defendants' counterclaims are barred by the statute of limitations is in any event appropriately presented and can be decided on the pleadings properly filed in this case. (On this question, see: *Brumble v. Brown,* 71 N.C. 513; 1 McIntosh, N.C. Practice and Procedure, 2d, § 327.)

Fragmentary appeals serve principally to delay disposition of causes upon their merits. It is a sound policy of our law not to permit appeals from interlocutory orders unless they affect substantial rights in such manner that the party whose rights are adversely affected will suffer substantial harm if the interlocutory ruling is not reviewed by the appellate court prior to trial of the cause on its merits. On the present record, such is not the case. Plaintiff's attempted appeal is

Dismissed.

Judges BRITT and HEDRICK concur.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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§ 11.5. Exclusive and Hostile Possession Between Child and Parent

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APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Appeal from an order relieving defendant from making alimony and child support payments pending determination of defendant's motion for modification of a previous order is premature. *Moore v. Moore,* 165.

Appeal from an order allowing plaintiff to examine defendants for the purpose of securing information to draw a complaint is premature. *Williams v. Blount,* 139.

Appellate court dismissed as premature plaintiff's attempted appeal from interlocutory orders striking certain allegations from plaintiff's re-

APPEAL AND ERROR — Continued

APPEAL AND ERROR — Continued

Chapel Hill, 93; *Jackson v. Jackson*, 71; *Simmons v. Johnson*, 168.

Appeal is subject to dismissal where the record does not show the filing date of the documents included therein. *Clouse v. Motors, Inc.*, 117; *Simmons v. Johnson*, 168.

§ 44. Effect of Failure to File Brief

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§ 46. Presumptions and Burden of Showing Error

There is a presumption in favor of the correctness of the judgment appealed from. *Insurance Co. v. Poultry Co.*, 242.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

The exclusion of testimony cannot be held prejudicial where the record fails to show what the witness would have testified had he been permitted to answer. *Construction Co. v. Hamlett*, 57.

APPEARANCE

§ 2. Effect of Appearance

The defense of lack of jurisdiction over the person was not waived by defendants' request under Rule 6(b) for an enlargement of time in which to "file answer, motion or other pleadings." *Leasing, Inc. v. Brown*, 383.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Defendant was properly arrested without a warrant at scene of automobile collision for public drunkenness. *S. v. Gaddy*, 599.

§ 6. Resisting Arrest

Defendant did not use unreasonable amount of force in resisting an unlawful arrest by grabbing the officer's shirt pocket. *S. v. Allen*, 485.

§ 11. Liabilities on Bail Bond and Recognizances

A superior court judge erred in ruling that, as a matter of law, he could not review an order of bond forfeiture entered by another superior court judge. *S. v. Hawkins*, 129.

Trial court erred in entering judgment absolute against defendant's cash bond on the same day defendant failed to appear. *Ibid.*

ASSAULT AND BATTERY

§ 5. Assault with a Deadly Weapon

Evidence was sufficient for the jury in a prosecution for felonious assault. *S. v. Whitted*, 62.

§ 11. Indictment and Warrant

A warrant alleging that defendant assaulted his wife "by threatening to kill her and throwed rocks at her and shooting at her with a gun" charges a misdemeanor under G.S. 14-33, not a felony under any subparagraph of G.S. 14-32. *S. v. Harris*, 268.

ASSAULT AND BATTERY — Continued

§ 14. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in prosecution for felonious assault of automobile insurance company employee. *S. v. Hinton*, 253.

Evidence was sufficient for the jury in a prosecution for assault with a deadly weapon, a knife, committed upon a police officer. *S. v. Lipsey*, 246.

State's evidence was sufficient for the jury in a prosecution for assaulting a police officer with a firearm. *S. v. Norton*, 136.

Trial court properly denied defendant's motion to set aside a verdict of guilty of assault with a deadly weapon per se, inflicting serious injury, made upon the ground that defendant acted in self-defense. *State v. Martin*, 132.

Evidence was sufficient for jury in prosecution for felonious assault. *S. v. Foster*, 663.

There was fatal variance where indictment charged that defendant assaulted an officer while the officer was attempting to arrest defendant for drunken driving, and the evidence showed assault occurred while officer was attempting to arrest a passenger in the vehicle driven by defendant. *S. v. Allen*, 485.

§ 15. Instructions

In a prosecution for felonious assault, trial court committed prejudicial error in instructing the jury that "you will find that there was serious injury, if you believe the evidence as it all tends to show here, no question about the serious injury." *S. v. Whitted*, 62.

Evidence did not require trial court to instruct the jury on the right of an accused who quits the combat to invoke the right of self-defense upon renewal of the affray, even though he may have been at fault in bringing about the original difficulty. *S. v. Martin*, 132.

Trial court erred in refusing to instruct the jury on self-defense in prosecution for assault with a deadly weapon, a rock. *S. v. Beaver*, 459.

§ 17. Verdict and Punishment

Only one sentence could be imposed under a one-count bill of indictment for assault with a firearm on a police officer which named three officers as victims of the assault. *S. v. Norton*, 136.

Jury's verdict purporting to find defendant guilty of "attempted assault with a deadly weapon" was properly rejected by the court. *S. v. Currence*, 263.

AUTOMOBILES

§ 21. Sudden Emergency

Doctrine of sudden emergency. *Davis v. Connell*, 23.

§ 45. Relevancy and Competency of Evidence

Trial court properly refused to allow plaintiff to cross-examine the driver of defendant's car as to whether he had been convicted of an offense "growing out of this accident." *Freeman v. Hamilton*, 142.

§ 46. Opinion Testimony as to Speed

Admission of testimony as to speed of plaintiff's vehicle was not prejudicial error. *Wilson v. Young*, 631.

AUTOMOBILES — Continued

§ 49. Relevancy and Competency of Declarations and Admissions

Trial court did not err in permitting defendant's driver to testify that a passenger injured in the accident told him at the collision scene that "it's not your fault." *Freeman v. Hamilton,* 142.

§ 81. Dangerous Position In or On Vehicle

Plaintiff was contributorily negligent as a matter of law in riding on the two-inch blade of a motor grader. *Peeler v. Cruse,* 79.

§ 88. Sufficiency of Evidence of Contributory Negligence

Trial court properly submitted to the jury an issue of contributory negligence by plaintiff's intestate in operating her automobile with brakes which she had reason to know were defective. *Davis v. Connell,* 23.

§ 89. Sufficiency of Evidence of Last Clear Chance

Doctrine of last clear chance did not apply in an action for injuries received by plaintiff when he fell from the blade of a motor grader. *Peeler v. Cruse,* 79.

§ 90. Instructions in Accident Cases

Trial court committed prejudicial error in failing to relate the doctrine of sudden emergency and the evidence pertinent thereto to the issue of plaintiff's contributory negligence. *Davis v. Connell,* 23.

§ 94. Contributory Negligence of Passenger

Trial court committed prejudicial error in charging jury that in order to find negligence of a bus passenger it must find that negligence of the passenger was a proximate cause of the "collision" and resulting death. *Childs v. Dowdy,* 535.

§ 126. Competency of Evidence of Driving Under the Influence

Trial court properly permitted a breathalyzer operator to express his opinion as to defendant's condition based on his observation of and conversation with defendant. *S. v. Royall,* 214.

Opinion testimony as to whether one of the horses ridden by defendant some two hours prior to his arrest was "meaner to ride than the others" was not relevant in a drunken driving prosecution. *Ibid.*

Admission of hearsay testimony by breathalyzer operator that solution used in breathalyzer test was tested by the SBI laboratory was harmless error. *S. v. Allen,* 485.

Breathalyzer test result was not rendered inadmissible by failure of officer to advise defendant of his right to refuse to take test. *Ibid.*

§ 127. Sufficiency of Evidence of Driving Under the Influence

Evidence was sufficient for jury in prosecution for drunken driving. *S. v. Allen,* 485.

§ 129. Instructions in Prosecution for Driving Under the Influence

Trial court properly instructed the jury on presumptions created by a breathalyzer test result of .15. *S. v. Royall,* 214.

AUTOMOBILES — Continued

§ 134. Unlawful Taking Without Consent of Owner

Defendant may not be convicted of the offense of unlawfully taking an automobile when tried upon an indictment charging larceny of an automobile. *S. v. Campbell,* 633.

AVIATION

§ 4. Injury to Persons on Ground

Trial court should have submitted to the jury plaintiff's action to recover for personal injuries received when the propeller of defendant's airplane revolved suddenly as plaintiff moved it to spray paint behind it. *Flores v. Caldwell,* 144.

BANKS AND BANKING

§ 1. Control and Regulation

An applicant for a branch bank is not required to establish the existence of a specific unmet banking need which existing banks are unable or unwilling to provide as a prerequisite to establishment of a new facility. *Banking Comm. v. Bank,* 283.

Banking Commission properly approved an application to establish a branch bank. *Ibid.*

§ 11. Forged Instruments

Summary judgment was properly entered in favor of defendant insurance company in action by savings and loan association to recover an amount charged back against it by a bank as a result of an alleged forged endorsement on a bank draft issued by the insurance company. *Savings and Loan Assoc. v. Trust Co.,* 567.

BILL OF DISCOVERY

§ 2. Examination of Adverse Party to Obtain Information Necessary to Draft Pleadings

Where an order was entered in 1968 allowing plaintiff to examine defendants for the purpose of securing information to file a complaint, plaintiff need not move again for an adverse examination under the new Rules of Civil Procedure. *Williams v. Blount,* 139.

BROKERS AND FACTORS

§ 6. Right to Commissions

In an action against two individuals to recover a broker's fee which one defendant allegedly agreed to pay plaintiff for the acquisition of property conveyed to a corporation, plaintiff's evidence was sufficient to support recovery against one defendant but was insufficient to support recovery against the second defendant. *Construction Co. v. Hamlett,* 57.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Bill of indictment for felonious breaking and entering and larceny

BURGLARY AND UNLAWFUL BREAKINGS — Continued

was not invalidated when solicitor changed description of stolen property from "scrap copper" to "scrap bronze." *S. v. Haigler,* 501.

Amendment by solicitor of description of stolen property in felonious larceny and receiving counts did not invalidate charge for felonious breaking and entering. *Ibid.*

Indictment alleging that defendant broke and entered a building occupied by one Dairy Bar, Inc., Croasdaile Shopping Center in the County of Durham, described the premises with sufficient particularity. *S. v. Paschall,* 591.

§ 4. Competency of Evidence

In a prosecution for breaking and entering a river cabin and larceny of property therefrom, the trial court properly admitted a rifle stolen from the cabin and found in defendants' possession when arrested, notwithstanding the indictment did not charge defendants with larceny of the rifle. *S. v. Eppley,* 314.

A breathalyzer test is inadmissible in a prosecution for breaking and entering. *S. v. Wade,* 414.

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to support findings that defendant broke into and entered a building and that he intended to commit larceny therein, notwithstanding no property was taken. *S. v. Hunt,* 157.

State's evidence was sufficient for the jury in a prosecution for felonious breaking and entering. *S. v. Killian,* 446.

State's evidence was sufficient for the jury on the issue of defendant's guilt of felonious breaking and entering under the doctrine of recent possession. *S. v. Black,* 373.

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of nonfelonious breaking and entering, notwithstanding defendant stated he was drunk and thought he was in his own house. *S. v. Wade,* 414.

Evidence that a blanket and sheet taken from a river cabin were found at a public access area across a channel from an island occupied by defendants was insufficient to be submitted to the jury under the doctrine of recent possession. *S. v. Eppley,* 314.

Evidence was sufficient for jury to find that defendant broke and entered a dwelling house with intent to steal, although nothing was stolen. *S. v. Redmond,* 585.

State's evidence was sufficient for the jury in a prosecution for breaking and entering an automobile supply store. *S. v. Pittman,* 588.

§ 6. Instructions

In a prosecution for wrongful breaking or entering, trial court did not err in failing to instruct the jury that defendant's entry must have been "unlawful" where the court instructed that entry must have been without the owner's consent and wrongful. *S. v. Wade,* 414.

In a prosecution under an indictment charging felonious breaking *and* entering, trial court properly instructed the jury it could return a verdict of guilty if it found defendant broke *or* entered the premises. *S. v. Pittman,* 588.

CONSTITUTIONAL LAW — Continued

§ 30. Due Process in Trial

Defendant was not denied the right to a speedy trial where warrant was issued on day crime was committed in November 1970 and defendant was tried in August 1971. *S. v. Lucas*, 285.

Trial court properly denied defendant's motion to dismiss a homicide charge against him for lack of a speedy trial. *S. v. Brown*, 570.

§ 31. Right of Confrontation

Although the trial court in an armed robbery prosecution erred in admission of nontestifying co-defendant's extrajudicial confession which implicated defendant, such error was harmless beyond a reasonable doubt. *S. v. Bell*, 346.

§ 32. Right to Counsel

A condition of probation requiring defendant to reimburse the State for court-appointed counsel does not infringe defendant's constitutional right to counsel. *S. v. Huntley*, 236.

An indigent must accept counsel appointed by the court unless he desires to present his own defense. *S. v. Gibson*, 409.

An expression of unfounded dissatisfaction with court-appointed counsel does not entitle a defendant to the services of another court-appointed counsel. *Ibid.*

A juvenile has a right to appointed counsel in a juvenile delinquency proceeding. *In re Walker*, 356.

§ 33. Self-Incrimination

Failure of officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evidence. *State v. Allen*, 485.

CONTRACTS

§ 1. Essentials of Contract

Laws in force at the time of the execution of a contract become a part thereof. *Shoaf v. Shoaf*, 231.

§ 5. Parol Provisions

All of the terms of a contract for services need not be reduced to writing. *McMichael v. Motors, Inc.*, 441.

§ 12. Construction of Contracts

An interpretation given a contract by the parties themselves prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used. *Shoaf v. Shoaf*, 231.

§ 14. Contracts for Benefit of Third Parties

Third-party complaint filed by original defendants was insufficient to state a claim for relief for damages as third-party beneficiaries for breach of a contract between plaintiff and third-party defendant. *FCX, Inc. v. Bailey*, 149.

CONTRACTS — Continued

§ 27. Sufficiency of Evidence and Nonsuit

Testimony by plaintiff, when considered with a letter from defendant's sales manager to plaintiff stating that "for the next two consecutive years you are to be placed on the payroll at $700 per month, plus 5 percent of vehicle selling gross," held sufficient to establish all the essential elements of a two-year employment contract. *McMichael v. Motors, Inc.*, 441.

Employment contract was breached by the employer where the employee terminated his employment because his pay was reduced and he was told by the employer's president that the employer would not abide by the terms of the contract. *Ibid.*

COUNTIES

§ 9. Liability for Torts

Plaintiff was not entitled to recover for personal injuries sustained when she slipped and fell during rain on steps leading into a county courthouse. *Riggins v. County of Mecklenburg*, 624.

COURTS

§ 9. Jurisdiction of Superior Court after Order of Another Superior Court Judge

A superior court judge erred in ruling that, as a matter of law, he could not review an order of bond forfeiture entered by another superior court judge. *S. v. Hawkins*, 129.

§ 15. Criminal Jurisdiction of Juvenile Courts

The provisions of statute relating to "an undisciplined child" are not unconstitutionally vague or indefinite. *In re Walker*, 356.

Trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or notice was served on the juvenile or her parents. *In re McAllister*, 614.

CRIMINAL LAW

§ 2. Intent

Trial court's instructions on proof of intent were proper. *S. v. Norman*, 394.

§ 7. Entrapment

Defendant was not entrapped by an S.B.I. agent when the agent invited defendant to sell drugs to him "if defendant wanted to find drugs to sell." *S. v. Williams*, 431.

§ 18. Jurisdiction on Appeals to Superior Court

Appeal from conviction in superior court of driving while license was suspended is dimissed where record does not show the disposition of the case in district court. *S. v. Harold*, 172.

§ 21. Preliminary Proceedings

The trial court did not err in the denial of defendant's motion for a preliminary hearing. *S. v. Dix*, 328.

CRIMINAL LAW — Continued

A motion in arrest of judgment is not the proper method to attack the preliminary hearing. *S. v. Diaz*, 730.

§ 23. Plea of Guilty

Defendant's plea of guilty is vacated where the record fails to show affirmatively that the plea was entered freely, understandingly and voluntarily. *S. v. Ratliff*, 275; *S. v. Harris*, 268; *S. v. Harris*, 270.

It was not error for the trial court to accept defendant's plea without making findings that the plea was voluntary where defendant was questioned in open court as to the voluntariness by his own attorney. *S. v. Lindsey*, 266.

Judgments imposed upon defendant's pleas of guilty are affirmed where no fatal defect appears on the face of the record proper. *S. v. Gregory*, 276.

Fact that defendant may have thought that incompetent evidence would be used against him at his trial is not sufficient ground for setting aside defendant's plea of guilty. *S. v. Bell*, 346.

Plea of guilty was not rendered invalid by failure of court to advise defendant that, in addition to sentence of imprisonment, he could be fined up to $2000. *S. v. Crocker*, 654.

§ 25. Plea of Nolo Contendere

Failure of the trial court to inform defendant of the minimum sentence he could serve did not vitiate defendant's plea of nolo contendere. *S. v. Blake*, 367.

§ 33. Facts Relevant to Issues

Uncertainty in testimony of a restaurant cashier as to the date she cashed a check for a fellow employee which was in a cash box taken in a robbery, and uncertainty by operator of a grocery store as to the specific date he cashed the check, did not render testimony about the check inadmissible. *S. v. Pass*, 635.

§ 34. Evidence of Guilt of Other Offenses

Defendant was not prejudiced by testimony showing he was on parole where he subsequently testified and freely admitted that he was on parole at the time of the robbery. *S. v. Pass*, 635.

§ 42. Articles Connected with the Crime

A rifle found behind the apartment where deceased was killed some seven or eight hours after the crime occurred was not inadmissible on the ground of remoteness. *S. v. Wilson*, 399.

§ 50. Expert and Opinion Testimony

State's evidence established a sufficient chain of possession of substance purchased by undercover agent for testimony by State's chemist to be admitted, notwithstanding there was no showing as to what post office employees may have handled the package containing the substance while it was in the mails. *S. v. Jordan*, 453.

CRIMINAL LAW — Continued

§ 51. Qualification of Experts

There was ample evidence to support trial court's finding that a State's witness was an expert in the field of chemistry and the identification of narcotic drugs. *S. v. Jordan,* 453.

§ 64. Evidence as to Intoxication

A breathalyzer test result is inadmissible in a prosecution for breaking and entering. *S. v. Wade,* 414.

Breathalyzer test result was not rendered inadmissible by failure of officer to advise defendant of his right to refuse to take test. *S. v. Allen,* 485.

§ 66. Evidence of Identity by Sight

It will be presumed that the trial judge disregarded incompetent hearsay testimony given during a voir dire examination to determine admissibility of in-court identification testimony. *S. v. Sneed,* 468.

There was competent, clear and convincing evidence to support trial court's finding that in-court identifications of defendant were of independent origin and not based on pretrial confrontation. *Ibid.*

Robbery victim's in-court identification was not tainted by any unconstitutional pretrial identification. *S. v. Hinton,* 564.

Rape and robbery victim's in-court identification of defendant was not tainted by the fact that she saw defendant being brought into the police station shortly after the offenses occurred and immediately identified him to her husband. *S. v. Cole,* 733.

Where trial court had determined that there had been no illegal pretrial confrontation, trial court did not err in refusing to allow defense counsel to read excerpts from a case dealing with the effect of an illegal pretrial lineup and to argue that prosecutrix' in-court identification of defendant was tainted by an illegal pretrial confrontation at the police station. *Ibid.*

§ 71. Shorthand Statement of Facts

Testimony that "He was trying to get in a house. When he saw me, he turned around and ran through the yard," held competent as a shorthand statement of fact. *S. v. Sneed,* 468.

§ 73. Hearsay Testimony

Testimony by a State's witness that, immediately before she heard a shot, she heard deceased state, "Spike, don't shoot me. I ain't done nothing to you," held competent as part of the res gestae. *S. v. Wilson,* 399.

Admission of hearsay testimony by breathalyzer operator that solution used in breathalyzer test was tested by the SBI laboratory was harmless error. *S. v. Allen,* 485.

§ 75. Voluntariness and Admissibility of Confession

Statements made by defendant to a police officer were admissible for the purpose of impeaching defendant's trial testimony even though defendant had not been given the *Miranda* warnings, *S. v. Wilson,* 399, or had not waived his right to counsel. *S. v. Nobles,* 340.

CRIMINAL LAW — Continued

Statements made by defendant to an officer at the scene of a homicide are admissible even though defendant had not been given the *Miranda* warnings. *S. v. Wilson,* 399.

No written waiver of counsel was required by former statute for the admission of sheriff's testimony that defendant walked into the sheriff's office and voluntarily stated that he had shot decedent. *S. v. Wright,* 675.

§ 76. Determination of Admissibility of Confession

Trial court erred in finding that defendant was not indigent at the time of his in-custody interrogation and in admitting in-custody statements without a written waiver of counsel; however, the admission of such statements was harmless error beyond a reasonable doubt. *S. v. Wade,* 414.

§ 84. Evidence Obtained by Unlawful Means

No warrant was required for seizure of two pistols from defendant's car where officer opened the car door and saw the pistols lying on the seat in plain view. *S. v. Parks,* 97.

Defendants who were trespassers had no standing to challenge the lawfulness of a search of a river cabin which they occupied, notwithstanding the State relied on the doctrine of recent possession of stolen property found in the cabin. *S. v. Eppley,* 314.

Evidence was sufficient to support the trial court's finding that defendant freely and intelligently consented to a search of his home without a warrant. *S. v. Nobles,* 340.

An automobile passenger had no standing to object to a search of the automobile where the owner and operator consented to the search. *S. v. Harrison,* 450.

Sobriety tests would not be rendered inadmissible by the fact that defendant had been illegally arrested. *S. v. Gaddy,* 599.

§ 86. Credibility of Defendant

Solicitor's questions on cross-examination of defendant as to his convictions for prior offenses were proper. *S. v. Harris,* 478.

Rule that defendant may no longer be cross-examined as to indictments for criminal offenses other than that for which he is on trial does not apply to trials which occurred prior to 15 December 1971. *S. v. Jones,* 588.

Contention that testimony of accomplice was inadmissible on ground it amounted to a confession induced by expectation of leniency was without merit. *S. v. Jones,* 558.

§ 87. Direct Examination of Witnesses

The trial court did not abuse its discretion in permitting the State to ask its witness leading questions where the questions sought to elicit elaboration about matters already mentioned. *S. v. Allen,* 485.

§ 88. Cross-Examination

Police officer was properly allowed to testify that threats had been made against defendant's accomplice, a witness, for the purpose of

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

Trial court committed prejudicial error in limiting defense counsel's jury argument of three felony cases to thirty minutes. *S. v. Campbell*, 596.

Where trial court had determined that there had been no illegal pretrial confrontation, trial court did not err in refusing to allow defense counsel to read excerpts from a case dealing with the effect of an illegal pretrial lineup and to argue that prosecutrix' in-court identification of defendant was tainted by an illegal pretrial confrontation at the police station. *S. v. Cole*, 733.

§ 105. Motion for Nonsuit

Where defendant introduces evidence, the motion for nonsuit at the close of the State's evidence is waived. *S. v. Parks*, 97.

Defendant's motion for nonsuit at the close of all the evidence may not be considered by the appellate court where defendant's evidence was omitted from the record on appeal. *S. v. Paschall*, 591.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court did not err in instructing the jury that it must be "satisfied to a moral certainty of the truth of the charge," rather than that the jury must be "satisfied to a moral certainty of the truth of defendant's guilt of the charge." *S. v. Diaz*, 730.

§ 114. Expression of Opinion by Court in the Charge

In a prosecution for felonious assault, trial court committed prejudicial error in instructing the jury that "you will find that there was serious injury, if you believe the evidence as it tends to show here, no question about the serious injury." *S. v. Whitted*, 62.

Trial court did not express an opinion in instructing the jury on the importance of applying the law as given to them by the court. *S. v. Netcliff*, 100.

§ 115. Instructions on Lesser Degrees

Any error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged is not prejudicial to the defendant. *S. v. Simpson*, 456.

§ 116. Charge on Failure of Defendant to Testify

Absent a special request, trial judge is not required to instruct the jury that defendant's failure to testify does not create any presumption against him. *S. v. Royall*, 214.

§ 118. Charge on Contentions of the Parties

Although defendant did not testify or offer evidence, trial court did not err in stating defendant's contentions in its instructions. *S. v. Hayes*, 616.

Trial court did not express an opinion in stating the State's contention that defendant's statement to a witness constituted an admission of guilt of assault on a female at least. *S. v. Moss*, 629.

§ 122. Additional Instructions after Initial Retirement of Jury

Statements by the trial judge, in giving the jury further instructions after they had begun their deliberations, that it was necessary for him

CRIMINAL LAW — Continued

to leave early because of a previous engagement some 120 miles away, and that "I am going to have to let you go home and come back here in the morning and resume your deliberations on this case unless you think you can finish it in 5 minutes," *held* not to constitute prejudicial error. *S. v. Tudor,* 526.

§ 124. Sufficiency and Effect of Verdict

It is not required that the verdict be consistent. *S. v. Simpson,* 456.

Where defendant was charged in a two-count bill of indictment with the felonies of breaking and entering and larceny, committed as part of one transaction, acquittal of defendant on the breaking and entering charge did not require the court to set aside the jury's verdict finding defendant guilty of larceny. *S. v. Black,* 373.

Where defendant was charged in a two-count bill of indictment with possession and transportation of 56 grams of marijuana, failure of the jury to reach a verdict on the possession count did not invalidate the verdict on the transportation count. *S. v. Lindquist,* 361.

§ 126. Unanimity of Verdict

Trial judge is not required to charge that verdict must be unanimous absent a request for such instruction. *S. v. Hinton,* 564.

§ 127. Arrest of Judgment

Trial court properly denied defendant's motion in arrest of judgment for alleged defects and irregularities in the preliminary hearing. *S. v. Diaz,* 730.

§ 131. New Trial for Newly Discovered Evidence

Trial court properly denied defendant's motion for a new trial on the ground of newly discovered evidence—a notation in a police file—where the court found such evidence was cumulative and corroborative and would not likely have produced a different result. *S. v. Chambers,* 249.

Affidavits filed by defendant were insufficient to sustain his motion for a new trial on the ground of newly discovered evidence. *S. v. Lindsey,* 266.

Motion for new trial for newly discovered evidence was properly denied. *S. v. Andrews,* 662.

In order to obtain a new trial on the ground of newly discovered evidence, the movant must negative laches and show that the newly discovered evidence is more than merely cumulative of or contradictory to the evidence adduced at the trial, and that such evidence is competent. *S. v. Lipsey,* 246.

§ 134. Form and Requisites of Judgment

When the commitment fails to set forth the judgment correctly, the judgment itself controls, and defendant is not entitled to a new trial by reason of such variance. *S. v. Jackson,* 579.

§ 138. Severity of Sentence and Determination Thereof

Defendant is not entitled to benefit of the statute reducing punishment for possession of marijuana which was passed while defendant's appeal was pending. *S. v. Newkirk,* 53.

CRIMINAL LAW — Continued

An appellate court has no authority to review the adequacy of an inquiry made by a trial judge before imposing punishment. *S. v. Frazier*, 104.

Sentence must be credited with time defendant spent in confinement awaiting trial as a result of the charge against him. *S. v. Hinton*, 253.

Defendant's constitutional rights were not violated by imposition of a greater sentence in superior court than that imposed in district court. *S. v. Coffey*, 642.

Statutes requiring that credit be given on a prison sentence for time spent in custody awaiting trial and pending appeal are not retroactive and do not create an unlawful discrimination between defendants tried subsequent to their enactment and those tried prior thereto. *Pinyatello v. State*, 706.

§ 144. Correction of Judgment in Trial Court

Trial court had inherent power to make corrections of the Clerk's Worksheet of Judgment after term. *S. v. Jackson*, 579.

§ 145.1. Probation

A condition of probation requiring defendant to reimburse the State for court-appointed counsel does not infringe defendant's constitutional right to counsel. *S. v. Huntley*, 236.

Revocation of defendant's probation is vacated for failure of the trial court to make sufficient findings as to whether defendant's failure to make payments required by the probation judgment was wilful or without lawful excuse. *S. v. Neal*, 238; *S. v. Huntley*, 236.

Trial court properly found that defendant had wilfully violated the terms of probation judgments. *S. v. Johnson*, 279.

§ 154. Case on Appeal

Trial court properly excluded the Clerk's Worksheet of Judgment from the record on appeal. *S. v. Jackson*, 579.

§ 155.5. Docketing of Record in Court of Appeals

Appeal is subject to dismissal for failure to docket the record on appeal in apt time. *S. v. Barbee*, 173; *S. v. Griffith*, 177; *S. v. Johnson*, 279; *S. v. Guffey*, 281; *S. v. Davis*, 287; *S. v. Jackson*, 288; *S. v. Simpson*, 456.

Order extending time within which to serve case on appeal on the solicitor does not extend the time for docketing record on appeal. *S. v. Hunt*, 626.

Appeal is dismissed for failure to docket record within extended time allowed by trial court's order. *S. v. Jones*, 656.

Service of the case on appeal, service of any countercase or exceptions, and settlement of the case on appeal by the trial judge must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed by Rule 5. *S. v. Taylor*, 703.

A judge who was not the trial judge did not have authority to extend the time for service of the case on appeal. *Ibid.*

CRIMINAL LAW — Continued

As used in the rule relating to the authority to extend time for docketing the record on appeal, the words "trial tribunal" include any judge. *Ibid.*

§ 157. Necessary Parts of Record Proper

Appeal from conviction in superior court of driving while license was suspended is dismissed where record does not show the disposition of the case in district court. *S. v. Harold,* 172.

Appeal is subject to dismissal where the record contains no verdict and nothing to show the organization and jurisdiction of the trial court. *S. v. Gaddy,* 599.

§ 158. Presumptions as to Matters Omitted

Charge is presumed correct when not included in the record. *S. v. Haigler,* 501.

§ 159. Form and Requisites of Transcript

The proceedings should be set forth in the record on appeal in the order of time in which they occurred. *S. v. Lipsey,* 246.

Appellant has the duty to see that the record on appeal is properly made up. *S. v. Lindsey,* 266.

§ 161. Form of Exceptions and Assignments of Error

An assignment of error which attempts to present several questions of law is broadside and ineffective. *S. v. Daye,* 166.

An appeal is an exception to the judgment and presents the face of the record proper for review. *S. v. Gregory,* 276; *S. v. Harris,* 270.

§ 162. Objections and Exceptions to Evidence

Trial court did not err in failing to rule on defendant's objection to testimony which a State's witness started to give. *S. v. Fountain,* 82.

Admission of incompetent evidence was not ground for a new trial where there was no objection at the time the evidence was offered. *S. v. Harold,* 172.

§ 163. Exceptions and Assignments of Error to Charge

Assignment of error that the court erred "in failing to declare and explain the law arising upon the evidence" is broadside and ineffectual, *S. v. Black,* 373.

§ 166. The Brief

Assignment of error not brought forward in the brief is deemed abandoned. *S. v. Royall,* 214; *S. v. Harris,* 270.

Appeal is subject to dismissal where appellant's brief was not filed within the time allowed by the Rules. *S. v. Guffey,* 281.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Although the trial court in an armed robbery prosecution erred in admission of nontestifying co-defendant's extrajudicial confession which implicated defendant, such error was harmless beyond a reasonable doubt. *S. v. Bell,* 346.

CRIMINAL LAW — Continued

Trial court erred in finding that defendant was not indigent at the time of his in-custody interrogation and in admitting in-custody statements without a written waiver of counsel; however, the admission of such statements was harmless error beyond a reasonable doubt. *S. v. Wade*, 414.

Admission of hearsay testimony by breathalyzer operator that solution used in breathalyzer test was tested by the SBI laboratory was harmless error. *S. v. Allen*, 485.

The exclusion of evidence cannot be held prejudicial where the record fails to show what the excluded evidence would have been. *S. v. Diaz*, 730.

§ 170. Harmless and Prejudicial Error in Remarks of Court

Trial court did not commit prejudicial error in asking defendant if he had been fingerprinted before. *S. v. Dees* 110.

Comments and questions by the trial judge during the trial, while disapproved, did not constitute prejudicial error. *S. v. Cole*, 733.

§ 171. Error Relating to One Count of Crime Charged

Any error from proceeding as if the indictment contained breaking and entering and larceny counts when the indictment was sufficient to charge larceny only was not prejudicial where defendant was sentenced only for larceny. *S. v. Gore*, 645.

Defendant was not prejudiced by the denial of his motion to dismiss a count charging receiving stolen property where the court actually submitted only the larceny count to the jury and defendant was convicted of larceny only. *S. v. Shields*, 650.

§ 181. Post-Conviction Hearing

Errors which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. *S. v. Bell*, 346.

DAMAGES

§ 11. Punitive Damages

Plaintiff's claim for punitive damages in an action based on alleged fraud in the sale of an automobile was improperly dismissed. *Clouse v. Motors, Inc.*, 117.

DECLARATORY JUDGMENT ACT

§ 2. Nature and Grounds of Remedy

In an action for a declaratory judgment construing a purported trust instrument, failure of some of the defendants to file an answer to the complaint or to answer interrogatories did not entitle plaintiffs to a judgment against such defendants based on plaintiffs' conclusions and contentions as to the construction of the instrument. *Baxter v. Jones*, 296.

DEEDS

§ 14. Reservations and Exceptions

Grantor's reservation in a deed conveying 331 acres of the right to go on the land and remove sand and gravel from 35 acres to be laid out

DIVORCE AND ALIMONY — Continued

children now reside in another state and were not present in this State when the motion was filed. *Johnson v. Johnson,* 378.

§ 23. Support of Children of the Marriage

The legal obligation of a father to support his child now terminates when the child reaches the age of 18. *Crouch v. Crouch,* 49; *Shoaf v. Shoaf,* 231.

Trial court erred in requiring the father to pay counsel fees of the mother for a hearing upon a motion to increase the father's child support payments where there was no showing or finding that defendant was a dependent spouse. *Crouch v. Crouch,* 49.

Contracts between parents providing for support and educational expenses of their children in excess of their legal obligations are binding. *Shoaf v. Shoaf,* 231.

In entering a consent judgment requiring that defendant make payments for support of his son "until such time as said minor child reaches his majority," the parties intended that such payments should continue until the son reached the age of 21. *Ibid.*

Husband was not required to make child support payments pursuant to a court order if the wife and children resumed living with the husband. *Jackson v. Jackson,* 71.

§ 24. Custody of Children

Finding that defendant is a fit and proper person to have custody of a child supports the court's order giving defendant visitation privileges. *Gaddy v. Gaddy,* 226.

Evidence supported trial court's determination that custody of child should remain in the father, notwithstanding the court also found the mother had established a satisfactory home. *Jarman v. Jarman,* 531.

EASEMENTS

§ 3. Creation of Easement by Implication or Necessity

Supreme Court's decision did not determine that plaintiffs are entitled to a way of necessity over defendants' land as a matter of law, but only that evidence was sufficient for jury. *Oliver v. Ernul,* 540.

EJECTMENT

§ 7. Burden of Proof

In an action to remove cloud on title in which plaintiffs claim superior title from a common source, plaintiffs must fit the descriptions in their chain of title and in defendant's chain of title to the land claimed and show that the land claimed is embraced within their respective descriptions. *Allen v. Hunting Club,* 697.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Action of county commissioners in obtaining an order restraining defendants from using their property for a mobile home park in violation

EXECUTORS AND ADMINISTRATORS

§ 4. Appointment and Powers of Administrator

Although the administratrix of an estate had filed a final account which had been approved and confirmed, the clerk of court had no jurisdiction thereafter to appoint an administrator d/b/n of the estate, where the original administratrix had not resigned or been removed. *In re Estate of Overman,* 712.

§ 5. Attack on Appointment of Administrator

An insurance company which was sued by an administrator d/b/n purporting to act for an estate had standing to challenge the validity of the appointment of the administrator d/b/n. *In re Estate of Overman,* 712.

FOOD

§ 2. Liability of Retailer to Consumer

An implied warranty of fitness has now been extended by the U.C.C. to include a product's container, such as a soft drink bottle. *Gillispie v. Tea Co.,* 1.

Plaintiff's evidence was sufficient for the jury in an action to recover for breach of warranty for personal injuries sustained when two soft drink bottles allegedly exploded as they were being carried by plaintiff to the checkout counter in defendant's store. *Ibid.*

FORGERY

§ 2. Prosecutions and Punishment

State's evidence was sufficient for the jury in a prosecution for uttering a forged check on which defendant had changed the amount. *S. v. Gibson,* 409.

The second count of a bill of indictment was insufficient to charge the offense of uttering a forged money order where it contained no particular description of the money order. *S. v. Sutton,* 422.

To convict defendant of the felony of forging the endorsement of a money order with intent to defraud in violation of the second sentence of G.S. 14-120, it was not necessary to allege or prove forgery of the face of the money order, which would have been a separate felony. *Ibid.*

State's evidence was sufficient for jury in prosecution for uttering a forged money order. *S. v. Sutton,* 612.

State's evidence was sufficient for jury on issue of defendant's guilt of forgery and uttering a forged Social Security check. *S. v. Hunt,* 626.

FRAUD

§ 7. Constructive or Legal Fraud

The mere relationship of parent and child does not raise a presumption of fraud or undue influence in the execution of a deed by the parent to the child. *Cornatzer v. Nicks,* 152.

§ 13. Instructions and Damages

Plaintiff's claim for punitive damages in an action based on alleged fraud in the sale of an automobile was improperly dismissed. *Clouse v. Motors, Inc.,* 117.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

A sales record sheet signed by defendants and a plat attached thereto which specifically described the property sold at auction held sufficient, when construed together, to show all of the essential elements of a contract of sale. *Greenberg v. Bailey*, 34.

An auctioneer at a sale is the agent of both the seller and the buyer. *Ibid.*

GRAND JURY

§ 2. Nature and Functions of

Improper action of the grand jury in returning two fictitious bills of indictment charging undercover agents with narcotics violations did not require that the bill of indictment charging defendant with transportation of marijuana be quashed. *S. v. Long*, 508.

§ 3. Challenge to Composition of

Defendant's evidence failed to establish a prima facie case of systematic exclusion of Negroes from the grand jury or the petit jury. *S. v. Newkirk*, 53.

Objections to the composition of the grand jury are waived if not raised before plea. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 7. Liability of Contractor

Summary judgment was properly entered in favor of defendant contractor in an action to recover for damages to plaintiffs' property allegedly caused by defendant's blasting operations in the construction of a highway. *Millsaps v. Contracting Co.*, 321.

§ 11. Neighborhood Public Roads

Dirt road on defendants' property which leads to plaintiffs' property and dwelling was not a neighborhood public road. *Walton v. Meir*, 183.

HOMICIDE

§ 15. Competency of Evidence

Testimony by a State's witness that, immediately before she heard a shot, she heard deceased say, "Spike, don't shoot me. I ain't done nothing to you," held competent as part of the res gestae. *S. v. Wilson*, 399.

§ 17. Evidence of Threats, Motive and Malice

Testimony by a police officer that a previous witness told him that defendant said he shot "the dudes" because they were white was properly admitted for the purpose of corroborating testimony by the previous witness. *S. v. Netcliff*, 100.

§ 20. Physical Object as Demonstrative Evidence

A rifle found behind the apartment where deceased was killed some seven or eight hours after the crime occurred was not inadmissible on the ground of remoteness. *S. v. Wilson*, 399.

HOMICIDE — Continued

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in prosecution for second degree murder. *S. v. Parks,* 97; *S. v. Netcliff,* 100; *S. v. Nobles,* 340.

There was no fatal variance between an indictment alleging defendant killed decedent on May 24 and evidence that decedent died on June 4 from a shotgun wound inflicted by defendant on May 24. *S. v. Wright,* 675.

State's evidence did not establish as a matter of law that defendant acted in self-defense when he shot the victim. *Ibid.*

§ 28. Instructions on Defenses

Trial court sufficiently instructed the jury on the intensity of proof required of a defendant in order to establish the defense of self-defense. *S. v. Richardson,* 86.

§ 30. Submission of Lesser Degrees of Crime

Evidence did not require the court to instruct the jury on the lesser included offense of manslaughter. *S. v. Mays,* 90.

Error in submission of second degree murder was rendered harmless by a verdict of guilty of manslaughter. *S. v. Parks,* 97.

Trial court did not err in submitting to the jury the lesser included offense of manslaughter. *S. v. Richardson,* 86.

INDICTMENT AND WARRANT

§ 7. Form and Sufficiency of Indictment

The recital of the wrong county in the caption of an indictment does not constitute ground for arrest of judgment. *S. v. Royall,* 214.

§ 8. Joinder of Counts, Merger and Duplicity

Only one sentence could be imposed under a one-count bill of indictment for assault with a firearm on a police officer which named three officers as victims of the assault. *S. v. Norton,* 136.

When defendant moves in apt time to quash a warrant on the ground of duplicity, the solicitor may take a nol pros as to all the charges except one, or he may upon motion and leave of the court amend the warrant and state in separate counts the charges upon which he desires to proceed. *S. v. Beaver,* 459.

Trial court committed prejudicial error in denial of defendant's motion to quash on the ground of duplicity a warrant charging that defendant assaulted the prosecuting witness by shooting at him and by hitting him with a rock. *Ibid.*

§ 9. Charge of Crime

Indictment alleging that defendant broke and entered a building occupied by one Dairy Bar, Inc., Croasdaile Shopping Center in the County of Durham, described the premises with sufficient particularity. *S. v. Paschall,* 591.

§ 12. Amendment

The substance of a bill of indictment may not be amended by the court or the solicitor. *S. v. Haigler,* 501.

INFANTS — Continued

Trial court did not commit prejudicial error in proceeding with a juvenile hearing in the absence of the solicitor. *Ibid.*

A juvenile has a right to appointed counsel in a juvenile delinquency proceeding. *In re Walker*, 356.

The provisions of a statute relating to "an undisciplined child" are not unconstitutionally vague or indefinite. *Ibid.*

Finding that a 15-year-old juvenile missed 12 out of the first 26 days of school is insufficient to support the court's order committing the juvenile to the custody of the Board of Youth Development. *In re Peters*, 426.

Trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or notice was served on the juvenile or her parents. *In re McAllister*, 614.

Juvenile delinquency petition was signed and verified as required by law. *In re Colson*, 643.

INJUNCTIONS

§ 5. Injunction to Restrain Enforcement of Ordinance

Action for injunction is not the proper procedure for testing the validity of a municipal ordinance requiring topless dancers and waitresses to pay a license tax of $500 per year. *Lewis v. Goodman*, 582.

§ 14. Hearing on the Merits

In an action to have a road on defendants' property declared a neighborhood public road, the court erred in permanently enjoining plaintiffs from using or attempting to use the road. *Walton v. Meir*, 183.

§ 16. Liabilities on Bonds

A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined was not abrogated by the enactment of Rule of Civil Procedure 65. *Orange County v. Heath*, 44.

In seeking to recover damages arising out of the issuance of a restraining order which has been dissolved, a plaintiff may proceed by motion in the cause for judgment against defendant's injunction bond, or he may bring an independent action if there are grounds to recover damages not within the contemplation of the bond, such as for malicious prosecution, abuse of process or injury to business. *Electrical Workers Union v. Country Club East*, 745.

INSURANCE

§ 6. Construction and Operation of Policies

Question of whether "Retrospective Rating Plan" endorsements contained a provision for rate adjustment where cancellation was by the insurer for reasons other than nonpayment of premiums was not properly presented. *Insurance Co. v. Poultry Co.*, 242.

§ 44. Actions to Recover Disability Benefits

Evidence was insufficient to support a jury finding that plaintiff's heart disease prevented him "from performing each and every duty of

INSURANCE — Continued

his occupation" within the meaning of a disability insurance policy. *Taylor v. Casualty Co.*, 418.

§ 75. Collision Insurance: Subrogation and Action Against Tortfeasor

Plaintiff insurer properly joined in one action alternate claims against the insured and the alleged tortfeasor to recover an amount paid to the insured under a collision insurance policy for damage to his vehicle. *Ins. Co. v. Transfer, Inc.*, 481.

§ 79. Liability Insurance

Rule of Civil Procedure 26(b) authorizes pretrial discovery of information concerning automobile liability insurance. *Marks v. Thompson*, 272.

§ 128. Waiver of Forfeitures and Conditions of Fire Policy

Evidence was sufficient to show that an insurance adjuster waived the 60-day limitation for filing proof of loss and the 12-month limitation for instituting suit required by fire policy. *Vail v. Insurance Co.*, 726.

Testimony by head of an insurance adjusting company that his company was employed by defendant insurer to adjust plaintiffs' claim was competent to prove that an agency relationship existed between the insurer and the adjusting company for waiving of the 12-month limitation period. *Ibid.*

§ 136. Actions on Fire Policies

Insurance company was not liable under a fire policy on a house where named insured had no insurable interest and persons holding the title were not insured under the policy. *Pressley v. Casualty Co.*, 561.

INTOXICATING LIQUOR

§ 2. Beer and Wine Licenses

Sale of wine on one occasion by the licensee's employee to an allegedly intoxicated person did not establish a failure of the licensee to give the licensed premises proper supervision. *Watkins v. Board of Alcoholic Control*, 19.

Finding that the licensee's employee sold wine to an intoxicated person, without a finding that such sale was made "knowingly," is insufficient to sustain an order suspending a retail beer and wine license. *Ibid.*

Permits for the sale of fortified wines may not be granted in territories in which the electorate voted against the sale of beer and wine in a local option election held pursuant to the former statute. *Clark v. Board of Alcoholic Control*, 464.

JUDGMENTS

§ 6. Correction of Judgment in Trial Court

Trial court had inherent power to make corrections on the Clerk's Worksheet of Judgment after term. *S. v. Jackson*, 579.

§ 14. Sufficiency of Pleadings to Sustain Default

In an action for a declaratory judgment construing a purported trust instrument, failure of some of the defendants to file an answer to the

JUDGMENTS — Continued

complaint or to answer interrogatories did not entitle plaintiffs to a judgment against such defendants based on plaintiffs' conclusions and contentions as to the construction of the instrument. *Baxter v. Jones*, 296.

§ 40. Judgments of Nonsuit

Action commenced by plaintiff within one year after plaintiff had taken voluntary nonsuit in her original action against defendant was properly dismissed upon defendant's motion where plaintiff had not paid the costs in the original action at the time she commenced her new action. *Galligan v. Smith*, 220.

JURY

§ 7. Challenges

Defendant's evidence failed to establish a prima facie case of systematic exclusion of Negroes from the grand jury or the petit jury. *S. v. Newkirk*, 53.

Objections to the panel of the petit jury are waived if not raised before plea. *Ibid.*

Petit jury in trial of a 20-year-old defendant was not invalidated by fact that the jury list did not include names of persons under 21 years of age. *S. v. Long*, 508.

KIDNAPPING

§ 1. Prosecutions

There was sufficient "carrying away" to constitute the offense of kidnapping where a jailer was forced by defendant at gunpoint to go from the front door of the jail through numerous distinct portions of the building to the jail cells. *S. v. Dix*, 328.

LANDLORD AND TENANT

§ 13. Renewals and Extensions of the Lease

In an action for summary ejectment, the evidence was sufficient to raise the question whether the conduct of lessor, lessee and the purchaser of the property in question constituted a waiver of the requirement of the lease that the lessee notify lessor by registered mail at the appropriate time of his intention to renew and extend the original lease. *Treadwell v. Goodwin*, 685.

LARCENY

§ 2. Property Subject to Larceny

It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it is taken. *S. v. Eppley*, 314.

§ 3. Degrees of the Crime

The "market value" of a stolen item is used in determining whether the crime of larceny is felonious or nonfelonious. *S. v. Dees*, 110.

§ 4. Warrant and Indictment

A bill of indictment for felonious breaking and entering and felonious larceny was not invalidated when the solicitor changed the description of

LARCENY — Continued

the stolen property in the larceny count from "scrap copper" to "scrap bronze." *S. v. Haigler,* 501.

Indictment for larceny of property of "Ken's Quickie Mart" is fatally defective. *S. v. Roberts,* 648.

§ 6. Competency and Relevancy of Evidence

In a prosecution for breaking and entering a river cabin and larceny of property therefrom, the trial court properly admitted a rifle stolen from the cabin and found in defendants' possession when arrested, notwithstanding the indictment did not charge defendants with larceny of the rifle. *S. v. Eppley,* 314.

§ 7. Sufficiency of Evidence and Nonsuit

There was no fatal variance between a larceny indictment placing ownership of stolen goods in a corporation and evidence that the tools were personally owned by individual mechanics but were in possession of the corporation at the time of the theft. *S. v. Dees,* 110.

State's evidence was sufficient for the jury on the issue of defendant's guilt of felonious larceny under the doctrine of recent possession. *S. v. Black,* 373.

State's evidence was sufficient for the jury in a prosecution for the larceny of wedding rings accomplished by breaking and entering. *S. v. Killian,* 446.

There is no fatal variance where an indictment charges larceny of property from a specified person and the evidence discloses that such person was not the owner but was in lawful possession. *Ibid.*

There was sufficient evidence of concerted action to support a finding that defendants were in joint possession of a stolen rifle and stolen shotgun found in the bottom of a boat in which defendants were riding when arrested. *S. v. Eppley,* 314.

Evidence that a blanket and sheet taken from a river cabin were found at a public access area across a channel from an island occupied by defendants was insufficient to be submitted to the jury under the doctrine of recent possession. *Ibid.*

Evidence was sufficient for jury on issue of defendant's guilt of larceny of $35.00 from a service station cash register. *S. v. Butts,* 607.

§ 8. Instructions

Evidence that defendant sold the stolen tools for $50.00 had no relevance to the market value of the tools and did not require the court to submit to the jury an issue of nonfelonious larceny. *S. v. Dees,* 110.

Trial court did not err in failing to instruct the jury on lesser included offenses of nonfelonious breaking and entering and nonfelonious larceny. *S. v. Eppley,* 314.

Although the only evidence in this larceny prosecution as to the value of the property stolen was the opinion of its owner that it had a fair market value of "about $325.00," the trial court did not err in submitting to the jury an issue of the misdemeanor of larceny of personal property of the value of less than $200.00. *S. v. Simpson,* 456.

The trial court adequately instructed the jury on the principle that the inference of guilt arising from the possession of recently stolen prop-

MASTER AND SERVANT — Continued

of vehicle selling gross," held sufficient to establish all the essential elements of a two-year employment contract. *Ibid.*

§ 9. Actions to Recover Compensation

Employment contract was breached by the employer where the employee terminated his employment because his pay was reduced and he was told by the employer's president that the employer would not abide by the terms of the contract. *McMichael v. Motors, Inc.*, 441.

§ 17. Strikes and Picketing

Disobedience to a void restraining order preventing picketing is not punishable. *Electrical Workers Union v. Country Club East*, 744.

§ 19. Liabilities of Main Contractor to Employees of Independent Contractor

General contractor was not liable for injuries of employee of subcontractor. *Rivenbark v. Construction Co.*, 609.

§ 60. Workmen's Compensation: Personal Missions

The death of a scientific director of a poultry company who was attending a convention and was shot to death during a robbery after he left the convention hotel did not arise out of and in the course of his employment. *Foster v. Poultry Industries*, 671.

§ 65. Compensation for Back Injury

Industrial Commission did not err in finding that plaintiff did not sustain an injury by accident when he suffered a back injury while attempting to lift a 150-pound brace over some cables in order to bring a steel frame into his work area. *Garmon v. Tridair Industries*, 574.

§ 90. Notice to Employer of Accident

Plaintiff failed to provide a reasonable excuse to justify his failure to give written notice to his employer within 30 days of the accident. *Garmon v. Tridair Industries*, 574.

MINES AND MINERALS

§ 1. Nature and Incidents of Title to Minerals

Commercial gravel is not regarded as a mineral under the mining laws of this State. *Builders Supplies Co. v. Gainey*, 678.

Grantor's reservation in a deed conveying 331 acres of the right to go on the land and remove sand and gravel from 35 acres to be laid out by the grantor constituted a profit a prendre in gross. *Ibid.*

Plaintiff was estopped by the doctrine of laches from removing sand and gravel under a profit a prendre reserved in a deed. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 19. Injunction Against Foreclosure and Sale

Trial court properly denied plaintiff's motion to extend until trial a preliminary injunction restraining defendants from selling a farm under a deed of trust foreclosure on the ground that the indebtedness on the

MORTGAGES AND DEEDS OF TRUST — Continued

farm had been discharged because of funds received by defendant from three sources. *Lackey v. Mitchell*, 748.

MUNICIPAL CORPORATIONS

§ 11. Discharge of Employees

Twelve-month probationary period of police officer in New Bern began on the date on which he began to serve as an officer and not on date of his conditional appointment. *Speck v. New Bern*, 554.

Superior court erred in remanding a civil service proceeding on the dismissal of a police officer to the civil service board for a hearing de novo. *In re Winkler*, 658.

§ 12. Liability for Torts

A municipal corporation's governmental immunitiy against a claim for damages by a party wrongfully restrained or enjoined was not abrogated by the enactment of Rule of Civil Procedure 65. *Orange County v. Heath*, 44.

§ 14. Injuries in Connection with Streets and Sidewalks

Plaintiff's evidence was insufficient to permit a finding of negligence on the part of a municipality in an action to recover for injuries sustained when plaintiff stepped on the metal cover of a water meter built into a municipal sidewalk and the cover tilted and caused her to fall. *Rogers v. Asheville*, 514.

§ 30. Zoning Ordinances and Building Permits

It was not error for a municipal board of aldermen to admit unsworn testimony and otherwise depart from the rules of evidence in a hearing upon application for a special use permit. *Carter v. Town of Chapel Hill*, 93.

Action of county commissioners in obtaining an order restraining defendants from using their property for a mobile park in violation of a zoning ordinance thereafter determined to be void did not constitute a taking of defendant's property. *Orange County v. Heath*, 44.

Trial court properly found that construction of a lounge for pilots would constitute an expansion or enlargement of the airport facilities in violation of a municipal zoning ordinance prohibiting a nonconforming use. *City of Brevard v. Ritter*, 207.

Operation of a private airport and construction of a pilot's lounge and auxiliary hangar do not constitute recreational uses within the meaning of a municipal zoning code provision. *Ibid.*

NARCOTICS

§ 2. Indictment

Indictment charging sale of marijuana must allege the name of the purchaser. *S. v. Long*, 508.

§ 3. Competency and Relevancy of Evidence

State's evidence established a sufficient chain of possession of substance purchased by undercover agent for testimony by State's chemist

NARCOTICS — Continued

to be admitted, notwithstanding there was no showing as to what post office employees may have handled the package while it was in the mails. *S. v. Jordan,* 453.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in prosecution of motel manager for possession of heroin found in an unrented motel room. *S. v. Sutton,* 161.

State's evidence was sufficient for jury in prosecution for possession and sale of heroin. *S. v. Geddie,* 171.

State's evidence was sufficient for the jury in a prosecution for possession of heroin. *S. v. Foye,* 200.

State's evidence was sufficient for jury in a prosecution for possession of heroin by a passenger of an automobile. *S. v. Harrison,* 450.

In a prosecution for selling barbiturates, it is not incumbent on the State to negative the provisions of the statute exempting from the definition of "barbiturate drug" certain compounds which contain barbiturates. *S. v. Williams,* 431.

State's evidence was sufficient for jury in prosecution for transporting marijuana found in two match boxes under the front seat of a car owned and operated by defendant. *S. v. Lindquist,* 361.

State's evidence was sufficient for jury on issue of defendant's guilt of possession of heroin found in apartment bathroom. *S. v. Romes,* 602.

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of giving away stimulant drugs. *S. v. Hayes,* 616.

Evidence was sufficient to support jury finding that defendant was in possession of LSD tablets found in refrigerator. *S. v. Campbell,* 493.

§ 4.5. Instructions

Trial court did not express an opinion on the evidence when it instructed the jury that the driver of an automobile is guilty of transporting marijuana if he knowingly carries in his automobile marijuana belonging to and in the custody of his passengers, and properly instructed the jury that exclusive control over an automobile is a circumstance to be considered in determining whether defendant has knowledge and control over narcotics found therein. *S. v. Lindquist,* 361.

The trial court did not err in instructing the jury that a person possesses a narcotic drug "when he has either by himself or together with others the power and intent to control the disposition or use of the drug." *S. v. Romes,* 602.

§ 5. Verdict and Punishment

A defendant convicted of an offense of possessing marijuana, *S. v. Newkirk,* 53, or of transporting marijuana, *S. v. Lindquist,* 361, or of selling barbiturates, *S. v. Williams,* 431, committed prior to 1 January 1972, the effective date of the Controlled Substances Act, is not entitled to the benefit of the more lenient punishment provisions of the new Act.

Where defendant was charged in a two-count bill of indictment with possession and transportation of 56 grams of marijuana, failure of the

NARCOTICS — Continued

jury to reach a verdict on the possession count did not invalidate the verdict on the transportation count. *S. v. Lindquist,* 361.

Punishment for unlawful transportation of narcotics under former act was not limited to confiscation of the vehicle used in such transportation. *S. v. Long,* 508.

NEGLIGENCE

§ 2. Negligence Arising from Performance of Contract

Plaintiff's evidence was insufficient to show actionable negligence on the part of defendant in the performance of a contract with a third party to construct a gravity sewer line which was to connect with a sewer lift station that plaintiff had contracted to construct for the third party. *Construction Co. v. Holiday Inns,* 475.

§ 5. Dangerous Machinery

Trial court should have submitted to the jury plaintiff's action to recover for personal injuries received when the propeller of defendant's airplane revolved suddenly as plaintiff moved it to spray paint behind it. *Flores v. Caldwell,* 144.

§ 12. Doctrine of Last Clear Chance

The doctrine of last clear chance is applicable when both plaintiff and defendant have been negligent and the defendant has time, after the respective negligences have created the hazards, to avoid the injury. *Peeler v. Cruse,* 79.

§ 35. Nonsuit for Contributory Negligence

Plaintiff was contributorily negligent as a matter of law in riding on a two-inch blade of a motor grader. *Peeler v. Cruse,* 79.

§ 39. Instructions on Last Clear Chance

Doctrine of last clear chance did not apply in an action for injuries received by plaintiff when he fell from the blade of a motor grader. *Peeler v. Cruse,* 79.

§ 53. Duties and Liabilities to Invitees

Trial court failed to declare and explain the law arising on evidence in an action by an invitee to recover for injuries allegedly suffered in defendant's store when plaintiff was struck by objects which flew from a planter being assembled by defendant's employee. *Redding v. Woolworth Co.,* 12.

§ 57. Sufficiency of Evidence in Actions by Invitees

Summary judgment was properly allowed in favor of defendants in an action to recover for injuries allegedly sustained by plaintiff when cartons of soft drink bottles in a display in a grocery store fell to the floor. *Peterson v. Winn-Dixie,* 29.

Plaintiff's evidence was insufficient for jury in an action to recover for personal injuries sustained when a car in a junkyard fell on plaintiff. *Haney v. Cochrane,* 259.

OBSTRUCTING JUSTICE

Evidence that defendant was arguing with an officer and protesting seizure of an unopened bottle of liquor was insufficient for jury on issue of defendant's guilt of obstructing an officer while the officer was attempting to arrest defendant's companion for drunken driving. *S. v. Allen,* 485.

PARENT AND CHILD

§ 2. Liability of Parent or Child for Injury of Other

Unemancipated minor child is precluded by doctrine of parental immunity from maintaining an action against a stepparent for personal injuries negligently inflicted. *Mabry v. Bowen,* 646.

§ 6. Right to Custody of Minor Child

The mother of an illegitimate child is entitled as a matter of law to regain custody of the child from an aunt and uncle with whom she had left the child. *In re Jones,* 334.

After the natural mother has permitted a child to be adopted by others, her right to custody of the child is no greater than that of a stranger to the child. *Rhodes v. Henderson,* 404.

Trial court's findings were insufficient to justify the court's order removing a child from the custody of its adoptive parents and granting custody to the natural mother. *Ibid.*

Trial court properly awarded custody of children to their father, the sole surviving parent. *Vaughn v. Tyson,* 548.

§ 7. Duty to Support Child

The legal obligation of a father to support his child now terminates when the child reaches the age of 18. *Crouch v. Crouch,* 49; *Shoaf v. Shoaf,* 231.

PARTIES

§ 8. Joinder of Additional Parties

Plaintiff insurer properly joined in one action alternate claims against the insured and the alleged tortfeasor to recover an amount paid to the insured under a collision insurance policy for damage to his vehicle. *Ins. Co. v. Transfer, Inc.,* 481.

PARTITION

§ 6. Appeal

Respondents in a partitioning proceeding may not appeal from an order entered in the superior court dismissing their co-respondents' appeal to superior court. *Poston v. Ragan,* 134.

PLEADINGS

§ 1. Filing and Service of Complaint

Order extending time within which to file a complaint was not rendered invalid by the fact that the application for the extension did not request permission to file the complaint "within 20 days" and the order did not state the nature and purpose of the action. *Morris v. Dickson,* 122.

PLEADINGS — Continued

Motion for extension of time to file complaint and order granting the extension were insufficient in failing to state the nature and purpose of the action. *Atkinson v. Realty Co.*, 638.

§ 40. Office and Necessity of Reply

Where husband filed no reply to wife's counterclaim, trial court properly allowed husband to introduce evidence as a defense to the counterclaim and to file a reply to the counterclaim conforming to the evidence already presented. *Johnson v. Johnson*, 40.

Although there is no such pleading as a "Reply to a Reply," plaintiff was not prejudiced by an order allowing defendants to file such a document. *Barnes v. Rorie*, 751.

§ 32. Motions to be Allowed to Amend

Trial court did not abuse its discretion in permitting defendant to amend her answer during the trial to allege that the collision was caused by defective brakes on the automobile driven by plaintiff's intestate. *Davis v. Connell*, 23.

Motion for leave to file an amended complaint is addressed to the discretion of the trial court. *Flores v. Caldwell*, 144.

Defendant did not waive his right to move to amend his answer to allege the statute of limitations by failing to make such motion until some 20 months after the action was commenced. *Galligan v. Smith*, 220.

§ 33. Scope of Amendment to Pleadings

Where husband filed no reply to wife's counterclaim, trial court properly allowed husband to introduce evidence as a defense to the counterclaim and to file a reply to the counterclaim conforming to the evidence already presented. *Johnson v. Johnson*, 40.

§ 34. Amendment as to Parties

Where plaintiff filed a complaint against a corporate defendant not involved in the alleged tort and not in existence at the time of the incident in question, an amended complaint naming the correct corporate defendant filed after the statute of limitations had run did not relate back to the original amendment, and the action was barred by the statute of limitations. *Teague v. Motor Co.*, 736.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

While the fact of agency may not be proved by testimony of declarations of the alleged agent, the agent himself may testify at the trial as to the fact of agency. *Vail v. Insurance Co.*, 726.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officer to Private Individual

Commissioner of Agriculture cannot be held liable for failure to require soybean dealer to obtain a permit and furnish bond. *Etheridge v. Graham*, 551.

RAPE

RECEIVING STOLEN GOODS

REGISTRATION

ROBBERY

possession of the service station's money box prior to any contact with the attendant, where defendant also removed money from the person of the attendant by the use of a firearm. *S. v. Fountain*, 82.

There was a fatal variance between the indictment and proof in an armed robbery prosecution where the evidence shows that the victim named in the indictment stepped into a robbery already in progress and that defendant shot her, not in an attempt to rob her, but because she sprayed gas in his face. *S. v. Hinton*, 253.

State's evidence was sufficient for jury on question of defendant's identification as one of the persons who committed an armed robbery. *S. v. Wilson*, 256.

Evidence was sufficient to permit an inference that money was taken at gunpoint with the intent to deprive the owner of the money permanently and convert it to defendant's own use. *Ibid.*

State's evidence was sufficient for jury in prosecution for armed robbery of motel night auditor. *S. v. Long*, 653.

Evidence was sufficient to support jury verdict finding defendant guilty of common law robbery. *S. v. Tudor*, 526.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

The evidence in a prosecution for attempted armed robbery did not support an instruction on common law robbery where there was no evidence that property was actually taken. *S. v. Duncan*, 113.

In a prosecution for attempted armed robbery, the trial court erred in failing to submit to the jury the lesser included offense of assault. *Ibid.*

Evidence in an armed robbery prosecution did not require submission of nonfelonious larceny. *S. v. Wilson*, 256.

Trial court's instructions on force as an element of common law robbery were sufficient. *S. v. Harris*, 478.

RULES OF CIVIL PROCEDURE

§ 3. Commencement of Action

Where plaintiff commenced action in 1968 by issuance of summons in accordance with the former statute, but has not yet filed a complaint, she is not required to recommence her action in accordance with the new Rules of Civil Procedure. *Williams v. Blount*, 139.

Order extending time within which to file a complaint was not rendered invalid by the fact that the application for the extension did not request permission to file the complaint "within 20 days" and the order did not state the nature and purpose of the action. *Morris v. Dickson*, 122.

Motion for extension of time to file complaint and order granting the extension were insufficient in failing to state the nature and purpose of the action. *Atkinson v. Realty Co.*, 638.

§ 6. Time to File Complaint

Trial court erred in denial of defendant's motion to dismiss and in enlarging the time allowed plaintiff to file his complaint after plaintiff

RULES OF CIVIL PROCEDURE — Continued

§ 27. Depositions Before Action

Where an order was entered in 1968 allowing plaintiff to examine defendants for the purpose of securing information to file a complaint, plaintiff need not again move for an adverse examination under the new Rules of Civil Procedure. *Williams v. Blount,* 139.

§ 39. Trial by Jury or by the Court

Where defendant did not demand a jury trial in apt time, the allowance of a jury trial was within the discretion of the trial court. *Rose & Day, Inc. v. Cleary,* 125.

§ 41. Dismissal of Actions

Action commenced by plaintiff within one year after plaintiff had taken voluntary nonsuit in her original action against defendant was properly dismissed upon defendant's motion where plaintiff had not paid the costs in her original action at the time she commenced her new action. *Galligan v. Smith,* 220.

§ 50. Motion for Directed Verdict and Judgment Notwithstanding Verdict

Defendants waived their motions for directed verdicts made at the close of plaintiff's evidence by offering evidence. *Woodard v. Marshall,* 67.

Appellate court could order a directed verdict in favor of defendants where defendants had properly moved for a directed verdict at the close of all the evidence and for judgment notwithstanding the verdict. *Poole v. Buick Co.,* 721.

§ 51. Instructions to Jury

Trial court did not err in refusing to give special instructions requested in writing by plaintiff after the jury had deliberated for three hours. *Freeman v. Hamilton,* 142.

§ 55. Default Judgments

In an action for a declaratory judgment construing a purported trust instrument, failure of some of the defendants to file an answer to the complaint or to answer interrogatories did not entitle plaintiffs to a judgment against such defendants based on plaintiffs' conclusions and contentions as to the construction of the instrument. *Baxter v. Jones,* 296.

§ 56. Summary Judgment

Statements in plaintiff's affidavit as to why she "thinks" cartons of soft drinks in a grocery store display fell cannot be considered in ruling on motion for summary judgment. *Peterson v. Winn-Dixie,* 29.

Plaintiff may not rely on the bare allegations of her complaint where defendants' motions for summary judgment are supported as provided in Rule 56. *Ibid.*

It is not required that all affidavits offered at a hearing on a motion for summary judgment be attached to and served with the motion. *Millsaps v. Contracting Co.,* 321.

Trial court had no authority to provide in its judgment denying plaintiffs' motion for summary judgment that the court would enter summary judgment in favor of plaintiffs if it were decided on appeal that the

RULES OF CIVIL PROCEDURE — Continued

instrument in question created a trust as contended by plaintiffs. *Baxter v. Jones,* 296.

When evidence supporting a motion for summary judgment is insufficient to establish lack of a triable issue of fact, opposing party need not present counter-affidavits or other material. *Oliver v. Ernul,* 540.

§ 60. Relief from Judgment

Motion under Rule 60 to set aside the judgment on the ground that a witness for plaintiff had perjured himself was properly made in the Court of Appeals. *Rhodes v. Henderson,* 404.

SALES

§ 1. Requisites and Construction of Sales Contract

A sale of soft drinks occurred within the meaning of the U.C.C. when the purchaser took the drinks into his possession with the intention of paying for them at the cashier's counter. *Gillispie v. Tea Co.,* 1.

§ 6. Implied Warranty

An implied warranty of fitness has now been extended by the U.C.C. to include a product's container, such as a soft drink bottle. *Gillispie v. Tea Co.,* 1.

Time of payment is not determinative of the question of when a sale takes place; if there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise. *Ibid.*

§ 13. Action to Rescind and Recover Purchase Price

Plaintiff was not entitled to recover from an automobile dealer under a theory of rescission of contract of sale of an automobile that had been used for 17 months and 30,000 miles. *Cooper v. Mason,* 472.

Plaintiff's evidence was insufficient for the jury in an action to rescind an automobile purchase contract where it failed to show plaintiff gave defendant any notice of revocation of his acceptance of the automobile. *Poole v. Buick Co.,* 721.

§ 17. Sufficiency of Evidence in Action for Breach of Warranty

Plaintiff's evidence was sufficient for the jury in an action to recover for breach of warranty for personal injuries sustained when two soft drink bottles allegedly exploded as they were being carried by plaintiff to the checkout counter in defendant's store. *Gillispie v. Tea Co.,* 1.

Plaintiff's evidence was insufficient to support recovery against an automobile manufacturer and automobile dealer on theory of breach of implied warranty of fitness. *Cooper v. Mason,* 472.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Defendants who were trespassers had no standing to challenge the lawfulness of a search of a river cabin which they occupied, notwithstanding the State relied on the doctrine of recent possession of stolen property found in the cabin. *S. v. Eppley,* 314.

SEARCHES AND SEIZURES — Continued

Defendants were not prejudiced by the trial court's denial of their motion for a voir dire examination on the question of the legality of a search of a river cabin which they occupied where the evidence shows defendants were trespassers on the premises. *Ibid.*

No warrant was required for seizure of two pistols from defendant's car where an officer opened the car door and saw the pistols lying on the seat in plain view. *S. v. Parks,* 97.

§ 2. Consent to Search Without a Warrant

Evidence was sufficient to support the trial court's finding that defendant freely and intelligently consented to a search of his home without a warrant. *S. v. Nobles,* 340.

The evidence supported the trial judge's finding that defendant freely and intelligently consented to an officer's search of his automobile. *S. v. Lindquist,* 361.

An automobile passenger had no standing to object to a search of the automobile where the owner and operator consented to the search. *S. v. Harrison,* 450.

§ 3. Requisites and Validity of Search Warrant

Affidavit of an ABC officer based on information from a confidential informant was sufficient to support the issuance of a warrant to search defendant's premises for narcotics. *S. v. Foye,* 200.

Warrant authorizing a search for "narcotic drugs, the possession of which is a crime" described the contraband with sufficent particularity. *Ibid.*

Affidavit of SBI agent was insufficient to support finding of probable cause for issuance of warrant to search for narcotics. *S. v. Campbell,* 493.

STATE

§ 4. Actions Against the State

Superior court had no jurisdiction over action for damages against Department of Agriculture based on failure of Commissioner of Agriculture to require soybean dealer to obtain a permit and furnish bond. *Etheridge v. Graham,* 551.

§ 8. Negligence of State Employee and Contributory Negligence of Person Injured

Evidence was sufficient for jury in action for wrongful death of plaintiff's intestate when she was struck by dump truck which was backing into dumping area on land owned by decedent and her husband. *Cogburn v. Highway Comm.,* 544.

Evidence supported finding by Industrial Commission that deceased was contributorily negligent in colliding with Highway Commission motor grader. *Barney v. Highway Comm.,* 740.

TAXATION

§ 38. Remedies of Taxpayer Against Collection of Tax

Action for injunction is not the proper procedure for testing the validity of a municipal ordinance requiring topless dancers and waitresses to pay a license tax of $500 per year. *Lewis v. Goodman,* 582.

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof

In order to recover damage for the wrongful cutting and removal of timber, plaintiff must show title by one of the methods set forth in *Mobley v. Griffin,* 104 N.C. 112, that he is the owner of the land from which the timber was cut. *Woodard v. Marshall,* 67.

Evidence that plaintiff's father conveyed land to plaintiff in 1935 and that the timber in controversy was cut from land embraced within the description in plaintiff's deed was insufficient to establish title in plaintiff by one of the approved methods. *Ibid.*

Plaintiffs failed to establish superior title to the land in controversy from a common source where they failed to show that land claimed by defendant is the land described in the complaint or to connect defendant or the land to which he claims title to the common suorce. *Allen v. Hunting Club,* 697.

TRIAL

§ 3. Motion for Continuance

Trial court did not err in denial of defendant's motion for continuance when plaintiff was allowed to introduce evidence as to defendant's counterclaim and to file a reply conforming to the evidence introduced. *Johnson v. Johnson,* 40.

§ 5. Course and Conduct of Trial

Pleadings are not to be read to the jury, unless otherwise ordered by the trial judge. *Barnes v. Rorie,* 751.

§ 14. Reopening Case for Additional Evidence

Trial court did not abuse its discretion in allowing plaintiff to introduce further evidence after both parties had rested. *Rose & Day, Inc. v. Cleary,* 125.

§ 33. Statement of Evidence and Application of Law Thereto in Instructions

Trial court failed to declare and explain the law arising on evidence in an action by an invitee to recover for injuries allegedly suffered in defendant's store when plaintiff was struck by objects which flew from a planter being assembled by defendant's employee. *Redding v. Woolworth Co.,* 12.

§ 49. New Trial for Newly Discovered Evidence

Motion under Rule 60 to set aside the judgment on the ground that a witness for plaintiff had perjured himself was properly made in the Court of Appeals. *Rhodes v. Henderson,* 404.

TRUSTS

§ 1. Creation of Written Trusts

Paperwriting signed by decedent was insufficient to create a trust for the management of decedent's property during her lifetime or for delivery of any part thereof to her step-children after her death. *Baxter v. Jones,* 296.

§ 14. Creation of Constructive Trusts

In the absence of fraud or other ground for equitable relief, a grantor may not impose a parol trust on land which he conveys by deed purporting to vest title in the grantee. *Cornatzer v. Nicks,* 152.

§ 19. Sufficiency of Evidence in Action to Establish Trust

Plaintiff's evidence on motion for summary judgment was insufficient to show a fiduciary relationship between plaintiff and her son at the time plaintiff conveyed property to the son and his wife. *Cornatzer v. Nicks,* 152.

UNIFORM COMMERCIAL CODE

§ 11. Construction and Definition of Sales

A sale of soft drinks occurred within the meaning of the U.C.C. when the purchaser took the drinks into his possession with the intention of paying for them at the cashier's counter. *Gillispie v. Tea Co.,* 1.

§ 15. Warranties

An implied warranty of fitness has now been extended by the U.C.C. to include a product's container, such as a soft drink bottle. *Gillispie v. Tea Co.,* 1.

Time of payment is not determinative of the question of when a sale takes place; if there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise. *Ibid.*

Plaintiff's evidence was insufficient to support recovery against an automobile manufacturer and automobile dealer on theory of breach of implied warranty of fitness. *Cooper v. Mason,* 472.

§ 16. Title; Creditors; Good Faith Purchasers

Trial court's finding that defendant was not a good faith purchaser of a boat, motor and trailer was supported by the evidence. *Lane v. Honeycutt,* 436.

Although the purchasers of a boat, motor and trailer took possession of the goods in exchange for a check which was thereafter dishonored, the goods were delivered under a contract of purchase and the purchasers could transfer good title to "a good faith purchaser for value." *Ibid.*

§ 20. Breach, Repudiation and Excuse

Plaintiff was not entitled to recover from an automobile dealer under a theory of rescission of contract of sale of an automobile that had been used for 17 months and 30,000 miles. *Cooper v. Mason,* 472.

Plaintiff's evidence was insufficient for the jury in an action to rescind an automobile purchase contract where it failed to show plaintiff gave defendant any notice of revocation of his acceptance of the automobile. *Poole v. Buick Co.,* 721.

VENDOR AND PURCHASER

§ 1. Requisites and Construction of Contracts of Sale

An auctioneer at a sale is the agent of both the seller and buyer. *Greenberg v. Bailey,* 34.

A sales record sheet signed by defendants and a plat attached thereto which specifically described the property sold at auction, held sufficient, when construed together, to show all of the essential elements of a contract of sale. *Ibid.*

It was unnecessary that the seller's written confirmation of an auction sale be actually delivered to the buyer in order for the contract of sale to be binding upon the parties. *Ibid.*

§ 2. Duration of Contract

Defendants will not be relieved of their contract to sell land to plaintiff by the fact that their agent mistakenly refunded plaintiff's cash deposit after defendants had refused to close the sale. *Greenberg v. Bailey,* 34.

§ 5. Specific Performance

Plaintiff was not entitled to specific performance of an option contract. *Eward v. Kalnen,* 619.

WILLS

§ 1. Testamentory Disposition of Property

An instrument which is testamentary in effect but fails to follow the prescribed formalities for the proper execution of a will is void. *Baxter v. Jones,* 296.

WITNESSES

§ 4. Rule That Party May Not Impeach Own Witness

The admission in a juvenile delinquency hearing of a photostatic copy of a statement signed by two State's witnesses did not violate the rule prohibiting a party from impeaching his own witness, *In re Potts,* 387.

§ 5. Evidence Competent for Corroboration

Trial court properly excluded from consideration as corroborative evidence a letter containing hearsay. *Vaughn v. Tyson,* 548.

§ 8. Cross-examination

Trial court properly refused to allow plaintiff to cross-examine the driver of defendant's car as to whether he had been convicted of an offense "growing out of this accident." *Freeman v. Hamilton,* 142.

WORD AND PHRASE INDEX